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NO. 53505-0-II

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

ANDRE TYRONE CROPPER,

Appellant.

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RESPONDENT'S BRIEF

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**I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR**

Cropper's conviction should be affirmed because there was sufficient evidence for the jury to find he used unlawful force.

**II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR**

**A. WAS THERE SUFFICIENT EVIDENCE FOR THE JURY TO FIND CROPPER USED UNLAWFUL FORCE BY PUNCHING ROBYN MALGESINI IN THE EYE AND FRACTURING HER SKULL?**

**III. STATEMENT OF THE CASE**

In April of 2018, Robyn Malgesini was living in a second-floor apartment at 801 North First Avenue in Kelso, Washington. RP 130-33. Malgesini lived with her six-year-old son and Andre Cropper. RP 131. Malgesini and Cropper were in a dating relationship. RP 132. Although, Cropper was not on the lease, he began living with Malgesini shortly after they began dating in November of 2017. RP 131-32.

On the night of April 26, 2018, Cropper and Malgesini had an argument. RP 134. Malgesini attempted to make Cropper leave the apartment. RP 134-35. Cropper punched her in the chest, knocking the wind out of her. RP 135. Malgesini then cried and went to bed. RP 135.

The next morning, when Malgesini woke up, her chest hurt badly, and she was having difficulty breathing. RP 136. Malgesini sent her son to school and watched him from the apartment balcony as the school bus

picked him up. RP 136. The balcony could be entered from the apartment through a sliding glass door. RP 138. The balcony did not have any stairs or access to the ground. RP 138-39. Once Malgesini returned to the apartment, Cropper was apologetic and wanted to work the relationship out. RP 136. Malgesini was not interested in continuing the relationship and told Cropper he had to leave. RP 137. Cropper did not leave and argued with Malgesini. RP 137.

Eventually, Malgesini exited the apartment. RP 137. As she was leaving, Malgesini realized that she had left her phone and keys inside. RP 139. She then returned to the apartment. RP 139. Malgesini and Cropper continued to argue. RP 140. Cropper still refused to leave. RP 140. Malgesini then attempted to leave. RP 140.

Cropper restrained Malgesini by grabbing hold of her arms tightly. RP 140. Malgesini was frightened of Cropper and attempted to push him away from her. RP 140. Cropper stood between Malgesini and the front door. RP 141. Malgesini broke free of Cropper's grip on her arms and headed for the apartment balcony. RP 141. Cropper grabbed hold of Malgesini's waist to stop her. RP 141. Malgesini grabbed the sides of the doorway to the balcony and screamed for help. RP 141. Cropper then released her. RP 141. Her downstairs neighbor, Chelsea Tangen, heard Malgesini screaming, "Somebody help me." RP 176.

Once Malgesini was on the balcony, she pleaded with Cropper to “get out” of the apartment. RP 141. Cropper refused. RP 141. Malgesini grabbed a curtain rod that hung above the sliding glass door. RP 142. The curtain rod was thin, able to be bent, and about four feet long. RP 142. While pointing the curtain rod at Cropper, Malgesini said, “Leave or let me go[.]” RP 142. Malgesini was “really scared and wanted to get away.” RP 142. Cropper refused to leave or let Malgesini leave. RP 142-43. Malgesini feared Cropper would hurt her “really bad.” RP 143. Malgesini pointed the rod at Cropper and attempted to run around him to access the front door. RP 143.

Cropper grabbed the rod, then punched Malgesini in the face. RP 143. Cropper struck Malgesini with a closed fist in the left eye. RP 143-44. Malgesini became dizzy and lost her balance. RP 144. She collapsed to her back and then crawled back to the balcony. RP 144. Malgesini was unable to stand and had blurry vision. RP 144-45. Malgesini screamed for her next-door neighbor “Curt” to help, but no one responded. RP 145.

Eventually, Malgesini’s senses returned. RP 145. She ran from the balcony out the front door. RP 146. She knocked on Curt’s door, but no one responded. RP 146. Malgesini then went down the stairs and contacted Tangen. 146, 177. Tangen observed Malgesini was “pretty seriously injured.” RP 178. Tangen provided Malgesini a phone to call

911, however due to her loss of vision she was unable to dial the phone number. RP 180. So, Tangen dialed 911 for her. RP 147, 180.

