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No. 69507-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

KEVIN MORAN,

Appellant/Cross-Respondent.

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

BRIEF OF APPELLANT/CROSS-RESPONDENT

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 JUN 13 PM 4:47

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A. SUMMARY OF ARGUMENT

At trial, the State presented insufficient evidence that Mr. Moran entered or remained unlawfully in a “dwelling,” as the State only offered evidence that Mr. Moran had entered the crawl space under a house. Thus, his conviction for residential burglary must be reversed and remanded for dismissal. In the alternative, Mr. Moran’s conviction should be reversed and remanded for a new trial, due to the newly discovered evidence that a key witness for the State attempted to pay Mr. Moran’s son to commit the very crime with which Mr. Moran was later charged. Because this is substantive evidence that would probably change the result at trial, the trial court abused its discretion and Mr. Moran is entitled to a new trial.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence produced by the State to support the jury verdict finding Mr. Moran guilty of residential burglary.

2. The trial court abused its discretion in denying Mr. Moran’s motion for a new trial.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Due process requires the State to prove each element of the charged offense beyond a reasonable doubt. When the State charges a defendant with residential burglary, the State must prove that the defendant entered or remained unlawfully in a “dwelling.” Here, the evidence presented shows only that Mr. Moran crawled under a home, not that he entered it. Is Mr. Moran entitled to reversal of the residential burglary conviction with instructions to dismiss?

2. A defendant is entitled to a new trial when he demonstrates that newly discovered 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. Given that the statement from Mr. Moran’s son satisfied this test, is Mr. Moran entitled to a reversal of his conviction with instructions for a new trial?

D. STATEMENT OF THE CASE

The Morans were married for 23 years and divorced in 2007. 7/23/12 RP 22. In the divorce proceedings, Ms. Moran was awarded sole possession of their home, but Mr. Moran maintained half ownership of the house and both parties agreed the plan was to

eventually sell it, allowing the couple to split the proceeds. 7/23/12 RP 23; 7/24/12 RP 100.

At Kevin Moran's criminal trial, his ex-wife, Karen Moran, alleged that she came home one afternoon to find "thou shall not covet" spray painted on her garage door. 7/23/12 RP 25. Later that evening, her toilet began backing up. 7/23/12 RP 26. When the clog got worse, she called a plumber, who discovered that someone had tampered with the sewer line. 7/23/12 RP 26-27.

Ms. Moran testified that after the incident, her son called Mr. Moran and spoke to him about what happened. 7/23/12 RP 28. Mr. Moran allegedly told the son to "let them clean up their own shit," referring to Ms. Moran and her boyfriend, who was visiting at the time. Id. The son accused Mr. Moran of tampering with the sewer line, and Mr. Moran responded that they could not prove he had done anything, and that Ms. Moran and her boyfriend were "getting everything they deserve." Id.

At trial, Mr. Moran's ex-girlfriend, Lynda Kozak, testified that Mr. Moran admitted to her that he had clogged Ms. Moran's sewer line. 7/23/12 RP 38. At the same time, in December 2010, she found a receipt from Home Depot listing several purchases, including foam

filler and spray paint. 7/23/12 RP 37-38. Ms. Kozak testified that she hid the receipt in the back of her cell phone, but did not speak with the sheriff's department until five months later, in May 2011. 7/23/12 RP 38, 40. She admitted that she contacted the authorities out of retaliation after Mr. Moran had moved out and she believed that he had taken some of her personal belongings. 7/23/12 RP 41.

After Ms. Kozak spoke with the sheriff's department, they retrieved a video from Home Depot that showed Mr. Moran purchasing the items on the day in question. 7/24/12 RP 87. The video showed Mr. Moran checking his list carefully, and Mr. Moran testified this was because the list had been given to him by Ms. Kozak, and that he was buying the items for her. 7/24/12 RP 103.

The sewer pipe at issue is located under the Morans' house, in what Ms. Moran described as a "crawl space." 7/23/12 RP 32. Once under the house, it is possible to stand in some areas, but it is necessary to physically crawl under the house in order to access the space. 7/23/12 RP 32-33. Nothing is stored in the area and the ground is covered only with plastic. 7/23/12 RP 33. In order for Mr. Moran to have tampered with the sewer pipe, he would have had to crawl

underneath the home, but not enter the home itself. It is not possible to enter the home by way of the crawl space. 7/24/12 RP 105.

