NO. 45938-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JORGE PEREZ BARROSO and ROILAND FERNANDEZ MEDINA, APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable John McCarthy

No. 13-1-01482-5 and 13-1-01481-7

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the prosecutor's argument that there was no evidence regarding a particular issue was a proper comment on the evidence?

2. Where three defense attorneys failed to object to the prosecutor's argument, whether the defendants waived their claim of error?

3. Whether the trial court abused its discretion regarding the furniture arrangements and the seating of parties in the courtroom?

4. Where none of the defense attorneys raised objections based on the Confrontation Clause, whether the alleged error was preserved for appeal?

5. Whether defense counsel created a sufficient record for appellate review of the Confrontation Clause issue?

6. Where defense counsel was permitted to move about in the courtroom to see and cross-examine witnesses who testified in open court, whether the Confrontation Clause was violated?

7. Whether "abiding belief" language in the reasonable doubt instruction violated the Constitution?

8. Whether the trial court abused its discretion in excluding possible evidence of drugs in the victims' apartment as irrelevant in a first-degree burglary case?

9. Whether the trial court abused its discretion in declining the defendant's proposed self-defense instruction in a first-degree burglary case where the defendant went to the victim's apartment to assault him?

10. Whether there is a legal basis for a self-defense instruction in a first degree burglary case where the defendants did not first withdraw from the crime?

B. STATEMENT OF THE CASE.

1. Procedure

On April 9, 2013, the Pierce County Prosecuting Attorney (State) charged the defendants Jorge Perez Barroso and Roiland Fernandez-Medina with one count of burglary in the first degree and one count of assault in the second degree. CP 1-2. The case was assigned to the Hon. John McCarthy for trial. 1 RP 3. Trial began with a CrR 3.5 hearing. 2 RP 43.

At the end of the State's case, the court dismissed Count II, assault in the second degree regarding Barroso. CP 183. After hearing all the evidence, the jury found the defendants guilty of burglary in the first degree. CP 144, 162. The jury found Fernandez-Medina not guilty of assault in the second degree (CP 159) but guilty of a misdemeanor unlawful display of a weapon. CP 161. The defendants filed timely notices of appeal. CP 228, 249.

2. Facts

April 7, 2013, some friends gathered at Dijon Wiley's small Lakewood apartment to eat and play video games. 7 RP 486, 487. Wiley went outside to smoke and saw a car parked behind his parking space. 6 RP 372, 8 RP 722. Wiley requested that the occupants move the car. 6 RP 372, 8 RP 722. Wiley and Fernandez-Medina argued about moving the car and exchanged profanities. 6 RP 373, 490, 8 RP 722. Fernandez-Medina threatened that he would "be right back" and "I have something for you." 6 RP 376, 500, 8 RP 722.

James Schlagel lived next door to Wiley. 10 RP 1142. Fernandez-Medina had come to Schlagel's apartment just before the confrontation. 10 RP 1160. Schlagel went to Fernandez-Medina's nearby apartment to dissuade him from returning to Wiley's intent on violence. 10 RP 1164.

Fernandez-Medina ignored his plea. Fernandez-Medina armed himself with a firearm and returned to Wiley's apartment. 10 RP 1165, 1167.

A short time later, Jeffery Taylor, another neighbor of Wiley's, saw Fernandez-Medina, Barroso, and two others approach Wiley's door. 9 RP 1100-1101. Snezhana Stetsyuk, one of Wiley's guests, looked out the window and saw Fernandez-Medina, accompanied by three other men approach Wiley's door. 6 RP 377. She could see that one of the men had a baseball bat. 6 RP 381. Wiley also saw the man armed with the bat. 8 RP 738.

Fernandez-Medina pounded on the door, announcing that he was back. 6 RP 386, 7 RP 512, 642. He challenged Wiley to come out. 7 RP 705. Stetsyuk and others inside called out, telling them to leave; that a small child was present, and one of the people inside was armed with a firearm. 6 RP 383, 7 RP 524, 650.