Police responded and contacted Malgesini. RP 148. Photographs were taken of her facial injury and fresh bruises on her arms. RP 213, 225-26. Tangen took Malgesini to the hospital. RP 148, 182. As a result of being punched by Cropper, Malgesini suffered a severe, blowout fracture of the left orbital floor of her skull. RP 195-96, 203.

Cropper was charged with assault in the second degree – domestic violence, and the case proceeded to trial. CP 4; RP 6. At trial, after Malgesini, Tangen, the doctor who treated Malgesini, and the police testified, Cropper testified. RP 244. Cropper claimed that prior to punching Malgesini, he had agreed to leave the apartment if he could first retrieve his phone. RP 248. Cropper said he patted Malgesini down because he believed his phone was inside her bra. RP 248-49. Cropper claimed Malgesini normally kept his phone in her bra. RP 249. Cropper claimed that after he patted Malgesini down, she grabbed the curtain rod and came at him. RP 246. Cropper testified that Malgesini jabbed him in the penis with the curtain rod, and he “instinctively jabbed her in her eye.” RP 246. Cropper also said the curtain rod was lengthy, and that Malgesini did not swing it at him but poked him with it. RP 252.

The jury was instructed on self-defense. RP 259. Both parties agreed that the aggressor instruction was appropriate. RP 258-59. The jury found Cropper guilty of assault in the second degree – domestic violence. RP 323.

#### IV. ARGUMENT

##### A. SUFFICIENT EVIDENCE WAS PRESENTED FOR THE JURY TO FIND CROPPER GUILTY OF ASSAULT IN THE SECOND DEGREE – DOMESTIC VIOLENCE.

Taken in the light most favorable to the State there was sufficient evidence for the jury to find Cropper guilty of assault in the second degree – domestic violence. The Washington Supreme Court has stated:

When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom.

*State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)); *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Cropper claims that there was insufficient evidence to disprove self-defense beyond a reasonable doubt. However, when all reasonable inferences are drawn in favor of the State and interpreted most

strongly against Cropper, there was sufficient evidence to support the jury's verdict.

When determining the sufficiency of evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, *State v. Jones*, 63 Wn. App. 703, 708, 821 P.2d 543, review denied, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992).

For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *Jones*, 63 Wn. App. at 707-08. "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Nothing forbids a jury, or a judge, from logically inferring intent from proven facts,

so long as it is satisfied the state has proved that intent beyond a reasonable doubt.” *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). All reasonable inferences must be drawn in the State’s favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

Washington follows the common law definition of assault: “An assault is an intentional touching or striking of another person, with unlawful force that is harmful or offensive regardless of whether any physical injury is done to the person.” *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 982, 329 P.3d 78 (2014) (emphasis removed). “Assault is, among other things, an unlawful touching.” *State v. Thomas*, 98 Wn. App. 422, 424, 989 P.2d 612 (1999). “[A] touching may be unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive.” *Id.* (quoting *State v. Garcia*, 20 Wn. App. 401, 403, 579 P.2d 1034 (1978)).

As with any other sufficiency claim, a reviewing court considers the sufficiency of the evidence to disprove a claim of self-defense, by “viewing the evidence in the light most favorable to the State.” *See State v. Bradley*, 96 Wn. App. 678, 685-86, 980 P.2d 235 (1999). “[T]he key inquiry is whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt[.]” *State v.*

*Hatt*, 2019 WL 6122397, --- P.3d --- (2019). While the State bears the burden of proving the absence of self-defense when it is at issue, *see State v. Walden*, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997), “the right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or revenge.” *State v. Janes*, 121 Wn.2d 220, 240, 850 P.2d 495 (1993) (quoting *People v. Dillon*, 24 Ill.2d 122, 125, 180 N.E.2d 503 (1962)).

Further, “[a]n aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant’s conduct precipitated a fight.” *State v. Wingate*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999). Although “words alone” do not constitute sufficient provocation for giving an aggressor instruction, “[w]here there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate.” *State v. Riley*, 137 Wn.2d 904, 909-911, 976 P.2d 624 (1999). And, the provocative act need not be the striking of the first blow. *State v. Hawkins*, 89 Wash. 449, 455 (1916).

