69507-0

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NO. 69507-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MORAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S REPLY BRIEF

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Washington Case

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Statute

A. ARGUMENT IN REPLY

1. **The State did not prove beyond a reasonable doubt that Mr. Moran committed the crime of residential burglary because the area Mr. Moran allegedly entered was a crawl space, not the basement of a home.**

Mr. Moran was charged with residential burglary after he allegedly crawled under his ex-wife's home and tampered with a sewer pipe. CP 80; 7/23/12 RP 26-27. At trial, the defense argued there was insufficient evidence for the jury to find Mr. Moran entered or remained unlawfully in a "dwelling," as required for a conviction of residential burglary. 7/24/12 RP 94; RCW 9A.52.025. The trial court denied Mr. Moran's motion and permitted the jury to be instructed on both residential burglary and burglary in the second degree, finding that the issue raised by Mr. Moran had yet to be resolved by case law. 7/24/12 RP 97.

It is undisputed that Washington case law examining a "dwelling" has not addressed this particular question. Resp. Br. at 10. The State argues common sense suggests the enclosed space under a dwelling is part of the dwelling, but cites no authority for this assertion. This "common sense" argument ignores the practical consideration that the crime of residential burglary provides for a heightened penalty

because an offender invades a person's home, and places the people inside the home at risk. Entering the space under a home, where no one lives, does not pose the same safety concern as actually entering the home itself.

The State also contends that other jurisdictions have found a basement to be part of the dwelling, and that the space at issue in this case is not a "crawl space" but instead should be identified as a "basement." Resp. Br. at 11. It claims Mr. Moran's description of the area as a crawl space is inaccurate, citing to the testimony at trial. Id. This argument fails.

The State relies on the testimony of the Snohomish County Sherriff detective who stated, with some ambiguity, that "the part where the house is accessed is – it's bigger than a crawl space, it's a door and it's underneath the back porch which is a – looks to be a wraparound porch." 7/24/12 RP 89. Despite the detective's testimony that "the part where the house is accessed" is larger than a crawl space, the complainant and homeowner, Ms. Moran, made it clear that the area at issue is indeed a crawl space. She testified that there were "some areas" of the space where it is possible to stand up and that the area is lighted, but that there is only plastic covering the ground. 7/23/12 RP

33. She also specifically testified "it's a crawl space" and that she did not "live in the crawl space." Id. Even the detective, whose testimony the State relies on, corrected himself at trial when he stated "you would have to remove the lattice in order to get to the crawl – the space." 7/24/12 RP 89. At no point during the trial was the space referred to as a basement.

The State likens a crawl space to a basement by relying on cases where a basement had only exterior access, yet in those cases, the courts focused on the fact that the basement, like the rest of the house, was used for habitation. See Commonwealth v. Rivera, 983 A.2d 767, 771 (Pa. 2009) ("the basement contains a bed, television, portable radio and washing machine. The basement is habitable."); Stewart v. Commonwealth, 793 S.W.2d. 859, 860 (Ky. 1990) (despite having only an exterior entrance there was a "laundry room, a refrigerator, and a workshop in the basement"); Burgett v. State, 161 Ind.App. 157, 161, 314 N.E. 799 (1974) (basements 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").

This crawl space is not used for habitation. Unlike a basement, it does not contain a laundry room or workshop. The complainant described the space as being "under" the house, not the bottom level of the house. 7/23/12 RP 32. It was an inhabitable space unconnected to residential space of the home. The evidence was insufficient to find that Mr. Moran entered a "dwelling" as required by RCW 9A.52.025(1).

2. The newly discovered evidence, which implicated a central State witness, required a new trial.

After the trial, Mr. Moran's son provided a statement indicating that Lynda Kozak, Mr. Moran's ex-girlfriend and a key witness for the State, had offered to pay him to tamper with the sewer pipes. CP 38. Mr. Moran moved for a new trial based on this newly discovered evidence but the trial court denied his motion, finding it was merely impeachment evidence that was not likely to change the outcome at trial. CP 32; 10/15/12 RP 2, 4; see also State v. Williams, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981).

In its response, the State points to a prior written statement by Mr. Moran's son, which was available to the trial court when it considered Mr. Moran's motion but was not referenced or admitted at trial. Resp. Motion to Supp. at 3; Ex. 4. The State claims that the prior

statement creates significant credibility concerns for Mr. Moran's son, suggesting that the son's testimony would not have likely changed the outcome at trial. Resp. Br. at 18.

However, the first statement describes the son's interaction with Mr. Moran after the incident, and the second statement describes the actions of Ms. Moran and Ms. Kozak. Ex. 4; CP 37-39. Aside from the fact the son claims in the first statement that on the evening of the incident, he met Mr. Moran at the "road house," but in the second statement he claims they met at Starbucks, the two statements are not in direct conflict. Ex. 4; CP 37. In addition, in the second statement the son specifically addressed why he previously withheld the information about Ms. Kozak, explaining that he feared being kicked out of his mother's home. CP 38.

The son's statement taken with the other witnesses' testimony at trial, including Ms. Kozak's admission that she only spoke with authorities in retaliation after separating from Mr. Moran, and Mr. Moran's testimony that he purchased the spray foam and paint from Home Depot at Ms. Kozak's direction, would likely change the results at trial. 7/23/12 RP 41; 7/24/12 RP 103. The statement provides support for the proposition that Mr. Moran was not responsible for the

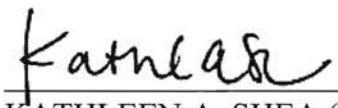
sewer tampering, and that Ms. Kozak was. This is substantive evidence of an additional suspect's culpability, and is therefore not merely impeachment evidence. The trial court's denial of Mr. Moran's motion for a new trial constitutes an abuse of discretion and should be reversed.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Moran respectfully asks this Court to reverse his conviction and either remand for dismissal, or in the alternative, remand the case for a new trial.

DATED this 6th day of December 2013.

Respectfully submitted,



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Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	KEVIN MORAN 41701 N SHORE LN CONCRETE, WA 98237	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 6TH DAY OF DECEMBER, 2013.

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