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NO. 63492-5-1

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

REC'D
MAY 03 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,
Respondent,
v.
ALEXANDRE MONTEIRO,
Appellant.

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

The Honorable Mary Yu, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. MONTEIRO DID NOT WAIVE HIS CHALLENGE TO THE AGGRESSOR INSTRUCTION.

The State contends that Monteiro's objection to the aggressor instruction in its entirety is insufficient to preserve this challenge because he "did not object to the wording of the instruction as given, nor did he propose an alternative first aggressor instruction that somehow limited it to a specific charge." Br. of Resp't at 22. The State acknowledges that Monteiro objected below on the basis that there was insufficient evidence to support giving the instruction. Br. of Resp't at 22.

A party who objects on one ground at trial generally may not raise a different ground on appeal. State v. Mak, 105 Wn.2d 692, 719, 718 P.2d 407 (1986). The issue raised on appeal is exactly the same as the issue raised below: the trial court erred by issuing an aggressor instruction where there was insufficient evidence for the jury to find that Monteiro was the aggressor in the first assault.

The State contends, without citation to authority, that Monteiro had a duty to propose an alternative first aggressor instruction. Br. of Resp't at 22. But the burden is on the proponent of the instruction to set forth an accurate statement of the law.

Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). Defense counsel's objection to the giving of *any* aggressor instruction for lack of supporting evidence preserved Monteiro's challenge on appeal.

2. THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT DID NOT FIX THE ERROR CONCERNING THE AGGRESSOR INSTRUCTION.

The State points out that the prosecutor "confined his remarks regarding the aggressor instruction to the second assault" and "did not argue that Monteiro provoked [the first] assault." Br. of Resp't at 26-27. But the prosecutor's remarks in closing argument cannot cure ambiguous jury instructions. State v. Kier, 164 Wn.2d 798, 813-14, 194 P.3d 212 (2008).

While the prosecutor at the close of the trial attempted to steer the jury in the right direction by applying the aggressor instruction only to the second assault, the jury was instructed to base its verdict on the evidence and the instructions and not on the arguments of counsel. CP 90-91. Accordingly, the prosecutor's argument did not trump the jury instructions, which did not distinguish between the assaults for purposes of the aggressor instruction.

The State also contends that “the evidence did not show that Monteiro acted as the first aggressor in the first assault; therefore, the aggressor instruction, by its plain language did not apply to the first assault.” Br. of Resp’t at 27. This argument is always true when an aggressor instruction is erroneously given. However, “it is error to give such an instruction when it is not supported by the evidence.” State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989). In Wasson, there was no evidence that the defendant acted intentionally to provoke an assault from the victim, yet an aggressor instruction was given to the jury. Wasson, 54 Wn. App. at 159. This Court concluded that erroneously issuing an aggressor instruction “effectively deprived” the defendant of his ability to claim self-defense. Wasson, 54 Wn. App. at 160. The proper remedy was reversal and remand for a new trial. Wasson, 54 Wn. App. at 161.

Here, the State concedes that there was not evidence to support giving the aggressor instruction for the first assault. Br. of Resp’t at 27. Because of the high likelihood that the erroneous instruction negatively impacted Monteiro’s ability to claim self-defense, an appellate court does not simply presume that the jury

knew the instruction did not apply to the first assault. Reversal and remand are necessary.

B. CONCLUSION

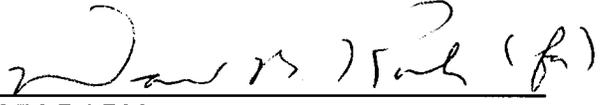
For the reasons discussed in the opening brief, this Court should reverse and dismiss Monteiro's burglary conviction because there is insufficient evidence to prove that he entered or remained in the house unlawfully.

Moreover, the aggressor instruction improperly eased the State's burden to disprove Monteiro's self-defense claim regarding the first assault. This Court should reverse his conviction for Assault in the Third Degree.

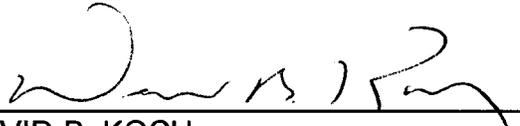
DATED this 3rd day of May 2010.

Respectfully submitted,

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Respondent,)	
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v.)	COA NO. 63492-5-1
)	
ALEXANDRE MONTEIRO,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALEXANDRE MONTEIRO
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SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF MAY, 2010.

x *Patrick Mayovsky*