After the State rested, Mr. Moran argued that there was insufficient evidence for the jury to find that 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. Mr. Moran argued the State should only be permitted to proceed with a charge of burglary in the second degree. 7/24/12 RP 95. The court found this to be “an interesting argument” but denied Mr. Moran’s motion because it was reluctant to take it out of the hands of the jury absent case law deciding this particular question. 7/24/12 RP 97.

After the trial, Mr. Moran’s son provided a statement indicating that Mr. Moran’s ex-girlfriend, 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. CP 32; 10/15/12 RP 2. However, despite the fact that this evidence raises the question of an additional suspect, the trial court denied Mr. Moran’s motion after finding that it was merely impeachment evidence that would not change the results of a trial. 10/15/12 RP 4.

D. ARGUMENT

1. The State did not prove beyond a reasonable doubt that Mr. Moran committed the crime of residential burglary.

a. Due process requires the State to prove every element of the crime beyond a reasonable doubt.

It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. 14; Const. art. 1, § 3.

In reviewing the sufficiency of the evidence to uphold the conviction, the 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. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In order to prove Mr. Moran committed the crime of residential burglary, the State was required to prove that he “unlawfully entered a dwelling” with the “intent to commit a crime against a person or

property therein.” CP 59 (“to convict” instruction); RCW 9A.52.025(1).

- b. The State did not prove beyond a reasonable doubt Mr. Moran entered a “dwelling.”

Rooms or structures attached to the home are considered part of a “dwelling.” See State v. Murbach, 68 Wn.App. 509, 513, 843 P.2d 551 (1993); State v. Neal, 161 Wn.App. 111, 115, 249 P.3d 211 (2011). In Murbach, the defendant was convicted of residential burglary based on evidence that she entered an attached garage. 68 Wn.App. at 511. On appeal, she argued that an attached garage was not a “dwelling” for purposes of RCW 9A.52.025. Id. at 512. This Court disagreed, finding that the attached garage, which had a door that led directly into the house, was a “portion” of a building used as lodging. Id. at 512-13.

In Neal, the defendant was convicted of residential burglary after he entered a tool room in a residential apartment building. 161 Wn.App. at 112. He argued that there was insufficient evidence to support the allegation that he entered a dwelling, because the tool room itself was not used as lodging. Id. at 113. The court found that the evidence was sufficient because, by entering the tool room he had entered a building used for lodging. Id. at 114.

The crawl space, as described in this case, is markedly different from a garage attached to a house or a tool room contained within an apartment building. This crawl space is not part of the house, or contained within it, but instead a physical space located underneath the house. 7/23/12 RP 32. Nothing is kept in the crawl space, and the ground is covered only in plastic. 7/23/12 RP 33. While 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. 7/23/12 RP 32-33. There is no access from the crawl space to the house itself. 7/24/12 RP 105.

Thus, unlike an attached garage or tool room, the crawl space at issue here is simply the open space located under the house. For purposes of RCW 9A.52.025(1), it should not be considered a portion of the dwelling. Insufficient evidence was presented at trial that Mr. Moran entered a “dwelling” when all he was alleged to have done was crawl under the house. 7/23/12 RP 32.

c. The charge must be dismissed.

If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. State v. Lee, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for

insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (“[t]he double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence”) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)).

2. Newly discovered evidence implicating a central State witness requires a new trial.

- a. A new trial should be granted for newly discovered evidence when the defendant meets the required five-part test.

A new trial should be granted on the basis of newly discovered evidence when the defendant has demonstrated 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. State v. Williams, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). When all five factors have been met, the court should grant a new trial. Id. at 223.

A court's ruling denying a new trial is reviewed on appeal for abuse of discretion. State v. Burke, 163 Wn.2d 204, 210, 181 P.3d 1 (2008); Williams, 96 Wn.2d at 221. "A 'discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" Id. (quoting State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008)).

b. Because the court misconstrued the nature of the new evidence, it applied the wrong legal standard.

At trial, Mr. Moran's ex-girlfriend, Lynda Kozak, testified that Mr. Moran admitted to her that he had tampered with the sewer pipe under his ex-wife's home. 7/23/12 RP 37. She further testified that she found a receipt from Home Depot that corroborated his statements. 7/23/12 RP 38. However, although Mr. Moran allegedly confessed to Ms. Kozak in December 2010 and she found the Home Depot receipt the same day, she did not report the incident to authorities until five months later, in May 2011. 7/23/12 RP 38, 40. She admitted she made the report out of retaliation, acting only after Mr. Moran had moved out and she believed he had wrongly taken items that belonged to her. 7/23/12 RP 41.

