

**SAMPLE ACCEPTABLE
APPELLANT'S OPENING BRIEF
CRIMINAL CASE**

(updated January 1, 2011)

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of at least 65 lb. weight]

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,)	
)	
Plaintiff-Respondent,)	Circuit Court Case
)	No. CM99-20449
v.)	
)	CA A000000
JONATHAN DOE,)	
)	
Defendant-Appellant.)	

APPELLANT'S OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the Judgment of the Circuit Court
for Eden County
Honorable Eve Jurist, Judge

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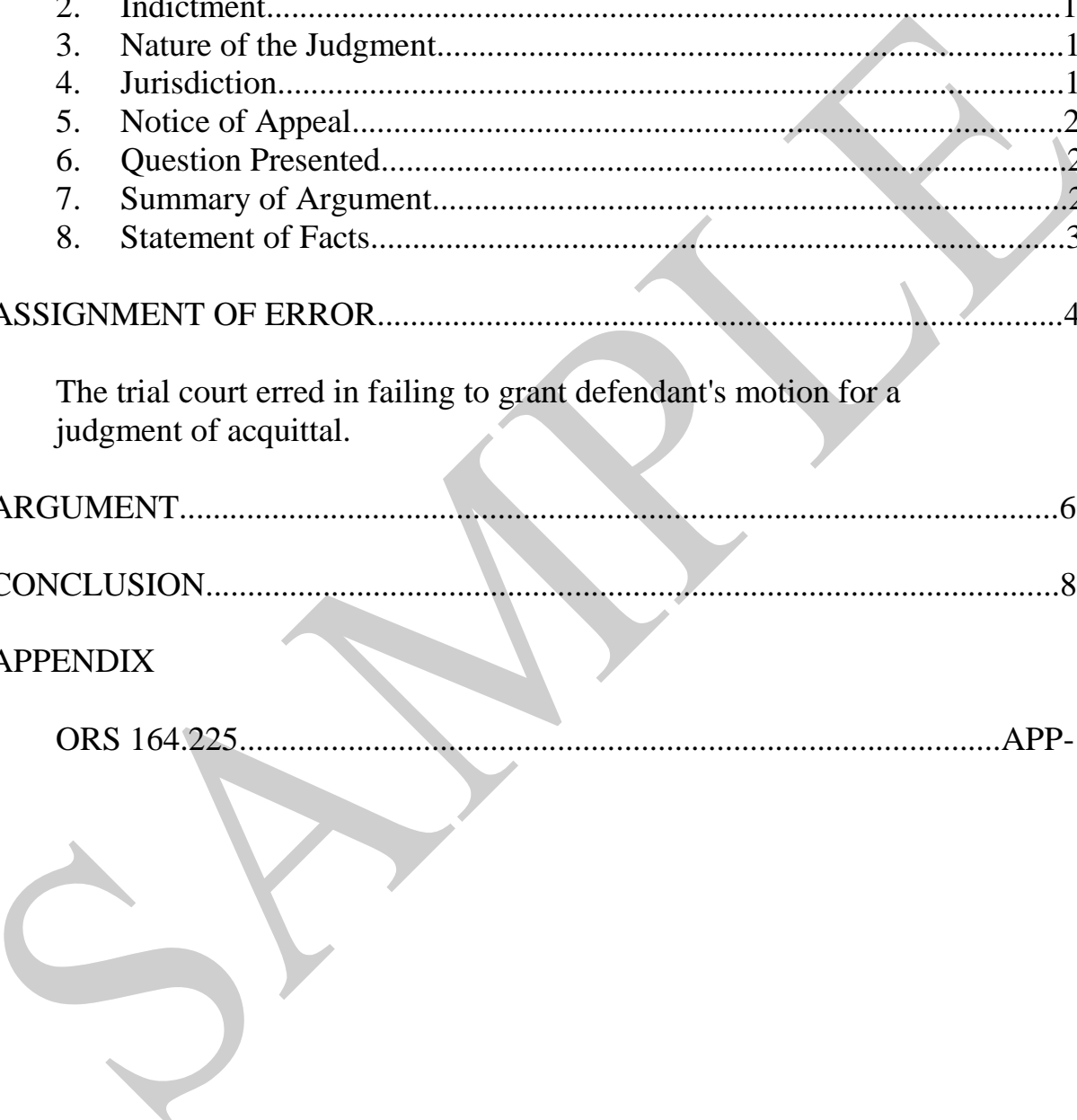


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APPELLANT'S BRIEF

STATEMENT OF THE CASE

Nature of the Proceeding

This is a criminal case in which defendant seeks reversal of his conviction for burglary in the first degree in Eden County Circuit Court Case No. CM99-20449.