Wiley went to the door. 7 RP 516, 8 RP 735. The door suddenly opened. 8 RP 734. Wiley was standing inside the apartment. 7 RP 644, 8 RP 736. Almost immediately, Fernandez-Medina struck Wiley in the face. 6 RP 384, 7 RP 517, 644, 8 RP 735, 737. Wiley and Fernandez-Medina struggled at, and just inside, the door. 6 RP 386, 7 RP 526-527. They struggled inside by a small table and the refrigerator. 7 RP 517, 523, 591.

As Wiley and Fernandez-Medina struggled, the three other men were at the door, right behind Fernandez-Medina. 6 RP 387, 7 RP 520, 649. They were prepared to follow Fernandez-Medina into the apartment to fight with the occupants. 7 RP 525. One of them, Valle-Matos, armed with a knife, tried to reach over and stab Wiley. 6 RP 387, 7 RP 518, 525, 648. At that point, DeAngelo White shot him. 6 RP 387, 7 RP 525.

After the gunshot, Fernandez-Medina and his companions ran off. 7 RP 527. Fernandez-Medina and Barroso helped Valle-Matos to the parking lot, where he died of the gunshot wound. 8 RP 851, 878, 9 RP 1106. Kayla King called 911. 7 RP 652. Police quickly responded. 7 RP Defendants Fernandez-Medina and Barroso were arrested nearby. 6 RP 328.

C. ARGUMENT.

1. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING WHERE HE ARGUED THE ABSENCE OF EVIDENCE TO SUPPORT THE DEFENDANT'S THEORY OF THE CASE.

a. The prosecutor's argument was proper.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. ***State v. Gentry***, 125 Wn.2d 570, 640, 888 P.2d

570 (1995), citing ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

A prosecutor may properly argue that certain testimony is undenied, as long as there is no reference to who may be in a position to deny it. ***State v. Brett***, 126 Wn.2d 136, 176, 892 P. 2d 29 (1995), citing ***State v. Ashby***, 77 Wn.2d 33, 38, 459 P.2d 403 (1969); ***State v. Morris***, 150 Wn. App. 927, 931, 210 P. 3d 1025 (2009).

> "Surely the prosecutor may comment upon the fact that certain testimony is undenied ...; and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his"....

Ashby, at 38, (quoting ***State v. Litzenberger***, 140 Wash. 308, 311, 248 P. 799 (1926)). Prosecutors may also comment on the defendant's failure to present evidence on a particular issue if persons other than the accused could have testified as to that issue. ***Ashby***, at 38.

Here, the prosecutor argued:

> There is no evidence that Dijon Wiley, that when the door was opened, they stepped back so that he could step out and they could get it on in the parking lot, no evidence of that whatsoever. No one testified that that happened. There was no evidence that Valle-Matos backed away from the door in order to allow the fight to be brought outside, none of them.

11 RP 1360. Indeed, there was no such evidence. There were several witnesses, besides the defendants, who could, and did testify regarding the

events. None of them helped the defendants' implausible self-defense theory. All the testimony from the victims was that the fight occurred quickly at, or just inside, the door. Two other neighbors, Jeffery Taylor and James Schlagel, testified consistently with the victims regarding the defendants arriving, approaching the victims' apartment, and the defendants' aggression. This argument did not comment on or even mention the fact that the defendants did not testify. The argument was proper.

As in the above cited cases, here, the court also correctly instructed the jury that "The defendant is not compelled to testify. You may not use the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way." Instruction 5, CP 155. This instruction would cure any prejudicial effect or misunderstanding by the jury. *See* ***Morris***; ***Ashby***, *supra.*

b. By failing to object to the prosecutor's remarks in closing argument, the defendant waived the issue on appeal.

Absent a timely and proper objection, a prosecutor's alleged misconduct cannot be raised on appeal unless it was so flagrant and ill-intentioned that no curative instruction could have obviated the resulting prejudice. ***State v. Warren***, 165 Wn.2d 17, 29, 195 P.3d 940 (2008); ***State***

v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Failure to object or move for mistrial at the time of the argument "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also* ***State v. Monday***, 171 Wn.2d 667, 679, 257 P.3d 551 (2011).

Here, none of the three defense attorneys objected to the State's closing argument. This Court may presume that either there were no grounds to object, or counsel decided to rebut and point out the flaws and errors in the State's summaries, inferences, and conclusions from the evidence in one of their own closing arguments. If the State's argument was incorrect, defense counsel could have objected and requested the court remind the jury of Instruction 5.

