31936-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM LEE FULTZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the convictions for first-degree burglary and first-degree robbery with deadly weapon enhancements because the State failed to prove beyond a reasonable doubt that Mr. Fultz was an accomplice

2. The evidence was insufficient to support the two convictions for second-degree assault with deadly weapon enhancements because the State failed to disprove self-defense beyond a reasonable doubt.

II. ISSUES PRESENTED

1. Did the State prove beyond a reasonable doubt that the defendant was an accomplice in the crimes?

2. Did the defendant provide evidence showing that he acted solely in self-defense?

III. STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's version of the statement of the case.

IV. ARGUMENT

A. THE STATE PROVIDED TESTIMONY FROM WHICH A REASONABLE JURY COULD FIND THAT THE DEFENDANT ACTED AS AN ACCOMPLICE.

The defendant makes two claims of error: The first claim being somewhat of an admixture of the defendant's arguments on the allegation that the State failed to disprove self-defense beyond a reasonable doubt, mixed with a claim that the State did not prove that the defendant was an accomplice. Both of these arguments ignore the findings of the jury as well as case law on point. The jury was instructed in Instruction No. 26:

> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the state has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to these charges.

RP 212.

The jury was selected, at least in part, by the defendant. The defendant does not make any arguments to the effect that the jury was mistaken in its decisions. Juries are presumed to follow the instructions of the court. *State v. Dye*, 170 Wn.App. 340, 348, 283 P.3d 1130 (2012), *aff'd*, 178 Wn.2d 541, 309 P.3d 1192 (2013).

In his argument at part A, in addition to his arguments regarding the State's alleged failure to disprove self-defense, the defendant claims that there was insufficient evidence to prove that the

defendant was an accomplice. As part of his argument, the defendant makes the claim that "… he did not have the baseball bat, did not hit anyone with the bat, did not enter the trailer, did not converse, or interact with the residents of the trailer, did not know what was going in the trailer as he was attacked outside by Mr. Knight, and did not take the PlayStation." App. Br., p. 8. The defendant did not testify. The claim on appeal is largely unsupported. The defendant makes up this set of claims out of whole cloth.

Factual questions are not retried by this court. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997). The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negate guilt, or to cast doubt thereon, does not justify the courts setting aside the jury's verdict. *State v. Randecker*, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971).

It would seem that the defendant did not examine the testimony of Tamara Knight, one of the persons in the trailer. Ms. Knight testified that the man who entered her residence was the defendant. RP 58. Ms. Knight's son, Nicholas was fighting with the defendant. RP 59. Ms. Knight testified that the defendant was the "… last one out of the gate." RP 60.

This testimony alone would be enough for the jury to conclude that the defendant was an active participant. The jury received Instruction No. 9 which states, in part:

> A person is an accomplice in the commission of a crime if with knowledge that it would promote or facilitate the commission of the crime he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime or,
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Instruction No. 9 (in part), RP 205.

The crimes in question occurred at approximately 3 a.m. It was up to the jury to decide whether or not the defendant was an accomplice. It would be very difficult for the defendant to explain that he was only out for a joyride and had no idea that the other persons in the vehicle had nefarious motives.

B. THE STATE PROVIDED EVIDENCE FROM WHICH A REASONABLE JURY COULD FIND THAT THE DEFENDANT DID NOT ACT IN SELF-DEFENSE

In part B of his arguments, the defendant claims he acted in self-defense. Instruction No. 25 reads in part:

> It is a defense to the charges of assault in the second degree that the force used was lawful, as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

Instruction No. 25 (in part), RP 211-212.

> A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

Instruction No. 26, RP 212.

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor and that defendant's acts and conduct provoked or commenced the

> fight, then self-defense or defense of another is not available as a defense.

Instruction No. 27, RP 212.

The defendant in this case was able to convince the trial court to include a self-defense instruction even though the defendant did not testify. The defendant may have been able to convince the trial court that he might have acted in self-defense, but the testimony from the state's witnesses allowed the jury to find beyond a reasonable doubt that no group of people approaching a residence at 3 a.m. were acting in complete innocence.

The defendant argues that evidence of self-defense must be viewed "… from the standpoint of a reasonably prudent person knowing all the defendant knows and seeing all the defendant sees." *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). "The longstanding rule in this jurisdiction is that evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." *State v. Allery*, 101 Wash.2d 591, 594, 682 P.2d 312 (1984).

Since the defendant did not testify, the only facts that the defense could use to support a self-defense argument were based on suppositions,

not testimonial facts. The major part of the defendant's arguments on self-defense relied on blaming a third party's actions, *i.e.* Mr. Moody.

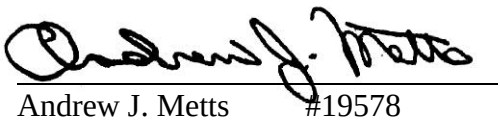
Essentially, the defendant is re-arguing the facts of this case and asking this court to overturn the jury's verdicts. As noted earlier in this brief, that is not the function of an appellate court.

V. CONCLUSION

For the reasons stated above, State respectfully requests that this case be affirmed.

Dated this 5 day of August, 2014.

STEVEN J. TUCKER
Prosecuting Attorney



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

STATE OF WASHINGTON, Respondent, v. WILLIAM LEE FULTZ, Appellant,	NO. 31936-9-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 5, 2014, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kenneth H Kato
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and mailed a copy to:

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8/5/2014	Spokane, WA	Kim Cornelius
(Date)	**(Place)**	**(Signature)**