Indictment

Defendant was charged by a two-count indictment with violation *inter alia* of ORS 164.225, as follows:

"The defendant is accused by the Grand Jury for Eden County of the following offenses:

"Count 1: BURGLARY IN THE FIRST DEGREE (FSG=7; A Felony; ORS 164.225)

"* * * * *

"Count 1

"The defendant, on or about 04/04/1999 to 04/05/1999, in the County of Eden and State of Oregon, did unlawfully and knowingly enter and remain in a dwelling located at [address], with the intent to commit the crime of theft of services and criminal mischief in the third degree therein."

Nature of the Judgment

Defendant pled "not guilty" to the charges and was found guilty of count 1 (burglary in the first degree) following a court trial. Defendant was acquitted of count 2 (criminal mischief in the second degree). Defendant was placed into grid block 7E (presumptive prison 16-18 months). The trial court found, under ORS 137.717, that defendant had four previous convictions of crimes listed in ORS 137.717(2), and defendant was sentenced pursuant to ORS 137.717(1)(a) to serve 19 months in prison. Judgment was filed July 22, 1999 and was entered of record August 18, 1999. A copy of the judgment appealed from is attached as Excerpt of Record ER 1-3.

Jurisdiction

This court has jurisdiction pursuant to ORS 138.040.

Notice of Appeal

The Notice of Appeal was timely filed on September 10, 1999.

Question Presented

Has the state failed to prove that the property entered was, at the time of the incident, a "dwelling" under the meaning of ORS 164.205(2)?

Summary of Argument

The state has failed to prove in count 1 that the property that defendant entered was a "dwelling" under ORS 164.205(2).

Statement of Facts

By this appeal, defendant challenges whether the building alleged to have been entered is, as a matter of law, a "dwelling." The facts relevant to that issue are summarized as follows:

The indictment alleges a burglary at [address], which occurred on or about April 4 or 5, 1999.

Late in the evening on April 4, 1999, [witness 1 name] heard what sounded like a television coming from next door, which was an unoccupied and unused duplex. No one was supposed to be in that duplex. Police were called. Defendant came out of the back of the duplex. On examination of the duplex, items were found within the duplex that were not supposed to have been in the duplex. (Tr 17-20.) There was a backpack and a little TV and garbage, as though someone had been living there. (Tr 22-23, 49-52.)

The duplex was owned by [witness 2 name]. (Tr 34.) When [witness 2 name] heard the noise coming from the duplex, he thought it was a ghost. No one had lived in the duplex for a long time, and the doors were locked. (Tr 34-35.) Heat and lights and the water heater were turned off in the duplex. The electric company had turned off the electrical power to the duplex because the previous tenant had not paid the electricity bill. [witness 2 name]'s wife, [witness 3 name], had recently called the electric company to restore electricity so that they could

show the duplex to potential renters. (Tr 35-36.) On week prior to this incident, [witness 2 name] had entered the duplex to show the duplex to prospective tenants. Everything was locked and shut off at that time. (Tr 44.)

Defendant had no permission to enter the duplex. (Tr 36.) The duplex had been entered by use of a screwdriver to force a window. (Tr 55.)

ASSIGNMENT OF ERROR

Preservation of Error

The trial court erred in failing to grant defendant's motion for judgment of acquittal.

Defendant moved the court for a judgment of acquittal as follows:

"[DEFENSE COUNSEL]: [W]e'd like to first start with the Burglary in the First Degree, and we're moving for a motion of a judgment of acquittal.

"I don't think that this has been established as a dwelling. The most that we have established is that it was rented back in September. We don't know the reasons for the renting of the Apartment, it has never been established. And even on top of that, they've indicated that they were there only for two days, or something to that effect. It wasn't a very long period of time if it was the same renters. I don't know if it was. So we're moving for a judgment of acquittal based upon the fact that there has not been any evidence that this is a dwelling." (Tr 65-66.)

The motion was denied as follows:

"THE COURT: I'll overrule the motion." (Tr 67.)

Standard of Review

State v. King, 307 Or 332, 768 P2d 391 (1974), describes the standard an appellate court uses when reviewing the sufficiency of evidence for conviction.

The Oregon Supreme Court stated:

"[T]he question is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Harris*, 288 Or 703, 721, 609 P2d 798 (1980). It is not proper for us to hold that there is a reasonable doubt because of conflicts in the evidence. After a verdict of guilty, such conflicts must be treated as if they had been decided in the state's favor. After the conflicts have been so decided, we must take such decided facts together with those facts about which there is no conflict and determine whether the inferences that may be drawn from them are sufficient to allow the jury to find defendant's guilty beyond a reasonable doubt. Our decision is not whether we believe defendant is guilty beyond a reasonable doubt, but whether the evidence is sufficient for a jury to so find. *State v. Krummacher*, 269 Or 127, 137-38, 523 P2d 1009 (1974)."

