

66920-6

66920-6

NO. 66920-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MIHAI MIHALCE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZÁLEZ

BRIEF OF RESPONDENT

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A. ISSUES

1. Where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, a first aggressor instruction is appropriate. The defendant burst into a hotel room, armed with a weapon, and accused the victim of sleeping with his girlfriend, then claimed he assaulted the victim in self-defense. Did the trial court properly give a first aggressor instruction?

2. Burglary in the first degree requires evidence that the defendant entered or remained unlawfully. The victim testified that Mihalce burst into the hotel room and began to assault him, and during the assault the occupants yelled at Mihalce to get out. Was the evidence sufficient to prove Mihalce entered and remained unlawfully for the charge of burglary in the first degree?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Mihai Mihalce, was initially charged with robbery in the first degree with a deadly weapon. CP 1-8. The charges were amended to burglary in the first degree and assault in the first degree with a deadly weapon. CP 22-23. Mihalce

proceeded to trial. After the State rested, Mihalce moved to dismiss for insufficient evidence that he committed burglary in the first degree. 6RP 75-77. The trial court denied the motion. 6RP 78. The trial court gave a "first aggressor" instruction over defense objection. 6RP 87; CP 110.

The jury found Mihalce guilty of burglary in the first degree. CP 91. The jury found Mihalce guilty of the lesser charge of assault in the second degree. CP 93-94. The jury answered yes to the special verdicts finding Mihalce was armed with a deadly weapon for both counts. CP 92, 95. The court imposed a standard range sentence. CP 149-57.

2. SUBSTANTIVE FACTS

On February 12, 2010, Mihalce and Troy Hardin burst into the hotel room of Tammy Keyser and accused the victim, Daniel Tomlinson, of sleeping with Mihalce's girlfriend. 4RP 110-11.¹ Mihalce immediately attacked Tomlinson, beating him with a rubber hose with brass fittings, and Hardin stabbing Tomlinson in the hip

¹ The verbatim report of proceedings consists of ten volumes, which will be referred to in this brief as follows: 1RP (2/9/11), 2RP (2/14/11), 3RP (2/15/11), 4RP (2/16/11), 5RP (2/17/11), 6RP (2/22/11), 7RP (2/23/11), 8RP (2/25/11), 9RP (3/25/11), and 10RP (4/1/11).

with a knife. 4RP 110-12, 117-18. Mihalce and Hardin were arrested as they tried to flee the hotel. 3RP 31, 40.

Tammy Keyser had a dating relationship with Mihalce. 5RP 51-52; 6RP 14. Her father was terminally ill and her friend Donald Long took her to Oregon to visit her father at the beginning of February. 5RP 52-55. They drove back to Bellevue and Long got Keyser a room at the Red Lion Motel because she wanted to be alone. 5RP 55-56. Keyser stayed in the room until February 12th. During her stay, friends would come to visit. According to Keyser, that included Mihalce. 5RP 57.

On February 12, 2012, a guest at the hotel called the front desk to report screaming and crashing sounds. 4RP 19. Long ran to the front desk and frantically told them to call 911. 4RP 20. Bellevue police responded and saw Long running in the parking lot with an axe handle. 3RP 19. He told police that a woman was being attacked. 3RP 9-10. Officers heard the sound of breaking glass on the second floor of the hotel and heard Keyser yelling for help. 3RP 25-29. Police went to the area and found Tomlinson bleeding and lying shirtless in broken glass. 3RP 18-19. Tomlinson had been stabbed. 4RP 28-29.

Officers saw Keyser and she told them "Mihai and some black guy" had attacked Tomlinson. 3RP 29. She pointed out the direction they had fled. Police found Mihalce and Hardin walking away and ordered them to stop. 3RP 31, 129-30. Hardin complied, but Mihalce briskly walked away. 3RP 129-30. Officers located him as he was trying to get into his car. 3RP 40-41. He was again told to put his hands up and he did not comply. 3RP 133. Mihalce did not follow the officer's commands until the officer drew his gun and held him at gunpoint. 3RP 133. Both Mihalce and Hardin were covered in Tomlinson's blood.

Officers noticed that Mihalce had a split lip but did not notice other injuries. 3RP 133. He was taken to the hospital, treated and released the same night. 3RP 67-68, 116-17. He claimed that he had been attacked and defended himself. 3RP 42.

Tomlinson was transported by paramedics to the hospital. He had a stab wound to his right hip, and lacerations on his face, head, neck, and arms.

