65227-3 65227-3

No. 65227-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ARTHUR WAYNE HALL,

Appellant.

---

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

The Honorable James D. Cayce

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# BRIEF OF APPELLANT

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## A. SUMMARY OF ARGUMENT

Arthur Hall was found inside a house that, although still furnished, had not been lived in for over a year and there were no immediate plans for anyone to live in the house. Mr. Hall was charged and convicted of residential burglary. He submits the State failed to prove the house was a "dwelling," thus failing to prove an essential element of residential burglary. Mr. Hall requests this Court reverse his conviction.

## B. ASSIGNMENT OF ERROR

The State failed to prove the house Mr. Hall entered was a "dwelling" for the purposes of proving the offense of residential burglary.

## C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires the State prove each essential element of the charged offense beyond a reasonable doubt. Whether the building was a dwelling is an element of residential burglary. Where the house had not been lived in by anyone in over three years and was not occupied at the time Mr. Hall entered it, did the State fail to prove the house was a dwelling, thus entitling Mr. Hall to reversal of his conviction and dismissal?

D. STATEMENT OF THE CASE

Robert and Nellie Schlagel lived in a home in the rural area of Covington for 47 years. 3/3/10RP 144-45. Robert Schlagel died on February 5, 2008. 3/3/10RP 147. At about the same time, Nellie Schlagel left the home, staying first with her son, and then when she became ill, moving to an adult care home. 3/3/10RP 144. The Schlagel's grandchildren lived in the house for approximately two months after February 2008. 3/3/10RP 148. The house did not have anybody residing in it after approximately April 2008, although it still was furnished as when Nellie Schlagel last lived in it. 3/3/10RP 148-50.

Although Nellie Schlagel still owned the house, her daughter Lavera Martin had power of attorney over her mother's estate. 3/3/10RP 147. Ms. Martin did not live in the house, did not want to maintain ownership of the home, and was unsure whether she wanted to sell it. 3/3/10RP 149-50.

On October 17, 2009, at approximately 1 a.m., King County Sheriff's deputies were called to the Schlagel home by neighbors who had seen a car drive down the driveway and not return. 3/2/10RP 4-10. When the deputies arrived, they saw someone inside the house. 3/2/10RP 11, 49. The deputies entered the

house, conducted a search, and discovered appellant, Arthur Hall, hiding in a freezer, and Matthew Tedrow hiding in a room off the kitchen. 3/2/10RP 15-17, 54-58.

Mr. Hall and Mr. Tedrow were subsequently charged with residential burglary. CP 5. Following a jury trial, both were convicted as charged. CP 22.

D. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE PRESENTED THAT MR. HALL ENTERED A "DWELLING" AS DEFINED BY RCW 9A.04.110(7)

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. Due process requires the State prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey,* 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d

560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In order to establish that Mr. Hall committed residential burglary, the State had to prove: (1) that he entered or remained unlawfully in a *dwelling*, and (2) that he intended to commit a crime against a person or property therein. RCW 9A.52.025; *State v. Stinton,* 121 Wn.App. 569, 573, 89 P.3d 717 (2004). A person enters or remains unlawfully if he does so without license, invitation, or privilege. RCW 9A.52.010(3); *State v. J.P.*, 130 Wn.App. 887, 892, 125 P.3d 215 (2005).

2. <u>The building was not a "dwelling" as that term is defined by statute</u>. RCW 9A.04.110(7) defines a "dwelling" as "any building or structure . . . which is used or ordinarily used by a person for lodging." *State v. McDonald*, 123 Wn.App. 85, 90, 96 P.3d 468 (2004). In determining whether a building is a "dwelling," the *McDonald* court adopted several factors found important by other courts:

> *State v. Black,* 627 So.2d 741, 745 (La.App.1993) ("To determine whether the house was 'lived in' ... it is proper to consider whether the occupant deemed the

> house to be her place of abode and whether she treated it as such."); *Hargett v. State,* 534 S.W.2d 909, 911 (Tex.Crim.App.1976) (where building was furnished and rented out periodically, it was inhabited); *Rash v. Commonwealth,* 9 Va.App. 22, 383 S.E.2d 749, 751-52 (1989) (occupant's intent to return is a factor in determining if building is a dwelling); *see also Occupant's absence from residential structure as affecting nature of offense as burglary or breaking and entering,* 20 A.L.R.4th 349, § 11 (1983); 13 Am.Jur. Burglary § 6 ("In determining whether a structure is a dwelling, the courts consider numerous factors such as ... whether the structure is 'usually occupied' by a person lodging there at night ... whether it is 'maintained' as a dwelling ... [and] how long it was vacant.") (citations omitted).

*McDonald*, 123 Wn.App. at 91, fn. 18.

Considering these factors, the State failed to prove the building here was a dwelling.

The house may have been a dwelling at one time, but was no longer a dwelling but was merely a building when Mr. Hall and Mr. Tedrow entered. The house was used as "lodging" and may again, but is not now used or ordinarily used for lodging. The house had not been lived in for over a year, and the Schlagel's obviously would not be returning to the home, given that Mr. Schlagel has passed away and Ms. Schlagel is in an adult care home. The person who would inherit the house and had control over the house at the time of Mr. Hall's entry, Ms. Martin, had no

idea what she was going to do with the house, did not live in the house, and was not even sure if she would retain it or sell it.. Finally, although the home was furnished, no one lived in it or had lived in it for some time. As a consequence, the State failed to prove the house was a "dwelling" for the purposes of residential burglary, thus failing to prove that Mr. Hall was guilty of residential burglary.

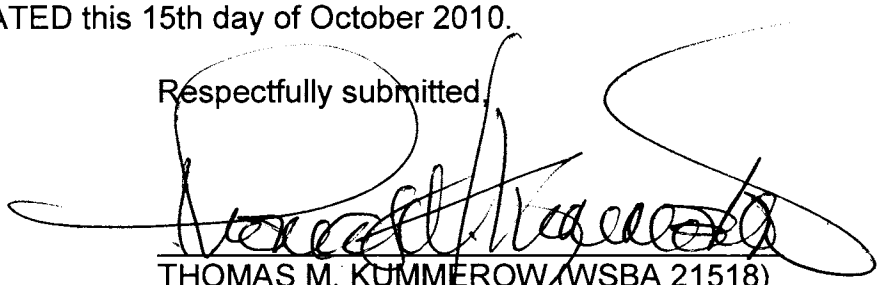
3. <u>This Court must reverse and remand with instructions to dismiss the convictions</u>. Since there was insufficient evidence to support Mr. Hall's conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

## E. CONCLUSION

For the reasons stated, Mr. Hall requests that this Court reverse his conviction with instructions to dismiss.

DATED this 15th day of October 2010.

Respectfully submitted,



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**DIVISION ONE**

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| STATE OF WASHINGTON, | ) | |
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| Respondent, | ) | |
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| ARTHUR HALL, | ) | |
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| Appellant. | ) | |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] ARTHUR HALL<br>1615 W SMITH ST. A203<br>KENT, WA 98032 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 15TH DAY OF OCTOBER, 2010.

X_____

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