The three defense counsels chose not to object or to request a curative instruction. There was nothing to object to, and nothing to cure.

2. THE FURNITURE ARRANGEMENT OF THE COURTROOM WAS NOT AN ABUSE OF DISCRETION, NOR DID IT VIOLATE THE DEFENDANT'S RIGHT TO CONFRONT WITNESSES.

a. The trial court may arrange the seats and positions of the parties as conditions in the courtroom require.

The trial court has broad discretion to make a variety of trial decisions regarding the conduct of trial. *See* ***State v. Dye***, 178 Wn. 2d 541, 309 P.3d 1192 (2013). The trial court's decisions regarding the general conduct of trial are reviewed for abuse of discretion. *Id.*, at 548. The trial court has the discretion to arrange positions of the parties and the furniture as conditions or circumstances require. *See* ***State v. Johnson***, 77 Wn.2d 423, 462 P.2d 933 (1969). This includes seating arrangement of the parties. *Id.* However, the arrangements may not be such as to violate the defendant's right to a fair trial. *See* ***State v. Jaime***, 168 Wn.2d 857, 233 P. 3d 554 (2010) (criminal trial held in a courtroom inside the jail).

Early in the present trial, the court noted that with three defendants and four attorneys, the area for the parties in the courtroom would be crowded. 2 RP 42. In addition the attorneys and the defendants, there was an interpreter and a legal intern. 4 RP 230, 231.The court inquired of all defense counsel if the configuration permitted them to see and hear adequately. 2 RP 43. As trial proceeded, defendant Barroso's attorney

objected to the arrangement of counsel tables. 4 RP 227. Barroso's counsel noted that an additional table had been brought in, but complained that the workspace was inadequate. 4 RP 228. The court replied that it felt the counsel tables were sufficient. 4 RP 229.

During jury selection, Barroso's counsel objected that, because of the arrangement of defendants and attorneys and the courtroom, he could not see the entire venire. 4 RP 235. The court suggested that counsel get up and move around so that he could see. 4 RP 236. Counsel seemed satisfied with that. 4 RP 236.

Just before testimony began, there was further discussion regarding the arrangement of the furniture. 6 RP 274. Barroso's counsel was generally satisfied, but wanted a longer table. *Id.* The court noted that it had spent time off the record with the attorneys re-arranging the furniture to better accommodate all the parties involved. 6 RP 275.

As photographs were displayed on a projector, another attorney voiced concern that, because of the seating arrangement, the photos were being shown directly over his client's head. 6 RP 257. The court again noted the difficulty of the crowded courtroom. The court also expressed that it was "doing its utmost to make sure that accommodations are met." 6 RP 357. The court then solicited constructive suggestions from counsel as to how the configuration could be improved for all concerned. 6 RP

358. He was trying to work with counsel to improve things. *Id.* The court went on to make a record that this courtroom was one of the largest in the courthouse; and gave its measurements. *Id.* Another time, when Barroso's counsel said he could not see a witness' gesture, the State asked the witness to repeat the testimony and motion so that it counsel could see it. 6 RP 381.

The next day, witness DeAngelo White was drawing a diagram on an easel. 7 RP 496. Barroso's counsel said that he could not see what White was drawing, because White was standing in front of the easel as he drew. 7 RP 498. The court replied that when the witness was finished drawing, counsel could get as close as he liked to the diagram. *Id.* Counsel was dissatisfied with the court's response. *Id.* Later, during the same testimony, the same attorney complained that he could not see White's explanation of testimony using the diagram because White's back was to counsel. 7 RP 501-502. The court invited counsel to inquire and clarify when it was counsel's turn at cross-examination. 7 RP 502. Despite this suggestion, on cross-examination, counsel did not ask White to explain or clarify regarding the diagram.

While the witness was demonstrating or explaining testimony using the diagram, the court made sure that the jury could see what he was pointing at. 7 RP 520, 521, 522.

c. The defendants waived a Confrontation Clause objection where they failed to object on these grounds at trial.