Tomlinson testified that he and Keyser used drugs² in the morning and had a "romantic encounter." 4RP 100-02. That

² The parties stipulated that both Tomlinson and Mihalce had been using cocaine and alcohol on February 12th.

evening, Mihalce knocked on the door. 4RP 106. Keyser became frantic when she realized it was Mihalce. 4RP 109-10. Keyser opened the door and Mihalce and Hardin pushed their way in. 4RP 110-11. Mihalce was yelling "are you F'ing my girlfriend?" 4RP 110-11. Mihalce began to beat Tomlinson with a hose with brass fittings. 4RP 110-13. According to Tomlinson, Mihalce was yelling that he would "do seven years for this." 4RP 114, 141. Tomlinson was able to push Mihalce and Mihalce told Hardin "get him off me" and "kill that motherfucker." 4RP 114-16. Hardin then grabbed Tomlinson from behind and stabbed him. 4RP 116-18. Tomlinson stumbled outside into the hotel hallway. 4RP 121, 123. He saw Mihalce had Keyser pinned on the bed. 4RP 120-21. Tomlinson grabbed a picture from the wall and hit Mihalce with it. 4RP 122-24. He saw that police were arriving so he broke the hotel window to get their attention. 4RP 125.

Long testified that he was in the hotel room with Tomlinson and Keyser when Mihalce arrived. He heard a loud knock at the door and saw that it was Mihalce. 4RP 57-58. He informed Keyser, who opened the door. 4RP 58. He heard them talking, then heard the door open up with a "swoosh." 4RP 58. The conversation was not friendly. 4RP 67. Long heard them enter and

Keyser raised her voice. 4RP 58. The next thing he knew, there was a scuffle and a fight. 4RP 58-59. Long was around the corner from the door and did not see the initial stages of the fight. 4RP 59-60, 66. Long saw Mihalce beating Tomlinson with a hose. 4RP 59. He also saw Hardin standing back with a knife in his hand. 4RP 60. Tomlinson did not have a weapon. 4RP 66. The scuffle moved in and out of the hotel room. 4RP 61. Long also saw Mihalce scuffling with Keyser on the bed, and then he ran to the front desk to get help. 4RP 61-63.

Police searched the scene and found the broken handle of a knife in the hall where Tomlinson was found. 2RP 42. The blade of the knife was found hidden in a flowerbed nearby. 2RP 42; 3RP 54. The hose with brass fittings was found in the parking lot the following morning. 2RP 42; 3RP 54-57.

Keyser testified and denied that she had any romantic encounter with Tomlinson. 4RP 53. She acknowledged that she had a romantic relationship with Mihalce. 5RP 51-52. He had stayed at her hotel room for several nights. 5RP 57. On February 12th, she had an argument with Mihalce and told him and everyone else to leave. 5RP 74. However, she claimed that Mihalce had permission to enter the room later that same evening. 5RP 74-75.

According to Keyser, she let Mihalce into the room and Tomlinson immediately attacked him. 5RP 60-63. She claimed that she panicked and could not remember what happened after that. 5RP 60-63, 82.

Mihalce testified at the trial. He claimed that he had stayed at the hotel with Keyser for several days. 6RP 15. They had a disagreement on February 12th, and Mihalce acknowledged that he was asked to leave. 6RP 18. The State offered a recorded telephone call from the jail placed by Vernon Thompson to Mihalce, and Mihalce could be heard bitterly complaining that he had been asked to leave the room earlier in the day. 5RP 90-91. He returned with Hardin, but he denied that he knew Hardin had a knife. 6RP 20-24. Mihalce claimed that Keyser let him into the room and Tomlinson immediately attacked him. 6RP 24-25. He called out for Hardin's help, and Hardin pulled Tomlinson off of him. 6RP 26. Mihalce grabbed a refrigerator hose that he kept in the room and used it to defend himself from Tomlinson. 6RP 26-27.

Mihalce indicated that Diane Foust and Doug Vance arrived and broke up the fight. 6RP 29. Mihalce left the room but returned only to be attacked again by Tomlinson. 6RP 29. Mihalce said that Tomlinson broke a picture frame over his head. 6RP 29. Foust

testified that when she approached the room she could hear arguing and heard Keyser yelling for them to "stop it and get out." 5RP 99, 120.

The jury found Mihalce guilty of burglary in the first degree and assault in the second degree with deadly weapon enhancements. CP 91, 92, 94 and 95.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY GAVE THE WPIC 16.04 AGGRESSOR INSTRUCTION.

Mihalce asserts that the trial court erred by giving an "aggressor" instruction to the jury. WPIC 16.04. Mihalce is incorrect. Mihalce burst into the hotel room armed with a weapon and confronted Tomlinson about sleeping with his girlfriend, thus precipitating any claimed need to act in "self defense." The trial court properly instructed the jury.

a. The Trial Court Properly Instructed The Jury.

