

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,)	No. 65227-3-I
)	
Respondent,)	
)	UNPUBLISHED OPINION
v.)	
)	
ARTHUR WAYNE HALL,)	
)	
Appellant.)	FILED: August 22, 2011

Schindler, J. — Arthur Wayne Hall asserts insufficient evidence supports his jury conviction for residential burglary. We affirm his conviction, and accept the State’s concession that the court erred by imposing community custody. On remand, the court should strike the community custody provision from the judgment and sentence.

FACTS

Nellie and Robert Schlagel were married and lived in the same home in rural Covington for 47 years. After Robert died in 2008, Nellie lived with her son. In early 2009, Nellie moved into an adult care facility. Nellie only took her jewelry and her clothes with her when she moved into the adult care facility. All of the furniture and personal effects remained at her house. In February 2008, Nellie gave her daughter Lavera Martin power of attorney so that Lavera could “do the banking” and pay bills.¹

Lavera and her husband Frank checked on Nellie's house typically once a week but at least once every other week. During each visit, they checked on the house, the outbuildings, and the barn. Before leaving, Lavera and Frank always made sure that the kitchen light was on and all the windows and doors in the house were locked.

Lavera hired next door neighbors Amy Spies and her brother Matthew Bacon to maintain the property. Bacon mowed the lawn on a regular basis and Spies collected the mail each day. Spies also walked her dogs on Nellie's property every morning in order to check on the house.

On the morning of October 16, 2009, Spies said that "the dogs were going crazy around all the buildings. . . . [T]hey kept running up at the house and barking." Spies noticed that the front door of Nellie's house was pushed open and a light was on in the attic. Spies went to get Bacon and David Murr. Murr lives in a recreational vehicle on Spies' property.

Bacon and Murr returned to Nellie's home with Spies. Bacon and Murr walked through the house and noticed that the back porch doors were unlocked and a large sliding window was open. They also noticed that the alarm panel had been ripped off the wall and was on the floor. When Spies went to turn off the light in the attic, she said sewing material was strewn all over the attic floor. Before leaving, Murr and Bacon tried to fix the broken front door and lock the house.

Murr decided to wait in the carport at Nellie's home that night to try to catch the intruders if they returned. At around midnight, Murr went home to eat. Shortly

¹ We refer to Nellie Schlagel and her daughter Lavera Martin by their first names for clarity and intend no disrespect by doing so.

thereafter, Murr's dog began to bark. Murr put on his night-vision goggles and was able to see two men on Nellie's property near the house. Spies called the police.

At approximately 1:00 a.m., Deputy Jeffrey Petrenchak and Deputy Jeriod Lee responded to the call. Deputy Petrenchak found a car parked near the house at the end of the driveway. There was fresh mud on the tires and the engine was still warm. Deputy Lee saw a man inside Nellie's house. Before entering, the deputies noticed that the front door had been forced open and the left side of the front door was completely broken off. Deputy Petrenchak found Matthew Tedrow in a back room. Deputy Lee noticed a black baseball cap near the freezer. When Deputy Lee lifted the lid of the freezer he found Arthur Hall crouched on top of the frozen food inside.

After reading Hall the Miranda² warnings, Hall told Deputy Lee that "he had not kicked in the door and had found it like that in an open position." Hall also said he "was told that everything was up for grabs" but "he knew he was wrong for being in the house and . . . that this is why he was hiding." The State charged Hall and Tedrow with residential burglary.

During a four-day jury trial, Deputy Lee, Deputy Petrenchak, Spies, Bacon, Murr, and Lavera and Frank testified. Deputy Lee testified that he found a pair of gloves and two flashlights at the house. Spies testified that she did not see either gloves or a flashlight in the house earlier that day.

Lavera testified that when she went through the house following the arrest, all the drawers of the china cupboard were pulled open and the contents thrown on the table. Lavera said that a box of china, a photograph, and a sugar bowl were missing.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Lavera testified that her two children lived at the house for two months before the burglary. Lavera also testified that the house was currently rented.