307 Or at 339.

Inferences that are drawn must follow more likely than not from the facts giving rise to the inference. When an inference is the sole basis for finding the existence of an element of the crime, the inference must follow beyond a reasonable doubt from the underlying facts. *State v. Rainey*, 298 Or 459, 466, 692 P2d 635 (1985).

The standard of review required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution is similar: "[T]he

relevant question is whether 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 US 307, 319, 99 S Ct 2781, 61 L Ed 2d 560 (1979).

ARGUMENT

Defendant was charged with violation of ORS 164.225, burglary in the first degree. ORS 164.225 provides, in relevant part:

"164.225 Burglary in the first degree. (1) A person commits the crime of burglary in the first degree if the person violates ORS 164.215 [burglary in the second degree] and the building is a dwelling[.]"

"Dwelling" for purposes of ORS 164.225 is defined at ORS 164.205(2):

"'Dwelling' means a building which regularly or intermittently is occupied by a person lodging therein at night, whether or not a person is actually present."

The issue, then, in this case is whether on April 4 and 5, 1999 the duplex at [address] was a "dwelling" under ORS 164.205(2). The meaning of "dwelling" has previously been litigated in several cases before this court.

In *State v. Eaton*, 43 Or App 469, 602 P2d 1159 (1979), this court considered a two-story summer camp building that was used eight weeks of the year as a dwelling for Jesuit candidates for the priesthood; the other 44 weeks of the year, the building stood vacant. Because burglary occurred at a time when the building was not used as a dwelling, the building was not a "dwelling."

In *State v. McDonald*, 77 Or App 267, 273, 712 P2d 163 (1986) (quoting Criminal Law Revision Commission, Proposed Oregon Criminal Code 143, § 135, Commentary (1970)), this court stated:

"The reason that invading a 'dwelling' is made a more serious crime is to '[protect] against invasion of premises likely to terrorize occupants.'"

In this case, the duplex was vacant and could not be used as a dwelling, because no one had authority to live there at the time it was entered. The duplex's owner testified that, at the time of the burglary, the unit was locked and utilities, electricity and hot water were turned off. Although the duplex had once been a dwelling and might once again become a dwelling, it was not at the time of the burglary a dwelling. At the time of the burglary, the property was not equipped to be used nor was it being used as a dwelling.

This court should reconsider its ruling in *State v. Ramey*, 89 Or App 535, 749 P2d 1219 (1988). In *Ramey*, this court considered the meaning of "dwelling" in relation to a one-room apartment that was vacant for remodeling at the time defendant broke into it. The apartment was vacant while it was being remodeled. A new tenant was to move in after the remodel was completed. This court held:

"Contrary to defendant's contention, ORS 164.205(2) does not require that at the time of the entry there must be an identifiable person using or authorized to use the building as sleeping quarters, either regularly or intermittently[.] Under the circumstances, defendant's entry was likely to terrorize the occupant. The court erred when it dismissed the charge of criminal trespass in the first degree."

89 Or App at 539.

The holding of *Ramey* is not consistent with the plain language of ORS 164.205(2), which states that a dwelling is a building that "regularly or intermittently is occupied" as lodging. The holding of *Ramey* is also inconsistent with the purpose of the burglary in the first degree statute that affords special protection to a dwelling where an occupant may be terrorized. In the case at bar, the duplex was not and could not have been occupied at the time of its entry. This is not the sort of building intended for the protection of the burglary in the first degree statute of the Oregon Criminal Code.

CONCLUSION

For the reasons stated above, defendant's conviction should be reversed.

Respectfully Submitted,

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Defendant-Appellant

EXCERPT OF RECORD

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Judgment (Trial Court File page 66).....ER 2-4

SAMPLE

JUDGMENT

[A copy of the judgment was included with this brief. *See* ORAP 5.50.]

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APPENDIX

[A copy of ORS 164.225 was included with this brief. *See* ORAP 5.52.]

SAMPLE

**CERTIFICATION OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 1,769 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

David Lawyer #000000
Attorney for Jonathan Doe
Defendant-Appellant

PROOF OF SERVICE

I certify that I directed the original and 13 copies of the Appellant's Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, at 1163 State Street, Salem, Oregon 97301-2563.

I further certify that I directed the Appellant's Brief to be served on attorneys for respondent, on September 18, 2000, by mailing two copies, with postage prepaid, in an envelope addressed to:

John Barrister, Attorney General
Jan Solicitor, Solicitor General
Department of Justice
[address]

David Lawyer #000000
Attorney for Jonathan Doe
Defendant-Appellant