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NO. 69507-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN J. MORAN,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. The defendant went under the deck of his ex-wife's home without permission, opened an access panel, and entered beneath the house. This area was large enough to stand up in, and was lighted. Once inside he cut open a sewer pipe, filled it with hardening foam, and closed it up again. His motive was to cause sewage to back up into the home and ruin his ex-wife's Christmas. Was there sufficient evidence that he had entered unlawfully in a "dwelling" to sustain a conviction for residential burglary?

2. The defendant's son Shawn Moran gave a sworn statement to police. In an untimely motion for new trial, trial counsel offered a materially different sworn statement from Shawn Moran. The trial court denied the motion, finding that the statement served only to impeach, and, given the conflicting sworn statements, that the outcome of the trial would not have been different. Did it abuse its discretion in denying the motion for new trial?

II. STATEMENT OF THE CASE

A. THE DEFENDANT'S BLOCKING THE SEWER PIPE UNDERNEATH HIS EX-WIFE'S HOME.

The defendant Kevin Moran and his wife Karen Moran built a house together. 1 Trial RP 22; 2 Trial RP 100-101. The defendant

was the general contractor and also did a fair amount of the labor. 1 Trial RP 23; 2 Trial RP 100; see 1 Trial RP 35. He had had his own framing and foundation crews. 2 Trial RP 105. He knew every inch of the house. 2 Trial RP 105; see 1 Trial RP 35. But the Morans got divorced in 2007. 1 Trial RP 22; 2 Trial RP 100. This left Karen Moore in sole possession of the house, with the defendant being able to come over only at certain times and by permission. 1 Trial RP 23-25; 2 Trial RP 108. The Morans' divorce had started out amicably enough, but it did not end that way. 1 Trial RP 22. The defendant's subsequent girlfriend, Lynda Kozak, recalled the defendant exhibiting "tremendous animosity" towards his ex-wife. 1 Trial RP 35. He was upset at her living in the home. 1 Trial RP 35.

On December 23, 2010, Karen Moran went to pick up her boyfriend, coming from out of town. 1 Trial RP 25, 29. When she returned with him to her home, she saw "Thou shalt not covet" spray-painted in red on the garage door. Id. Ms. Kozak testified the defendant used the word "covet" a lot when referring to his ex-wife. 1 Trial RP 42.

Ms. Moran's son Shawn began to clean the garage door off with paint thinner. 1 Trial RP 26. Later in the evening the main-floor toilet started backing up. It had done this before. Id. But when the following day, on Christmas Eve, the bathtub started backing up too, Ms. Moran realized they had a problem, and called "Roto-Rooter." 1 Trial RP 26-27. The plumber went underneath the house and showed her how a sewer pipe had been glued together with black plumber's cement, still tacky and leaking. 1 Trial RP 27. What had happened was the sewer pipe, underneath the house, had been cut and filled with foam that on contact with air expands and hardens. 1 Trial RP 54-56, 67.

The defendant was living with his girlfriend Lynda Kozak at the time. 1 Trial RP 36, 51. He came home, laughed, and bragged to her how he had cut a pipe under the house and filled it, she recalled, with "some sort of solution" so that the toilet and shower would back up with sewage and smell so bad it would force Karen Moran out of the house on Christmas. 1 Trial RP 36-37, 46.

Shawn Moran called to ask his father, the defendant, to ask why he had done this. Ms. Moran, his mother, was listening on speakerphone. 1 Trial RP 28, 30; see 1 Trial RP 42. Ms. Moran recalled the defendant saying Shawn should let his mother and her

boyfriend clean up their own s—t, that they couldn't prove anything, that they got what they deserved, and that Shawn should stay out of it. 1 Trial RP 25, 28, 30-31; see 1 Trial RP 42.

Ms. Kozak found a receipt from Home Depot. Among the listed purchased items were red spray point and an aerosol can of expanding foam. 1 Trial RP 37-39. She kept it. Id. Later, she turned it over to police. 1 Trial RP 39-40; 2 Trial RP 86.