After Mr. Moran was convicted of residential burglary, counsel for Mr. Moran received an affidavit from Mr. Moran's son, which stated that Ms. Kozak offered him \$300 to commit the crime with which Mr. Moran was later charged. CP 33, 38. The son also stated that he overheard conversations between his mother, Ms. Moran, and Ms. Kozak discussing how they could get back at Mr. Moran. CP 38. This new evidence suggested there was an additional suspect with an identified motive, and corroborated Mr. Moran's testimony at trial that he had purchased the items at Home Depot at Ms. Kozak's direction. 7/24/12 RP 103.

Prior to sentencing, Mr. Moran moved for a new trial based on this newly discovered evidence. CP 32; 10/15/12 RP 2. The trial court applied the five-part test and denied Mr. Moran's motion after finding that the new evidence was only admissible for purposes of impeachment and that it would not have not have changed the outcome at trial. 10/15/12 RP 4.

A trial court properly denies the defendant a new trial when the newly discovered evidence may be used to further impeach a witness, but not exculpate the defendant. See State v. Sublett, 156 Wn.App. 160, 194, 231 P.3d 231 (2010) (rev. granted, aff'd on other grounds).

In Sublett, a defendant moved for a new trial after newly discovered evidence suggested that a witness for the State was more involved in the murder than she admitted. Id. This Court affirmed the denial of a new trial after finding that the newly discovered evidence could have been used to impeach the witness's credibility, but would have offered nothing to exculpate the defendant. Id. In addition, the Court noted that defense counsel had thoroughly impeached the witness on cross examination using other information, suggesting that any additional attack on her credibility would not have changed the outcome at trial. Id.

In contrast, here the son's statement directly exculpated Mr. Moran by providing substantive evidence of an additional suspect's culpability. 7/23/12 RP 38. Evidence that Ms. Kozak had expressed an interest in tampering with the sewer line prior to commission of the crime suggested that it was her, and not Mr. Moran, who committed the crime. This is substantive evidence that could, and should, have been presented to the jury regardless of whether Ms. Kozak testified. Thus, the court erred in finding that the son's statement was merely impeachment evidence. Mr. Moran is entitled to a new trial.

c. The new evidence will probably change the result at trial.

The court found that Mr. Moran's attorney exercised due diligence and spoke with the son before trial, but that the son had not revealed this information until after trial. 10/15/12 RP 3. The court found that, "given the conflicting statements that were made under penalty of perjury," the court could not find that the results would probably change if a new trial were granted. 10/15/12 RP 4.

However, the son's statements were not in conflict.

The son spoke with Mr. Moran's counsel before the trial but failed to disclose Ms. Kozak's offer or the conversations he overheard between Ms. Kozak and Ms. Moran. CP 33; 10/15/12 RP 3. The record provides a possible explanation for this discrepancy. It appears that the son may have been concerned about getting involved because he did not wish to get evicted from his mother's home, and because there was an outstanding warrant for his arrest at the time. CP 33, 38. The son did not fully disclose pertinent information to the defense until after trial, but it did not conflict with his prior statements.

Thus, the court's finding that the newly discovered evidence would not change the results at trial rests on a misinterpretation of the record. Indeed, the son's statement, taken with Ms. Kozak's admission

that she only notified authorities out of retaliation, and Mr. Moran's testimony that he bought the items from Home Depot at Ms. Kozak's direction, would very likely change the results at trial. 7/23/12 RP 41; 7/24/12 RP 103. The son's statement provides critical support for the proposition that Mr. Moran was not responsible for the sewer tampering, but that Ms. Kozak was. This error constitutes an abuse of discretion.

E. CONCLUSION

This Court should reverse Mr. Moran's conviction and remand for dismissal because the State failed to present sufficient evidence to the jury that Mr. Moran committed the crime of residential burglary. In the alternative, given the newly discovered evidence in this case, this Court should reverse and remand for a new trial.

DATED this 13th day of June, 2013.

Respectfully submitted,


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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	NO. 69507-0-I
)	
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KEVIN MORAN,)	
)	
Appellant-Cross-respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF JUNE, 2013, I CAUSED THE ORIGINAL **OPENING 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:

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