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**IN THE
COURT OF APPEALS OF INDIANA**

ROGER L. BROOKS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 40A01-0706-CR-271
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0608-FB-197

DECEMBER 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Roger L. Brooks appeals the trial court's entry of judgment for burglary as a Class B felony. We affirm.

ISSUE

Brooks raises one issue for our review, which we restate as: Whether the State presented sufficient evidence to support the trial court's determination that Brooks burglarized a dwelling.

FACTS AND PROCEDURAL HISTORY

The State charged Brooks with burglary of a dwelling, a Class B felony; non-residential burglary, a Class C felony; theft, a Class D felony; and receiving stolen property, a Class D felony. Brooks entered a guilty plea to burglary on the condition that the sentencing court would determine whether the building he entered was a dwelling.

At the hearing, George Corya testified that he lives on property known as Graham Creek Farms.¹ The burglarized building is located on that property, and Corya testified that at different times, he lived full time in the building. The building was his home for one year while a new house was being built on the property, and it was again his home for five months after lightning struck the new house. There is an office in the building, and a portion of the building is used as a "shop" containing farm equipment, tools, and other equipment. (Appellant's App. at 57). The building also contains "full living

¹ The information alleged that the burglarized building was the dwelling of Corya and his son, David.

facilities,” including a washer-dryer, a bathroom, a television, a couch, several reclining chairs, a bedroom with a bed, a full kitchen, and a dining area. (App. at 51).

Employees ate meals in the building, and visitors to the property sometimes stayed overnight in the building. Indeed, some weeks before the burglary, several of Corya’s friends stayed in the building during hunting season.

The sentencing court determined that the building was a dwelling, and it thus imposed the sentence for a Class B felony.

DISCUSSION AND DECISION

Ind. Code § 35-41-1-10 defines a “dwelling” as a “building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person’s home or place of lodging.” Representative cases inform us that the facts and circumstances classify this building as a dwelling.

In Brown v. State, 580 N.E.2d 329 (Ind. Ct. App. 1991), the defendant argued that the burglarized building was not a dwelling because it was not the owner’s dwelling on the day of the burglary. This court, however, held that the building had been occupied just prior to the burglary, and that the occupants kept their food and personal belongings there, as well as exercising control “as if it was their dwelling and had not completely abandoned the premises at the time of the burglary.” Id. at 331.

In Burwell v. State, 517 N.E.2d 812 (Ind. Ct. App. 1988), trans. denied, a majority of the panel noted that although the occupant had vacated the apartment three days prior to the burglary she had not relinquished possession and control to the landlord and it still

contained food, utensils, personal belongings, and clothing. The court therefore held that the apartment was dwelling at the time of the burglary.

Finally, in Jones v. State, 457 N.E.2d 231 (Ind. Ct. App. 1983), this court held that a three-room log cabin used by fishermen and hunters, and containing a refrigerator, an electric stove, utensils, groceries, a bed, and both a wood and gas stove, was a dwelling.

Thus, case law tells us that a dwelling need not be the immediate or even the tentative residence of the person alleged to be the owner or occupant. It is enough that the building or structure is used or may be used as lodging for the legal occupant—be it owner, landlord, tenant, or even casual overnight guest.

The key factors would appear to be whether the building or structure with its accoutrements, e.g., bath, bed, kitchen, etc., has been used for lodging, and within the intent of the occupier or owner, is readily accessible for such use. In the present case, the frequency of use for lodging or living purposes, and the presence of items associated with such use, support the sentencing court’s conclusion that the building is a dwelling.

The expansive definition of “dwelling” would appear to stretch the statutory definition that the building “is a person’s home or lodging.” (Emphasis supplied). However, the recognition of past physical occupancy or the future intent to occupy the premises, together with other factors, may further the legislative intent. It may well be the legislative purpose to punish the felonious breaking and entry into a building likely to contain human inhabitants. In such cases, the presence of persons might well lead to violence and injury or death perpetrated by the intruder. Whatever the rationale, the existing case law of Indiana convinces us that the judgment of the trial court was correct.

CONCLUSION

The sentencing court's determination that Brooks burglarized a dwelling is supported by sufficient evidence. Thus, the court did not err in imposing a sentence for a Class B felony.

Affirmed.

BAKER, C.J., and SHARPNACK, J., concur.