An appellate court generally will not consider a claimed error that was not raised in the trial court. *See* RAP 2.5(a). The general rule that an assignment of error be preserved includes an exception when the claimed error is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). To meet RAP 2.5(a)and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. ***State v. Kirkman***, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *Id.*, at 935.

In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. ***State v. O'Hara***, 167 Wn.2d 91, 99, 217 P. 3d 756 (2009). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *Id.*, at 99, quoting ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Here, none of the defense counsel raised a Confrontation Clause objection in the trial court. Although, as pointed out in detail above, Barroso's counsel complained several times that he could not see adequately, he never made a record of what was the cause of this; whether

it was his seat at counsel table, a post that was part of the building, the witness was not facing him, or one of the other attorneys was blocking his view. All of his complaints were regarding issues lack of convenience and adapting to a crowded courtroom. None were based on the Confrontation Clause.

d. There was no violation of the Confrontation Clause.

The Sixth Amendment of the United States Constitution provides that a person accused of a crime has the right "to be confronted with the witnesses against him." Article 1, § 22 of the Washington Constitution provides that "[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face." The rights guaranteed under the Confrontation Clause include the right to have the witness physically present, to have that testimony offered under oath and subject to cross examination, and to provide the trier of fact with an opportunity to observe the demeanor of the witness. ***State v. Foster***, 135 Wn.2d 441, 456, 957 P. 2d 712 (1998).

Because of ***Crawford v. Washington***, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) the right to confront witnesses has recently been a topic of legal discussion and analysis, mostly as it applies to hearsay evidence. ***Foster***, 135 Wn.2d 441, is a better example and

analysis of the "face to face" aspect of the confrontation right under Washington law. There, the Supreme Court examined the constitutionality of RCW 9A.44.150, which permits a witness to testify by closed-circuit television in a child sex case. The Court held that the statute did not violate the defendant's rights under the State or federal Constitutions. ***Foster***, 135 Wn.2d at 444, 470. *See also* ***Maryland v. Craig***, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). In comparison, in ***Coy v. Iowa***, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), the United States Supreme Court held that placement of screen between defendant and child sexual assault victims during testimony against defendant violated defendant's Confrontation Clause rights.

All of the above cases involve legitimate Confrontation Clause issues where counsel raised, preserved, and argued them in the trial court. In the present case, the obstruction was not a physical or video screen intentionally shielding the witness from the defendant; but perhaps a post was in counsel's way, or the witness' back was to him when the witness was drawing a diagram. The "obstructions" in this case could be, and were, easily remedied by counsel moving to where he could see.

The witnesses testified in person from the witness stand. All three defense attorneys were able to see and cross-examine any and all of the

witnesses. This is probably why counsel did not raise a legal objection regarding the Confrontation Clause in the trial court.

3. "ABIDING BELIEF" LANGUAGE IN THE REASONABLE DOUBT INSTRUCTION IS NEITHER UNCONSTITUTIONAL, NOR IMPROPER.

The "abiding belief" language in WPIC 4.01 has been discussed, and affirmed, repeatedly over the years. In ***State v. Pitrle***, 127 Wn.2d 628, 656, 904 P. 2d 245 (1995), the defendant argued that "abiding belief" invited the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit. The Supreme Court concluded that WPIC 4.01 adequately permits both the government and the accused to argue their theories of the case. In ***State v. Bennett***, 161 Wn.2d 303, 317, 165 P.3d 1241 (2007), the Supreme Court most recently again affirmed the language of WPIC 4.01.

Division I of this Court recently discussed this issue in ***State v. Federov***, 181 Wn. App. 187, 200, 324 P.3d 784 (2014). Fedorov challenged the court's reasonable doubt instruction similar to the one given in the present case. He relied on ***State v. Emery***, 174 Wn.2d 741, 760, 278 P.3d 653 (2012), to challenge the "abiding belief" language. He claimed

the language was similar to the impermissible "speak the truth" remarks made by the State during closing.

Citing ***Bennett***, and ***Pirtle***, the appellate court rejected the argument. The Court distinguished ***Emery*** and found the "speak the truth" argument improper because it misstated the jury's role. Read in context, the reasonable doubt instruction accurately stated the law. ***Federov***, at 200.

