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Court of Appeals
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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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence is insufficient to support appellant's conviction for Residential Burglary.

Issue Pertaining to Assignment of Error

Residential Burglary requires unlawful entry into a "dwelling," defined as a building used or ordinarily used by a person for lodging. The building appellant entered was an unoccupied house, boarded up, and without utility services. Did the State prove appellant unlawfully entered a dwelling?

B. STATEMENT OF THE CASE

The Pierce County Prosecutor's Office charged Nathaniel Hall with (count 1) Residential Burglary, (count 2) Theft in the Third Degree, and (count 3) Making or Having Burglary Tools. CP 3-4.

The events leading to these charges occurred on the evening of February 2, 2016 at a Puyallup address: 6811 128th St. East, the former residence of Myrtle Fredson. RP 56-57, 91-92. Fredson, an elderly woman in her 80s, had lived in the home from 1986 to October 2014. RP 92, 104. Issues related to her dementia, however, forced her family to move her from the home to another location. RP 92-93.

Although Fredson's furniture and some other items belonging to her, including appliances and clothing, were left behind, no one had lived in the home since 2014. RP 93-94, 104, 110-111. Thereafter, strangers repeatedly broke windows and entered the unoccupied home. RP 94. Fredson's son, Lloyd, barricaded the front door and used boards to block all other points of entry except for a single back door to the garage. Once through that door, a second door allowed entry into the main house. RP 94-96.

One could access the single-story home from the main road by way of an approximately 50-yard driveway. RP 59. About halfway up the driveway, a sign had been posted on a tree warning, "Private Property. No Trespassing." RP 61. Another sign on the front of the house said, "Warning. Security Cameras In Use." RP 63.

Lloyd tried to stop by the house at least once a week after it was no longer occupied. RP 96. On the evening of February 2, 2016, Lloyd and his mother drove to the property so that Lloyd could look around. RP 96. He noticed more trash than usual outside the house and – through the boards on the front of the house – saw a flash of light on the ceiling inside. RP 97-98. He discovered that whoever was inside had apparently gained access from the back.

RP 98-99. Lloyd called police. RP 100.

Pierce County Sheriff's Deputies arrived. RP 56-58. There were no operating lights on the property. RP 73. A muddy path with significant standing water led from the driveway to the back of the house. RP 63-64. Deputies walked around back and found the back door to the garage (the one never boarded up) slightly ajar. RP 64-65; exhibit 5. Deputies knocked loudly, announced their presence, and ordered anyone inside to come out. RP 65, 79. A female, Tonya Routt, exited the house and was arrested. RP 65-66, 79. Deputies again knocked, announced themselves, and this time threatened to deploy a K-9 that was present. RP 80. Nathaniel Hall then exited through the door. RP 80.

Hall was wearing a backpack. RP 80. A search of that pack revealed a box containing a porcelain collector's plate, a decorative chalice, and some drill bits, all of which were identified as Myrtle's property. RP 67, 70, 84-85; exhibit 7. Inside the backpack, a deputy also found flashlights and a box containing "hand tools or dental tools that are commonly used to pick locks." RP 82-83.

In response to questioning, Hall said he did not know to whom the house belonged and he had been trying to exercise his "squatter's rights." RP 68. When asked if it was okay to take

property from the house without permission, Hall said that he thought the house was vacant. RP 69.

During closing arguments, the parties disputed whether the State had proved, for purposes of Residential Burglary, that Myrtle Fredson's unoccupied house was a "dwelling." RP 146-147, 157 (prosecution); RP 152-154 (defense).

Ultimately, the jury convicted Hall on all three charges. RP 162-163; CP 5, 36, 38. For the Residential Burglary, the Honorable Karena Kirkendoll imposed a standard range 15-month sentence. CP 50-55. For the two gross misdemeanors, Judge Kirkendoll imposed concurrent suspended sentences of 364 days each. CP 66-70. Hall timely filed his Notice of Appeal. CP 74.

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN HALL'S
CONVICTION FOR RESIDENTIAL BURGLARY.

In criminal prosecutions, due process requires the State to prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether

there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Under Washington law, "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." RCW 9A.52.025. "'Dwelling' means 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(7).

Whether the unoccupied Fredson house qualified as a "dwelling" was disputed at trial and is disputed now on appeal. Hall asks this Court to find the State's evidence on this element of proof insufficient.