Here, taken in the light most favorable to the State there was sufficient evidence to support Cropper’s conviction for assault in the second degree – domestic violence. Prior to any use of force by Malgesini, she attempted to flee the apartment. Cropper restrained her by

grabbing her so tightly that she had bruises on her arms. When Malgesini bolted for the balcony, Cropper grabbed her waist, forcing her to grab the sides of the doorway in an effort to exit the living area of the apartment. Then, to prevent Cropper from assaulting her further, Malgesini grabbed a curtain rod to keep him away.<sup>1</sup> She asked Cropper, “Leave or let me go[.]” RP 142. Cropper did neither. Frightened for her safety, she pointed the curtain rod at Cropper. Cropper grabbed the rod and pulled it away from Malgesini. He then punched her in the face, fracturing her skull. Cropper punched Malgesini so forcefully that she lost her balance, was temporarily unable to stand, and her vision was blurred.

As the sole judge of credibility, the jury could have found Malgesini’s testimony entirely credible. This was likely, considering the strong corroborative evidence that included Tangen hearing Malgesini screaming for help, the bruises on her arms, and the severe facial injury she suffered as a result of being punched. RP 176, 195-96, 203, 213, 225-26. Further, the jury was unlikely to be convinced by Cropper’s testimony. He claimed Malgesini jabbed him in the penis with a lengthy curtain rod, causing him to instinctively punch her in the face. However, had the four-foot rod been separating them, this would have created too

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<sup>1</sup>Cropper’s brief incorrectly asserts that prior to Malgesini using the curtain rod the argument was “only verbal[.]” *Brief of Appellant* at 6. This ignores that Cropper twice grabbed Malesini and held her against her will as she attempted to leave the apartment and flee from him. RP 140-41.

great a distance between them for Cropper to reach her with an immediate, reactive punch as he described.

Moreover, if the jury found Cropper's acts made him the aggressor, it would have justified use of force by Malgesini to protect herself. Cropper was assaulting Malgesini by grabbing her against her will and was refusing to let her leave the apartment. Consistent with having been grabbed violently, police observed bruises on her arms. Her act of using the curtain rod for protection from Cropper was provoked by his continued assault against her and unwillingness to let her go. The jury could have found it unreasonable for Cropper to punch Malgesini in the face after his assault and restraint of her caused her to use the rod to protect herself. Thus, once Cropper provoked Malgesini's use of force to protect herself by assaulting her and restraining her against her will, he was not justified in then using further force against her.

Additionally, the jury could have found it was not reasonable or necessary for Cropper to punch Malgesini in the face. The jury could have observed Cropper to be physically dominant as compared with Malgesini. It could have found that punching her in the face was unreasonable after she used a flimsy curtain rod to defend herself. The jury could also have found the extreme level of force employed by Cropper—punching Malgesini in the face and fracturing her skull—far exceeded what was

necessary to protect himself after he provoked the incident by refusing to let her leave.

When all reasonable inferences are drawn most favorably for the State and most negatively against Cropper, there was sufficient evidence for the jury to find his use of force was unreasonable, beyond what was necessary, and that he was the aggressor.<sup>2</sup> Thus, there was sufficient evidence for the jury to find Cropper's use of force did not amount to self-defense and was therefore unlawful beyond a reasonable doubt.<sup>3,4</sup>

**V. CONCLUSION**

For the above stated reasons, Cropper's conviction should be affirmed. Respectfully submitted this 11<sup>th</sup> day of December, 2019.



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<sup>2</sup> In assault trials, the first sentence of the aggressor instruction is often utilized by both the defense and the State. Though not at issue here, perhaps if the last sentence of WPIC 16.04 were changed or removed, it would allow the jury to receive a more comprehensive explanation of lawful use of force without raising concerns over the State's burden.

<sup>3</sup> Because there was sufficient evidence to support Cropper's conviction, the Court need not address his double jeopardy claim.

<sup>4</sup> Cropper's statement of additional grounds was filed December 4, 2019. Because the clerk filed notice on October 31, 2019, this exceeded the time for filing under RAP 10.10(d). Further, his factual assertions neither impact the sufficiency analysis nor raise any other legal issue.

**CERTIFICATE OF SERVICE**

I, Julie Dalton, do hereby certify that opposing counsel listed below was served RESPONDENT'S BRIEF electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on December 12, 2019.

  
\_\_\_\_\_  
Julie Dalton

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

**December 12, 2019 - 10:24 AM**

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