The "abiding belief" language has long been accepted in American jurisprudence. In ***Victor v. Nebraska***, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994), the United States Supreme Court traced the history of this concept and explanation of "reasonable doubt" to ***Commonwealth v. Webster***, 59 Mass. 295, 320 (1850). The trial court did not err by including "abiding belief" language in the reasonable doubt instruction, #2. CP 152.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF DRUGS IN THE VICTIMS' HOME.

Questions of relevancy are within the discretion of the trial court, and are reviewed only for manifest abuse of discretion. ***State v. Aguirre***, 168 Wn.2d 350, 229 P.3d 669 (2010). The same is true of determinations of relevancy under ER 404. *See* ***State v. Fisher***, 165 Wn.2d 727, 202 P.3d

937 (2009). Even if the trial court ruling was erroneous, reversal is required only if there is a reasonable possibility that the testimony would have changed the outcome of trial. ***Aguirre***, at 361.

Here, the State moved to exclude evidence of drug and alcohol abuse at the victims' apartment. CP 27, 6 RP 277. The defendants sought to admit evidence that there were illegal drugs in the victims' apartment. 6 RP 281. Fernandez-Medina's counsel argued that the evidence was *res gestae* of the crimes charged. 6 RP 281. The defense also argued that the evidence went to the credibility of the witnesses. 6 RP 288.

Before ER 404(b) evidence can be presented, the proponent must prove the acts by a preponderance of the evidence. *See* ***State v. Lough***, 125 Wn.2d 847, 889 P.2d 487 (1995). Here, there was no evidence that the powder was drugs. Neither the State, nor the defendants had had the substance tested. 6 RP 279, 281.

Res gestae or "same transaction" evidence is conduct or evidence that is an inseparable part of the crime charged. *See* 5 Washington Practice, Evidence Law and Practice § 404.18 (5th ed.). *Res gestae* evidence is most accurately applied and reviewed in the context of general relevance, not just ER 404(b). *See* ***State v. Briejer***, 172 Wn. App. 209, 225, 289 P.3d 698 (2012), citing ***State v. Grier***, 168 Wn. App. 635, 645, 278 P.3d 225 (2012). In ***Briejer***, this Court cautioned that when applying

the *res gestae* rule, trial courts should bear in mind the issues, facts and circumstances of the individual case. *Id.*, at 224-225. This is exactly what the trial court did in the present case.

Here, the crimes charged were burglary in the first degree and assault in the second degree. Neither involved an allegation of drug activity. There were no witnesses to drug use in the apartment. 6 RP 286. There was no evidence that the case had to do with drugs or drug transactions. 6 RP 288. The defendants had no evidence that the witnesses had been promised preferential treatment by the State. 6 RP 290.

The court found evidence of intoxication or impairment of witnesses relevant. 6 RP 280. But, the trial court found evidence of possession or trafficking irrelevant. 6 RP 291. The court also concluded that the prejudicial effect outweighed any probative value that such evidence might have. *Id.*, 291-292. The ruling applied the defendants as well as the witnesses. 6 RP 292. The court was open to re-visiting the issue as the trial progressed, if evidence and testimony supported it. 6 RP 292. The trial court did not abuse its discretion in excluding the proffered evidence.

5. THE TRIAL COURT DID NOT ERR IN DECLINING TO INSTRUCT ON SELF-DEFENSE IN A FIRST DEGREE BURGLARY TRIAL.

When determining whether a defendant is entitled to an instruction on self-defense the trial court views the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees. ***State v. Read***, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). The trial court must determine whether the defendant produced any evidence to support the claim he subjectively believed in good faith that he was in imminent danger of injury and whether this belief, viewed objectively, was reasonable. *Id.*, at 243. "The trial court must view the evidence in the light most favorable to the defendant." ***State v. George***, 161 Wn. App. 86, 95–96, 249 P.3d 202 (2011).

The appellate standard of review of a trial court's refusal to instruct the jury on self-defense depends on why the trial court refused the instruction. ***Read***, 147 Wn. 2d at 243:

> If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of [injury],55] an issue of fact, the standard of review is abuse of discretion. If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo.