The house had a wrap-around deck or porch with lattice closing off the bottom. 1 Trial RP 32; 1 Trial RP 88-90, 105; Exs. 8, 10. One had to remove the lattice and crawl under the deck to get to an access door. 1 Trial RP 32; 2 Trial RP 88-90, 105; Exs.8, 10, 16. The access door was set in what appears to be the foundation. Ex. 16. Once inside, where the sewer pipe had been cut, one can stand up, and the area is lighted. 1 Trial RP 33; 2 Trial RP 88-90. The floor is covered with plastic, nothing is stored down there, and the space cannot be accessed from inside the house. 1 Trial RP 33; 2 Trial RP 105.

The defendant testified he had badly cut his hand on a table saw and had it in a cast at the time, so he could not possibly have cut the sewer pipe. 2 Trial RP 101-103; see 1 Trial RP 48-50. Asked on cross examination how it was that the Home Depot video

showed him using both hands when making the purchases, and wearing no cast, he stated that his cast was "removable." 1 Trial RP 109-110.

B. "BUILDING" VS. "DWELLING," LESSER-INCLUDED INSTRUCTIONS, AND VERDICT.

At the close of the State's case the defendant made a "halftime motion" pursuant to State v. Green,[1] arguing that while the State had presented enough evidence that the defendant had entered a building (that is, an enclosed space) to send a charge of second-degree burglary to the jury, there was no evidence he had entered a "dwelling," to establish residential burglary, since no one lived underneath the house. 2 Trial RP 94-95. The State countered that the defendant wanted to cut the house off the foundation, without case authority to support such an analysis. 2 Trial RP 96-97. With no on-point caselaw, the trial court let the question go to the jury, with the parties given leave to argue. 2 Trial RP 97. Both sides did so in closing. 2 Trial RP 120-21 (State arguing the house "goes all the way down"); 2 Trial RP 126 (defense stressing no one lived in an "underneath area" that "appeared to be dirt"); 2 Trial RP 133 (State in rebuttal arguing "living area" is not the definition of

"dwelling,' and that the "entire building is used for lodging"). The jury was instructed on the lesser-included offense of second-degree burglary of a "building," as the defense had proposed. 2 Trial RP 115, 120; 1 CP 57, 60-61, 69 (trial court's instructions), 71-76 (defense proposed). The jury did not reach the lesser crime and convicted the defendant of residential burglary.1 CP 40-41 (verdict forms). The defendant was sentenced within the standard range. 1 CP 3-13. This appeal followed. 1 CP 2.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE ELICITED AT TRIAL TO SUPPORT THE JURY'S FINDING THAT THE DEFENDANT ENTERED OR REMAINED UNLAWFULLY IN A "DWELLING."

As he did below, the defendant argues that there was insufficient evidence that he entered a "dwelling" to support a verdict of residential burglary. BOA 7-9. His argument, both then and now, focuses on this element alone. Id. The defendant had conceded below that there was sufficient evidence for the crime of second-degree burglary of a "building" to go to the jury. 2 Trial RP 94-95.

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[1] Per State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), examining, in light most favorable to the prosecution, whether there is sufficient evidence to send case to the jury.

On review, there is sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010); State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003); 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 States' evidence. Salinas, 119 Wn.2d at 201; State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284, review denied, 169 Wn.2d 1028 (2010); State v. Porter, 58 Wn. App. 57, 791 P.2d 905 (1990). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); Salinas at 201; State v. Soderholm, 68 Wn. App. 363, 373, 842 P.2d 1039 (1993).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight of the evidence. State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007); State v.

Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered), State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict).

The rules apply equally to a circumstantial evidence case, for circumstantial evidence is no less reliable than direct evidence. Stewart, 141 Wn. App. at 795; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); State v. Zamora, 63 Wn. App. 220, 223, 817 P.2d 880 (1991); see WPIC 5.01. Direct and circumstantial evidence carry the same weight. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Circumstantial evidence is sufficient to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978).

