

COA Opinion: The fact that a structure was not a dwelling is not an element of the arson offense of “burning other real property”

16. May 2010 By Aaron Lindstrom

After Lamar Evans was seen running away from a burning house while carrying a gasoline can, he was apprehended and charged with an arson offense. The State charged him with the crime of “burning other real property,” but not with the crime of “burning a dwelling.” (“Burning other real property” is a lesser-included offense for “burning a dwelling,” but Evans was charged only with the lesser crime.) At his trial, Evans argued that the prosecution failed to prove an element of the crime, contending that to prove the “burning other real property” offense, the prosecution would need to prove that the burned building was not a dwelling. The trial court agreed and directed the verdict in Evans’ favor, dismissing the case. In *People v. Evans*, No. 290833, the Court of Appeals reversed and remanded for a new trial. Judge O’Connell, writing for the Court, explained that the fact that the building was not a dwelling is not an element of the crime, and thus the prosecution’s failure to prove that non-element was irrelevant. In fact, the standard jury instruction that Evans relied on contained a use note explaining that the prosecution needs to prove the building was not a dwelling only when a defendant is charged with “burning other real property” as a lesser-included offense to “burning a dwelling.” Thus when a defendant is charged with “burning other real property” as a stand-alone offense, the prosecution need not prove the building was not a dwelling. The Court also rejected Evans’ argument that granting the State a second trial would violate the Double Jeopardy Clause. No double-jeopardy violation arose, the Court explained, because the only finding the trial court made was that the prosecution presented no evidence tending to show the building was not a dwelling, and that finding did not relate to an actual element of the crime, so no factual findings were made as to any real element of the crime.