Id., citing ***State v. Walker***, 136 Wn.2d 767, 771–772, 966 P.2d 883 (1998). A trial court abuses its discretion only if the decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "[A] court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." ***State v. Rafay***, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

Here, defendant Fernandez-Medina proposed instructions on self-defense. CP 207-211. The evidence was that Fernandez-Medina brought three friends to victim Wiley's door. The evidence showed that Fernandez-Medina was armed with a gun, Valle-Matos was armed with a knife, and a third person was armed with a baseball bat. Fernandez-Medina pounded on the door and challenged Wiley to come outside. When the door opened, Fernandez-Medina struck Wiley. The assault continued further into the apartment. The court did not see the evidence to support self-defense. 10 RP 1276. Even in a light favorable to Fernandez-Medina, he was the aggressor. He went to another person's residence and assaulted him.

Defense counsel argued a "lack of clarity" as to who struck whom first, but admitted that victim Wiley testified that Fernandez-Medina struck him first. *Id.* The court found that there was no testimony that Fernandez-Medina believed that he was in actual danger of injury and

acted in self-defense[1]. 10 RP 1277. The court similarly rejected a proposed defense instruction that the assault was consensual as "mutual combat". 10 RP 1294. Based upon the facts and evidence, the defendants were not entitled to a self-defense instruction.

Legally, they were not entitled to such a defense, either. Burglary in the first degree occurs where:

> with intent to commit a crime against a person or property therein, he or she *enters or remains unlawfully* in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020. Before any assaultive behavior occurs, by either party, the defendant has to have committed the crime of unlawfully entering or remaining in the building. "[T]he burglary is deemed to be in progress after the break and entry when defendant is still on the premises or when the defendant is fleeing from the scene." ***State v. Dennison***, 115 Wn.2d 609, 616, 801 P.2d 193 (1990).

The Supreme Court held that Dennison was not even entitled to assert self-defense. ***Dennison***, 115 Wn.2d at 616. A person cannot commit a crime and then claim self defense when the victim reacts with violence. *See* ***State v. Craig***, 82 Wn.2d 777, 514 P.2d 151 (1973). Where the

[1] None of the defendants testified. 10 RP 1258-1260.

defendant is the aggressor and does not abandon his threatening behavior, the defendant is not entitled to a self defense instruction. *Id.*, at 784. In ***State v. Bolar***, 118 Wn. App. 490, 78 P.3d 1012 (2003), the Court of Appeals held that where self-defense was unavailable as a matter of law in a "regular" burglary, as in ***Dennison***, it was certainly unavailable to one who entered the victim's residence with the purpose to assault or kill him. *Id.*, at 507.

Thus, a person may not claim self- defense where he unlawfully enters and is met by force to repel or expel him. To even theoretically claim self-defense in a burglary, the defendant would first have to "withdraw" from the crime "in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action." ***Craig***, 82 Wn.2d at 783; *see also* ***Dennison***, *supra.* In ***Dennison***, the defendant claimed that he was leaving or withdrawing, so the resident had no right to use force against him. 115 Wn. 2d at 617. The trial court disagreed, as did the Supreme Court.

The present case is more like ***Bolar*** than ***Dennison***. Here, it is an understatement to say that there is no evidence that the defendant(s) were attempting to withdraw or break off the fight they brought to victim Wiley's residence. This is probably why the defendants did not even argue that they had withdrawn, and were therefore entitled to a self-defense

instruction. The trial court did not abuse its discretion, nor commit legal error in denying the defendants' proposed self-defense instruction.

D. CONCLUSION.

The defendants received a fair trial where, despite the fact that they armed themselves and went to the victim's residence where Fernandez-Medina assaulted Wiley and Valle-Matos tried to stab him, the defendants claimed self-defense. The trial court made appropriate rulings on the conduct of trial and evidence. The State respectfully requests that the convictions be affirmed.

DATED: FEBRUARY 12, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas C. Roberts

THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/12/15 [signature]
Date Signature

PIERCE COUNTY PROSECUTOR

February 12, 2015 - 2:52 PM

Transmittal Letter

Document Uploaded: 3-459388-Respondent's Brief.pdf

Case Name: State v. Jorge Barroso & Roiland Fernandez Medina
Court of Appeals Case Number: 45938-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

glinskilaw@wavecable.com
KARSdroit@aol.com