Credibility determinations are for the trier of fact and are not subject to review. State v. Cantu, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

A "dwelling" is defined as "any building or structure that is used or ordinarily used by a person for lodging." RCW

9A.04.110(7); WPIC 2.08. The jury was so instructed. 1 CP 63. There is no question that Karen Moran's house was a "dwelling" within the meaning of the term. See Ex. 10. Viewed in the light most favorable to the State, the testimony was that the defendant went underneath this house, cut the sewer pipe, filled it with hardening foam, and glued the pipe back together. 1 Trial RP 26-28, 30-31, 37-40, 54-56, 67. To do so he had to enter through a panel or door that appears to have been cut into the foundation. 1 Trial RP 30; 2 Trial RP 88-90, 105; Exs. 8, 16. Once through the panel and underneath the house proper, the space was big enough to stand up in, *and it was lighted*. 1 Trial RP 33; 2 Trial RP 88-90. This was not a detached garage or shed, or an outbuilding. Exs. 8, 10, 16. And there is no authority – indeed, appellant cites none – from which to argue that one must divide a residence into layers, with the regularly-habitable part deemed a "dwelling" but an unfinished basement, for example, only comprising a "building."

The defendant argues that "[w]hile some areas under the house are tall enough to stand, in order to access the space it is necessary to physically crawl under the *house*." BOA 8 (emphasis added). This is not quite accurate: One must crawl under the *deck*

to get to the access door, but once through it, and underneath the *house*, one can stand up. 1 Trial RP 32-33; 2 Trial RP 88-90, 105.

As the parties recognized below, Washington cases examining what is a "dwelling" do not address this specific question. See State v. Murbach, 68 Wn. App. 509, 843 P.2d 551 (1993)(unlawful entry into attached garage); State v. J.P., 130 Wn. App. 887, 125 P.3d 215 (2005) (unlawful entry into vacant home); State v. McDonald, 123 Wn. App. 85, 96 P.3d 468 (2004) (same). But cases elsewhere support the proposition that basements are part of a dwelling, even if inaccessible from inside the residence: See Commonwealth v. Rivera, 983 A.2d 767, 771 (Pa. 2009) (burglary of basement used for storage and accessed only through exterior entrance, but sits below 3 apartments, therefor "adapted for overnight accommodation;" State v. Maykoski, 583 N.W.2d 587, 588–89 (Minn.1998) (holding that basement was "part of dwelling house" and "clearly part of the occupied dwelling," even though inside stairs to basement were unusable and basement could only be accessed from outside house); Stewart v. Commonwealth, 793 S.W.2d 859, 861 (Ky.1990) (holding basement accessible only from exterior of house was part of "dwelling" within meaning of burglary statute, where owner had laundry room, refrigerator, and workshop

in basement); People v. Zelaya, 194 Cal.App.3d 73, 75, 239 Cal.Rptr. 289 (1987) (entry into a garage, basement, hallway, and several storage rooms contained within apartment house sufficient to establish burglary of a dwelling); Burgett v. State, 161 Ind.App. 157, 314 N.E.2d 799, 803 (1974) ("Basements are located directly under the living area of a residence and are used for a variety of purposes connected with family living, such as storage of various household items, location of hearing and mechanical equipment, and laundering of clothing. Being under the same roof, functionally interconnected with and immediately contiguous to other portions of the house, it requires considerable agility to leap over this fulsome interrelationship to a conclusion that a basement is not part of a dwelling house because no inside entrance connects the two.").

These cases support the common-sense proposition that a "dwelling" is a single unit, such that an enclosed area underneath a residence, with utilities installed or accessible, is part of the "dwelling."