The defense theory was that someone else forced the door open and there was no proof of intent to commit the crime of residential burglary. The jury convicted Hall and Tedrow of residential burglary. At sentencing, the court imposed a low-end standard range sentence of six months for Hall with 12 months of community custody.

ANALYSIS

Hall argues that insufficient evidence supports the residential burglary conviction because the State did not prove Nellie's house was a "dwelling." In reviewing a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Hepton, 113 Wn. App. 673, 681, 54 P.3d 233 (2002). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom." State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). Circumstantial and direct evidence are equally reliable. State v. McNeal, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

To convict Hall of residential burglary, the State had to prove beyond a reasonable doubt that Hall entered or remained in a "dwelling." RCW 9A.52.025(1). A "dwelling" is "any building or structure . . . which is used or ordinarily used by a person

for lodging.” RCW 9A.04.110(7).

In McDonald, the court rejected the defendant’s claim that insufficient evidence established that he entered a dwelling. State v. McDonald, 123 Wn. App. 85, 91, 96 P.3d 468 (2004). The court held that the determination of whether a building is a dwelling “turns on all relevant factors and is generally a matter for the jury to decide.” McDonald, 123 Wn. App. at 91 (footnote omitted). The owner in McDonald moved out of his house during a remodel but did work on the house in the evenings and on weekends. McDonald, 123 Wn. App. at 87. In reaching the determination that sufficient evidence supported the conviction, the court identified a number of relevant factors to consider to decide if a house is a dwelling, including whether “the occupant deemed the house to be her place of abode and whether she treated it as such,” whether it is furnished and rented out periodically, if it was inhabited, whether it is maintained as a dwelling, and how long it was vacant. McDonald, 123 Wn. App. at 91, n.18 (quoting State v. Black, 627 So. 2d 741, 745 (La. Ct. App. 1993)) (citing Hargett v. State, 534 S.W.2d 909, 911 (Tex. Crim. App. 1976); Rash v. Commonwealth, 9 Va. App. 22, 383 S.E.2d 749, 751-52 (1989)).

Here, Hall claims that there is no evidence that anyone “used or ordinarily used” Nellie’s house as a dwelling because the house was vacant. Because the evidence establishes an intent to maintain the house as a dwelling, we disagree.

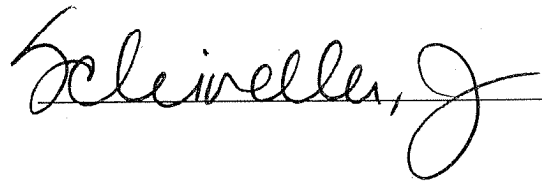
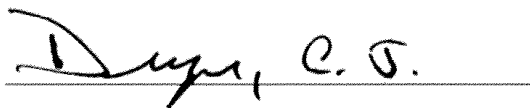
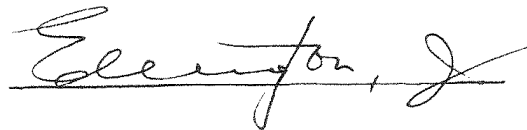
Viewing the evidence in the light most favorable to the State, sufficient evidence supports the jury determination that the house was a dwelling. The house was fully furnished, contained numerous personal items, and was consistently cared for and

maintained. Lavera testified that the house was still in Nellie's name and that she had no intention to sell the home or to tear it down. Lavera's daughter and son had lived in the house for a couple of months before the burglary. Lavera also testified that her plan for the house was "to have somebody live there to watch over it."

In the brief on appeal, the State concedes that the court erred by imposing community custody for the residential burglary conviction.³ We accept the State's concession. Under RCW 9.94A.701, the trial court is not authorized to impose a term of community custody for the crime of residential burglary.

We affirm the jury conviction of Hall for residential burglary but remand to strike the community custody provision from the judgment and sentence.

WE CONCUR:

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³ Hall joins in the State's concession.