To raise self-defense before a jury, a defendant bears the initial burden of producing some evidence that he acted in

self-defense. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). A defendant must show a reasonable apprehension of great bodily harm and imminent danger. In order to establish self-defense, a finding of actual danger is not necessary. The jury must find only that the defendant reasonably believed that he or she was in danger of imminent harm. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). The evidence of self-defense must be assessed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees. Janes, 121 Wn.2d at 238.

However, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action. State v. Craig, 82 Wn.2d 777, 783, 514 P.2d 151 (1973); State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). "A court properly submits an aggressor instruction where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the

defendant's conduct provoked the fight; or (3) the evidence shows that the defendant made the first move by drawing a weapon.”

State v. Anderson, 144 Wn. App. 84, 89, 180 P.2d 885 (2008) (citing Riley, 137 Wn.2d at 909-10, 976 P.2d 624). Where 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. Hughes, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986); State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1991). If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction. State v. Thompson, 47 Wn. App. 1, 7, 733 P.2d 584 (1987). An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992). The State needs to produce some evidence showing a defendant was the aggressor to meet its burden of production. Riley, 137 Wn.2d at 909-10. This Court reviews de novo whether sufficient evidence justifies an aggressor instruction. Anderson, 144 Wn. App. at 89. It is not error to give this instruction when there was credible evidence from which the jury could reasonably have concluded that it was the defendant

who provoked the need to act in self-defense. Hughes, 106 Wn.2d at 192; State v. Heath, 35 Wn. App. 269, 271-72, 666 P.2d 922 (1983).

Ample evidence supported the instruction in this case. Mihalce pushed his way into Keyser's hotel room while armed with a weapon. 4RP 111. He immediately confronted Tomlinson yelling "are you F'ing my girlfriend." 4RP 111. At this point, Tomlinson would have been justified using force to defend himself and eject Mihalce from the room, and Mihalce cannot claim he was "defending himself." In this case, there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense and an aggressor instruction was appropriate. State v. Hughes, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986); State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1991).

Mihalce argues that the first aggressor instruction is not appropriate when the assault itself is the first aggressive act. Mihalce relies on State v. Brower, 43 Wn. App. 893, 721 P.2d 12 (1986), and State v. Wasson, 54 Wn. App. 156, 772 P.2d 1039 (1989). However, those cases are distinguishable because in both Brower and Wasson, the assault itself was the only provocation. In

the present case, Mihalce forcing his way into the room and confronting Tomlinson with a weapon was an aggressive act that was likely to provoke a reaction from those in the hotel room, and under these facts, the court properly gave the first aggressor instruction.

b. Any Error Was Harmless.

Any error in giving the WPIC 16.04 aggressor instruction was harmless. Erroneous use of the aggressor instruction is reviewed under the constitutional harmless error standard. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998); State v. Stark, 158 Wn. App. 952, 961, 244 P.3d 433, 437 (2010). The error cannot be deemed harmless unless it is harmless beyond a reasonable doubt. Id.

The Supreme Court's decision in State v. Kidd, 57 Wn. App. 95, 101, 786 P.2d 847, 851 (1990), demonstrates that an erroneous first aggressor instruction can be harmless error. The Supreme Court held:

The error was harmless, however, since we are persuaded beyond a reasonable doubt that no reasonable jury could have found that the bus shootings were acts of lawful self-defense. In such

circumstances, error related to self-defense instructions is harmless.

Id., 57 Wn.2d at 101.

Similar to Kidd, no reasonable jury could have found that Mihalce acted in self-defense. Furthermore, Mihalce's use of force was excessive. He and Hardin outnumbered Tomlinson. Tomlinson was unarmed. 4RP 66. Mihalce and Hardin both had weapons. 4RP 60, 111. They beat and stabbed an unarmed man that Mihalce accused of sleeping with his girlfriend. No jury would have found Mihalce was using lawful force. Under these circumstances, giving the jury the WPIC 16.04 instruction, even if improper, was harmless.

2. THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD CONCLUDE MIHALCE ENTERED AND REMAINED UNLAWFULLY IN THE HOTEL ROOM.

Mihalce contends that the evidence was not sufficient to find that he entered or remained unlawfully in the hotel room. He argues that he was allowed in the room by Keyser or alternatively that he was a lawful resident of the room. However, there was ample evidence that he forced his way into the room and was told to leave by Keyser.

