

69369-7

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**NO. 69369-7-I**

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**JOSEPH KELLY,**  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

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**RESPONDENT'S BRIEF**

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## **I. SUMMARY OF ARGUMENT**

The appellant, Joseph Kelly, was convicted of Theft in the First Degree, Residential Burglary, and four counts of Trafficking in Stolen Property in the First Degree.

Mr. Kelly claims that the State presented insufficient evidence to prove beyond a reasonable doubt that the building in question was a “dwelling.”

The State responds that, viewing the evidence in the light most favorable to the State, the evidence was sufficient for the jury to find that Mr. Kelly entered a dwelling.

## **II. ISSUES**

Did the State present sufficient evidence to prove the crime of Residential Burglary beyond a reasonable doubt when there was a sufficient factual basis for the jury to find that the building was a dwelling?

## **III. STATEMENT OF THE CASE**

Errol and Laura Hanson purchased a piece of property in 2010 that included a 1900s era residence, a barn, and some outbuildings. Regarding the residence, their intent was to “restore it and bring it back to what it was,

original.” RP 10<sup>1</sup>. After the remodeling was complete, it was the Hansons’ intent to move into the home. RP 61. The residence was a 2600 square foot two story farmhouse. RP 60-61. It was located at 18662 Milltown Road, Conway, Washington. RP 10, 60.

In 2011, Mr. Hanson reached an agreement with Mr. Kelly that Mr. Kelly would pay off a debt owed to Mr. Hanson by doing some work on the barn. Additionally, while working on the barn, Kelly was permitted to sleep in a room in the barn. RP 15.

Mr. Hanson informed Mr. Kelly that he was not permitted to enter the house. The house was kept locked. RP 18.

Mr. Hanson would drop by the premises and notice that no work was getting done, that Mr. Kelly was sleeping instead of working, and that items were going missing from the premises. RP 19-21, 23.

In September the Hansons went on vacation. RP 24. When they returned, they noticed that many of their items were missing. RP 25. These items included tools, antiques, and other things including items from within the home. RP 26- 39, 66-67. After being confronted, Mr. Kelly admitted to taking some of the items. RP 40.

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<sup>1</sup> The State will refer to the verbatim report of proceedings containing proceedings of 9/10/12, 9/11/12, and 10/10/12, by using “RP” followed by the page number.

Mr. Kelly also admitted to Mr. Hanson that he had entered the house by jimmying and sliding up a window and that he had stolen molding from within the home. RP 45, 92, 109-111.

Mr. Kelly testified that he entered the house every day but denied that he did not have permission. RP 135, 145.

At some point around the time he was confronted with the missing items, Mr. Kelly moved out of the property. RP 41. After he left, Mr. Hanson's son was walking through the barn and found a pawn slip on the floor. RP 41, 67. The pawn slip was for a number of the missing items reflecting that those items had been pawned by Mr. Kelly. RP 44, 67, 89, 94.

The pawn slip was turned over to Deputy Morgan who was then able to identify two pawn transactions made by Mr. Kelly for tools that later turned out to belong to Mr. Hanson. RP 95. Mr. Kelly subsequently admitted pawning the items. RP 97, 101. He also admitted to taking various metal items from the Hanson property and selling them at Skagit Steel. RP 97-98. Deputy Morgan was able to retrieve some of the missing items that Mr. Kelly had taken but not yet disposed of. RP 99-100, 109.

It was ultimately determined that Mr. Kelly stole about \$6,600 worth of property belonging to the Hansons including the molding which itself was worth about \$1,200. RP 164.

#### IV. ARGUMENT

##### 1. The State presented sufficient evidence to establish that the burglary occurred in a “dwelling.”

The standard of review for a challenge to the sufficiency of the evidence was set out in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). We said there that evidence is sufficient if, after it is viewed in a light most favorable to the State, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Green, 94 Wn.2d at 221, 616 P.2d 628 (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, reh'g denied, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979)).

State v. Randhawa, 133 Wash. 2d 67, 73, 941 P.2d 661, 664 (1997).

A “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.

Whether a building is a dwelling, or a residence, is highly fact specific and is generally a question for the jury. State v. McDonald, 123 Wn. App. 85, 90-91, 96 P.3d 468, 470-71 (2004).

The fact that a house is vacant does not preclude its being a “dwelling.” In McDonald, that the building in question was not inhabited and was being remodeled did not preclude its being a dwelling. McDonald, 123 Wn.App. at 87, 90.

The residence at 18662 Milltown Road which was purchased by the Hansons was in the process of being remodeled for future habitation. It had

been lived in in the past. The Hansons planned to move in it and live in it when the remodeling was complete. This evidence establishes the intent to maintain the building's use as a residence. The house contained personal items including antiques. RP 10. The windows were intact and locked. RP 64. The rooms still had carpet. RP 65. The house was treated differently from the barn: it was maintained with a heightened privacy interest as evidenced by the fact that it was kept locked up and inaccessible to all but the owners who had the only keys. There was no evidence that the building had ever been kept for any other purposes than to be a residence.

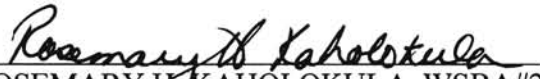
Viewing the evidence in the light most favorable to the State, the evidence was sufficient for the jury to find that Kelly entered a dwelling when he entered the house at 18662 Milltown Road.

#### **V. CONCLUSION**

For the foregoing reasons, this Court should affirm the conviction for Residential Burglary.

DATED this 4<sup>th</sup> day of October, 2013.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by;  United States Postal Service;  ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jan Trasen, addressed as Washington Appellate Project, 1511 Third Avenue, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 4<sup>th</sup> day of October, 2013.

  
KAREN R. WALLACE, DECLARANT