

65227-3

65227-3

No. 65227-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR HALL,

Appellant.

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

The Honorable James D. Cayce

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

Initially, the State notes that the parties and the trial court below erred in sentencing Mr. Hall to a period of community custody as Residential Burglary is not a crime against persons under RCW 9.94A.411(2). Brief of Respondent at 14-15. Mr. Hall thanks and agrees with the State's concession of error and joins the State in asking this Court to strike the period of community custody from the judgment and sentence.

THE VACANT HOUSE WAS NOT A DWELLING UNDER RCW 9A.04.110(7)

1. The house was not a dwelling. Mr. Hall submitted that the house in question here was vacant, had been vacant for some time, and there were no plans for anyone to live in it, hence the house was not a "dwelling" as defined by RCW 9A.04.110(7). The State's response does nothing to dispel this argument.

The State concedes as it must that the house had been vacant since 2008. Brief of Respondent at 2. The State also notes that the owner of the building, Ms. Martin's two children had lived in the building for a short period of time after Ms. Schlagel had moved but that no one had lived in the building for the two months prior to Mr. Hall's entry. *Id.* at 12. While the State notes that Ms. Martin

had no intention of tearing the house down, she had also testified that she 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, Brief of Respondent at 12.

Finally, whether one of the police officers thought that “it appeared to him that someone was living in the home[.]” is no moment. Brief of Respondent at 12. The issue is not what someone thought, the only issue is whether the building was being lived in or would be lived in. The only answer to that question came from Ms. Martin’s testimony and was a resounding “No.”

The State failed to prove that the Schlagel building was a dwelling. Mr. Hall is entitled to reversal of his conviction.

2. The jury was never instructed on second degree burglary, thus it is not a proper remedy. Should this Court reverse Mr. Hall’s conviction for insufficient evidence, the State suggests this Court remand for entry of a conviction for second degree burglary. Brief of Respondent at 13-14. Under this Court’s recent decision in *In re the Personal Restraint of Heidari*, ___ Wn.App. ___, No. 63040-7 (Div. 1, January 24, 2011) that is not the proper remedy.

This Court in *Heidari*, ruled that where the jury had not been instructed on a lesser included offense, imposition of a conviction

for that offense is not a proper remedy where the Court reverses on a greater offense:

Absent an instruction on the lesser included crime, the jury cannot find him guilty of that crime. The State asks us to do on appeal what the neither the jury nor the trial court was authorized to do at trial. We lack such authority.

Heidari, slip op at 8 (citation omitted).

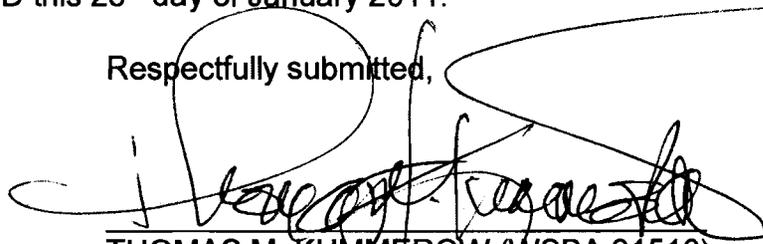
Thus, should this Court reverse Mr. Hall's conviction, the remedy is remand with instructions to dismiss the conviction for residential burglary.

B. CONCLUSION

For the reasons stated, Mr. Hall requests this Court reverse his conviction with instructions to dismiss. Alternatively, Mr. Hall requests this Court strike the period of community custody.

DATED this 28th day of January 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65227-3-I
v.)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **REPLY 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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JENNIFER ATCHISON

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JANUARY, 2011.

X _____ *[Signature]*

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