The defendant may argue that the space here was not even a basement, but a mere crawl space. But, as discussed above, this is not an accurate description. Even the area by the access panel was "bigger than a crawl space." 2 Trial RP 89. It might have been

a closer question if the sewer pipe were accessed merely underneath the wraparound porch, see Ex. 10; but that is not what happened here. There was sufficient evidence the defendant unlawfully entered a "dwelling."

Even if the defendant is correct, there remains the question of remedy. The defendant conceded below, in his "Green motion," that there was sufficient evidence for the jury to consider the lesser offense of second-degree burglary, of a "building." 2 Trial RP 94-95. He ignores this concession now. BOA 8-9. The jury was in fact instructed on the lesser offense, at defendant's urging. 2 Trial RP 115, 120; 1 CP 57, 60-61, 69, 71-76.

If it finds insufficient evidence of the greater offense, a reviewing court can remand for entry of an amended sentence on a lesser-included or lesser-degree offense, provided the jury had been explicitly instructed on the lesser. State v. Heidari, 174 Wn.2d 288, 293, 274 P.3d 366 (2012) (citing State v. Green, 94 Wn.2d 216, 234, 616 P.2d 628 (1980)); see State v. Brown, 50 Wn. App. 873, 878-79, 751 P.2d 331 (1988) (permitting remand for entry of amended judgment for second-degree criminal trespass when State failed to prove area unlawfully entered was a "building"), overruled in part by Heidari, 174 Wn.2d at 293 (to the extent Brown,

50 Wn. App. at 878, stated it was not necessary to a jury to have been instructed on the lesser in order to remand for amended judgment). Consequently, should this Court find the area accessed through the panel door was not part of Karen Moran's "dwelling" – a point not conceded – it can remand for entry of an amended sentence of second-degree burglary.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE DEFENDANT HAD NOT PRODUCED "NEWLY DISCOVERED MATERIAL EVIDENCE" TO JUSTIFY A NEW TRIAL.

The defendant also argues that the trial court abused its discretion in denying his untimely motion for a new trial. BOA 9-14.

Under Criminal Rule ("CrR") 7.5(a), a motion for new trial may be granted for one or more of eight reasons, if it appears "that a substantial right of the defendant was materially affected" thereby. Such a motion must state its basis with specificity, and "must be served and filed within ten days" of the verdict. CrR 7.5(b). Appellate courts review a trial court's ruling on a CrR 7.5 motion for new trial for abuse of discretion. State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996); State v. Marks, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967); State v. Russ, 93 Wn. App. 241, 244, 969 P.2d 106 (1998). In this context, a trial court abuses its

discretion only if "no reasonable judge would have reached the same conclusion." State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989)).

One of the eight reasons listed in the court rule, and the only one at issue here, is "newly discovered material evidence" that could not have been discovered with reasonable diligence pretrial. A claim for new trial based on "newly discovered material evidence" may be considered only when a moving party establishes that the evidence: (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. In re Personal Restraint of Stenson, 150 Wn.2d 207, 217, 76 P.3d 241 (2003). The absence of any one of these five factors is grounds to deny a new trial. Stenson, 150 Wn.2d at 217.

On July 6, 2012, the defense had obtained a continuance. __ CP __ (sub 18). Shortly thereafter, on July 18, 2012, it endorsed Shawn Moran as a witness. __ CP __ (sub 19). However, the defendant ended up not calling his son as a witness. See 2 Trial RP 98 (saying so), 99-113 (testimony of defendant as

lone defense witness). As summarized above, the State had not called him either; instead, it elicited the substance of his telephone conversation with his father through testimony of Karen Moran, who was listening on speakerphone. 1 Trial RP 25, 28, 30-31.

In January 2011 Shawn Moran had given a signed statement to police, under penalty of perjury, that largely tracked the testimony at trial. Ex. 4.