Whether a building is a dwelling "turns on all relevant factors and is generally a matter for the jury to decide." State v. McDonald, 123 Wn. App. 85, 91, 96 P.3d 468 (2004). Relevant factors include whether the place is "usually occupied" by a person lodging there, whether someone deemed the place her abode and treated it as such, whether it was furnished and rented out periodically, whether a

former occupant intended to return to the location to live there, and how long the place had been vacant. Id. at 91 n.18 (citing foreign cases).

Applying these factors to this case, neither Myrtle Fredson nor anyone else usually occupied the former residence for lodging, she no longer deemed the place her abode or treated it as such, it contained furnishings (but not for renters or others' use in the home), there is no indication she intended to return and live there again, and the place had been vacant for 16 months.

In McDonald, the homeowners had lived in their Gig Harbor home for about eight years, but had temporarily moved out for several months while they remodeled. Id. at 87. Although the house was in a temporary state of construction (plywood covered an exterior bathroom wall, the front steps had been removed, and there was a trench around the perimeter to facilitate work on the foundation), the McDonald court found that jurors could reasonably conclude it met the definition of a "dwelling." Id. at 87, 90-91.

Similarly, in State v. Highsmith, 192 Wn. App. 1022, review granted on other grounds and remanded, 185 Wn.2d 1033, 377 P.3d 734 (2016), and State v. Kelly, 180 Wn. App. 1039, review denied,

181 Wn.2d 1005, 332 P.3d 985 (2014),¹ structures not consistently occupied by their owners, but undergoing remodeling, were nonetheless deemed “dwellings.” In Highsmith, the home was for sale, but the owners kept some furniture, personal effects, and even one of their cars at the home. Moreover, the family regularly returned and stayed at the home, once or twice a month, to work on various home improvement projects. Highsmith, at *1-*3. In Kelly, the owners kept antiques inside their home and were in the process of remodeling with the intention to live there upon completion. Kelly, at *1-*2.

In McDonald, Highsmith, and Kelly, the structures were “ordinarily used for lodging,” only temporarily unoccupied, and efforts were being made toward renewed occupancy. This is simply not the case for Myrtle Fredson’s former abode.

¹ Under GR 14.1(a), Hall does not cite these unpublished decisions as binding authority. Rather, he cites them for whatever persuasive value this Court deems appropriate.

In State v. Moran, 181 Wn. App. 316, 324 P.3d 808, review denied, 181 Wn. App. 1020, 337 P.3d 327 (2014), this Court found that an area beneath a home – a lighted crawl space where the defendant intentionally damaged a sewer pipe -- qualified as a “dwelling” because, as required by the statutory definition, “a portion” of the home was then being used for lodging (by the defendant’s ex-wife). Id. at 318-319, 322-323; see also State v. McPherson, 186 Wn. App. 114, 115-119, 344 P.3d 1283 (jury could reasonably find that jewelry store with attached apartment a “dwelling” where apartment currently in use for lodging), review denied, 183 Wn.2d 1012, 352 P.3d 188 (2015); State v. Neal, 161 Wn. App. 111, 112-115, 249 P.3d 211 (tool room inside residential apartment building a “dwelling” because it constitutes portion of structure currently in use for lodging), review denied, 172 Wn.2d 1011, 259 P.3d 1109 (2011).

While the focus in Moran, McPherson, and Neal was determining whether entry into a portion of a structure met the definition of “dwelling,” they share the same common circumstance as McDonald, Highsmith, and Kelly: current or ordinary use as lodging. Not so in Hall’s case.

In contrast to these cases, Myrtle Fredson had not used the structure at 6811 128th St. East for lodging during the almost year

and a half prior to the charged burglary. RP 92, 104. There was no electricity and no evidence of any other working utilities in her former home. RP 73, 149. Except for one back door, all points of entry and windows had been covered with boards or otherwise secured to prevent ingress and egress. RP 94-96. There was no evidence presented of a plan for Myrtle to move back in to the house or for anyone else to move there in the future. The plan moving forward may have been eventual demolition; the record is simply silent on this issue. What we know for certain is that the former home had become – for all practical purposes – merely a place to store some of Myrtle Fredson's furniture and other property.

Because the State failed to prove beyond a reasonable doubt that Myrtle Fredson's former abode was a dwelling, Hall's conviction for Residential Burglary must be vacated. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice proper remedy for failure of proof).

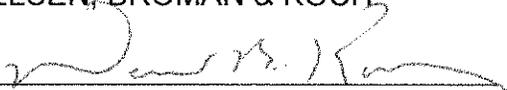
D. CONCLUSION

Hall respectfully asks this Court to reverse and dismiss his Residential Burglary conviction.

DATED this 7th day of November, 2017.

Respectfully submitted,

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