The standard of review for determining the sufficiency of the evidence to sustain a criminal conviction is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 316-20, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1970)). In State v. Gerber, 28 Wn. App. 214, 622 P.2d 888 (1981), this court noted:

A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and all inferences that can reasonably be drawn therefrom. The evidence is interpreted most strongly against the defendant and in a light most favorable to the State...When there is substantial evidence, and when that evidence is conflicting or is of such a character that reasonable minds may differ, it is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact.

Gerber, 28 Wn. App. at 217 (citing State v. Theroff, 25 Wn. App. 592, 593, 608 P.2d 1254 (1980)).

It is not necessary that the reviewing court itself be convinced of the defendant’s guilt beyond a reasonable doubt. Gerber, 28 Wn. App. at 221. Appellate courts must continue to give deference to the trier of fact to resolve conflicts in testimony, weigh

evidence, and draw reasonable inferences therefrom. Jackson, 443 U.S. at 319; Gerber, 28 Wn. App. at 622.

When there is a factual dispute as a result of conflicting testimony or assessments of credibility, the Court must defer to the jury. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992)). The Court of Appeals does not substitute its judgment for that of the jury on factual issues. State v. Israel, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A person is guilty of burglary in the first degree if, 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 assaults any person. RCW 9A.52.020(1)(b). A person unlawfully enters a building when he is not then licensed, invited, or otherwise privileged to enter or remain. RCW 9A.52.010(5).

The evidence at trial was sufficient to prove Mihalce entered and remained unlawfully in Keyser's hotel room. Tomlinson also testified that while Keyser opened the door for Mihalce, she did not let him in. 4RP 110. Tomlinson clearly testified that Keyser was frantic when she realized that Mihalce was at the door and that Mihalce pushed his way into the room. 4RP 110-11. Tomlinson testified that Mihalce pushed his way into the room yelling "are you F'ing my girlfriend?" 4RP 110-11. Tomlinson's account was corroborated by Long. Long was around the corner in the room and did not see the beginning of the confrontation. He testified:

Not really sure what happened. I just heard this noise and conversing, whatever, and the door – I heard the door kind of open up, swoosh, and then once they came in , she was saying something a little louder. And this Dennis guy got up, went to the door and was -- I really couldn't see what was going on. The next thing I know, I was hearing like a scuffle.

3RP 58. Long went on to testify:

I don't know exactly if it came through the door, was let in, or what happened. All I -- when I came around the corner this guy Dennis and Mahai were fighting behind the door.

3RP 59. Long heard heated words, the swoosh of the door, and the fight was immediate. 4RP 58-59. The evidence was sufficient to show Mihalce unlawfully forced his way into the room. In

addition, the evidence was sufficient to show that Mihalce remained unlawfully. Even according to Keyser and Mihalce, he had been asked to leave the room earlier in the day. 5RP 74. Foust heard Keyser telling everyone to get out of the room. 5RP 99, 120.

Mihalce relies on the testimony of Keyser to argue that he did not enter or remain in the room unlawfully. Keyser testified that she allowed Mihalce into the room. 5RP 74-75. Ultimately, the jury had to evaluate the credibility of the witnesses to resolve the conflict between Keyser and Tomlinson's testimony. The conflicting testimony must be resolved in favor of the State. The jury was permitted to find Tomlinson's account, corroborated by the other evidence in the case, was more credible.

Finally, Mihalce claims that because he stayed in the room previously that he was legally entitled to be there and hence could enter or remain unlawfully. Mihalce cites State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007), to support his legal status. But the facts in Wilson are markedly different from those here. Wilson was a co-signer on the lease; the assault victim stated that Wilson lived there, and a prior no contact order did not prohibit Wilson's

presence at the residence. Id. at 612. Throughout its analysis, the court repeatedly noted that the no-contact order had not excluded Wilson from his girlfriend's residence, even though the order could have done so. Id. at 611.

Here, Keyser was renting a motel room from day to day. 4RP 18. She had several people come stay at her hotel room, including Mihalce and others. She had told everyone, including Mihalce, to leave the hotel earlier that day. 5RP 74. Mihalce complained bitterly that Keyser had excluded him. 5RP 90-91. The evidence at best showed that Mihalce was one of several guests that Keyser had allowed to stay in the room. This did not give him a legal right to burst into the room and beat Tomlinson.

The evidence at trial established that Mihalce forced his way into Keyser's hotel room and assaulted Tomlinson. He was not permitted in the room and remained despite being told to leave. The evidence was sufficient to convict him of burglary in the first degree.

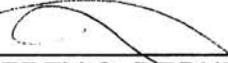
D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Mihalce's conviction for burglary in the first degree.

DATED this 16th day of April, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Respondent's Brief, in STATE V. MIHAI MIHALCE, Cause No. 66920-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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