Twenty-nine days after the verdict the defendant filed a motion for new trial, based on a different, undated but ostensibly sworn statement of Shawn Moran. 1 CP 32-39. In that statement, Shawn Moran said he had overheard his mother, Karen Moran, and the defendant's girlfriend, Lynda Kozak, conspiring over the phone to get his father (the defendant) in trouble; that his mother threatened to kick him out of her house if he did not give a statement against his father; and that Lynda Kozak had offered him $300 "to do exactly what I came home to on 12/23/10," and that, when he refused, she threatened to get him kicked out of his mom's house and in trouble with his parole officer. 1 CP 37-39.[2]

[2] Because the statement is undated, it does not comply with the statutory requirements at RCW 9A.72.085. Therefore it actually was not made under penalty of perjury, even though it purports to be.

At a hearing on October 15, 2012, the trial court examined the five factors for analyzing "newly discovered evidence." It agreed that, based on the representations of counsel, the matter was only discovered post-trial and could not have been discovered before trial, because Shawn Moran had never said so (factors 2 and 3). It agreed that the evidence was material and admissible (factor 4). But it found, given the existence of conflicting statements under penalty of perjury, that the evidence would have been unlikely to change the outcome of the trial (factor #1), and that the evidence served only to impeach (factor #5). 10/15/12 New Trial Motion & Sent'g Hrg RP 3-4. Based thereon, it denied the motion for new trial, and proceeded to sentencing. 10/15/12 New Trial Motion & Sent'g Hrg RP 3-5.

At the outset, as the State argued at the time, see __ CP __ (State's response, sub 77, at 6-7), the motion was untimely, as not having been made within 10 days as required by CrR 7.5(b). The jury's verdict was rendered on July 24, 2012. 1 CP 41. The defendant's motion for new trial was filed twenty-nine days later, on August 22, 2012. 1 CP 32-39. While the trial court reached the merits, this court can affirm on any basis supported by the record.

State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998). This Court should deny relief for untimeliness alone.

As to the merits, the trial court was correct. The proffered "new evidence' would not have changed the outcome of the trial. As the trial court acknowledged, Shawn Moran would have been impeached with his own sworn statement made to police. As to Mss. Moran and Kozak conspiring together, the testimony at trial had been that they had met only once. 1 Trial RP 44, 50-51. And it is hard to see how the jury would have given any weight to the son's proffered "new evidence" when even the defendant told the jury he had kicked his son Shawn out of his house because of drugs. 2 Trial RP 113. The "new" testimony served merely to impeach Ms. Kozak, given that Shawn Moran did not say how the sewer pipe was blocked or who did it, only that, apparently, Ms. Kozak offered him money to do this himself. He does not explain how the two women, who had only met once, would even have known that one can do this to a sewer pipe: go under the house, cut the pipe open, fill it with expanding/hardening foam, and then close it up again. It was the defendant, after all, not Ms. Moran or Ms. Kozak, who knew "every inch" of the house. 2 Trial RP 105.

The most benign view one can give of this is that of a troubled young man caught in a dispute between his parents, saying first one thing, and then another. This would not have affected the outcome of the trial, and served only to impeach.

The defendant disagrees, saying the "new evidence' was substantive, in suggesting another perpetrator, and would have changed the outcome of the trial, in supporting the defendant's claim of innocence and his assertion that he had bought the items at Home Depot at Ms. Kozak's request, rather than on his own initiative. BOA 10-14. But Shawn Moran's statement at 1 CP 37-39 does not identify another perpetrator. Most of all, the defendant's argument completely ignores the earlier sworn statement at Ex. 4, and the significant credibility problems this creates for Shawn Moran. The trial court, for its part, had both statements in front of it. 10/15/12 New Trial Motion & Sent'g Hrg RP 4. In considering and weighing them both, it did not abuse its discretion in denying the motion for new trial. Id. ("given the conflicting statements that were made under penalty of perjury, I can't say that the results would probably change if a new trial were granted"). This argument fails.

IV. CONCLUSION

The judgment and sentence should be *affirmed*.

Respectfully submitted on September 23, 2013.

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