

63492-5

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NO. 63492-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDRE MONTEIRO,

Appellant.

REC'D

DEC 29 2009

KING COUNTY SUPERIOR COURT
Appellate Division

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

The Honorable Mary Yu, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support Monteiro's burglary conviction.

2. The trial court erred by issuing a first aggressor instruction.

Issues Pertaining to Assignments of Error

1. Monteiro shared a house with his girlfriend, Raquel Santos, the alleged victim in this case. One evening, the couple got into a disagreement that turned into a physical altercation. The couple fought inside the home, went outside, and then Santos went back inside and locked the door. Monteiro broke into the house and their fight continued. Is there sufficient evidence to uphold the burglary conviction where the victim acknowledged that Monteiro was living with her at the time of the altercation and there is no evidence that she permanently revoked his privilege to stay?

2. Over the objection of defense counsel, the trial court issued a first aggressor instruction. The court stated Monteiro's act of breaking into the home and through the bedroom door constituted the factual predicate for the court including the instruction. But one of the assault charges (Assault in the Third Degree) occurred before Monteiro broke the door to get inside the

house. Did the court err by issuing the instruction where it precluded the jury from considering Monteiro's claim of self-defense for the first assault?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecuting Attorney charged Alexandre Monteiro with one count of Assault in the Second Degree, one count of Assault in the Third Degree, one count of Burglary in the First Degree, and one count of Malicious Mischief. CP 19-20. The information alleged that all of the charges involved domestic violence. CP 19-20.

The case proceeded to a jury trial in King County Superior Court before Judge Mary Yu in April 2009. The jury returned guilty verdicts on all counts. CP 125-28. The trial court sentenced Monteiro to 36 months of confinement and prohibited any future contact with Santos. CP 153. Monteiro filed a timely Notice of Appeal. CP 134.

2. Trial Testimony

a. The Alleged Crimes

Monteiro began a dating relationship with Santos in September 2007. 5RP¹ 21. Both Monteiro and Santos grew up in Brazil. 5RP 17, 8RP 57. The couple became acquainted through mutual Brazilian friends. 5RP 21. At the time they met, Monteiro lived in Tacoma with his mother while Santos lived in the basement portion of a house in Kirkland. 5RP 21. Monteiro worked at Costco in Tacoma while pursuing a college degree at Pierce County College in Lakewood. 5RP 22, 8RP 57. After work, Monteiro sometimes drove to Kirkland to spend the night with Santos. 5RP 22. As the relationship became more serious, Monteiro got a job in Kirkland so that he could be closer to Santos. 5RP 27. Monteiro began staying more regularly with Santos. 5RP 27. In June 2008, Monteiro and Santos agreed that Monteiro should move into the Kirkland home. 5RP 36-37.

On the evening of July 12, 2008, Monteiro and Santos attended a birthday celebration for a mutual Brazilian friend. 5RP

¹ 1RP is March 30, 2009; 2RP is March 31, 2009; 3RP is April 6, 2009; 4RP is April 7, 2009; 5RP is April 8, 2009; 6RP is April 9, 2009; 7RP is April 13, 2009; 8RP is April 14, 2009; 9RP is April 15, 2009; 10RP is April 16, 2009; 11RP is April 20, 2009; 12RP is April 21, 2009; 13RP is May 8, 2009.

38. Both Monteiro and Santos consumed alcohol at the party. 5RP 39-40, 6RP 16. They left the party together to return to the Kirkland home. 5RP 41. The couple began arguing during the drive. 5RP 42-43. Once home, Santos told Monteiro not to leave because he was drunk and she took his keys. 6RP 25, 7RP 79. At one point during the argument, Santos pointed her finger in Monteiro's face and told him to stop. 5RP 45. Santos claimed that Monteiro responded by hitting and kicking her. 5RP 46. Santos remembers pushing Monteiro during the argument. 5RP 49.

Santos testified that she ran outside and Monteiro pursued her. 5RP 50. The couple continued to argue in the yard. 5RP 53-54. Santos testified that she told Monteiro to leave, went back inside the house, and locked the door. 5RP 54-55. She went into her bedroom, locked the door, and went to bed. 5RP 57. Santos testified that Monteiro broke some glass on the front door, came into the house, and began banging on her bedroom door. 5RP 57.

According to Santos, Monteiro broke into her bedroom and strangled her on the bed. 5RP 59. Santos bit Monteiro on his back and on his stomach during the struggle. 6RP 5. The bites broke Monteiro's skin. 6RP 8. Santos acknowledged that she fought with Monteiro during the argument. 6RP 10.

Monteiro left in his car. 5RP 67. He parked at a gas station and then fell asleep. 6RP 91. Police contacted Monteiro in response to a request for a welfare check. 6RP 91. They found that blood was coming from his hand and arm, and there was some swelling and blood coming from one of his eyes. 6RP 91. Monteiro told police that he and Santos had ended their relationship. 6RP 94. Monteiro told police where Santos lived. 6RP 96-97. Based on information provided by Monteiro, police went to check on Santos. 6RP 97. The police noted that Santos had physical signs of having recently engaged in a struggle. 6RP 101. After speaking with Santos, police arrested Monteiro at his grandmother's house later that morning. 6RP 83.

b. The Defense Strategy

The defense theory of the case was that Monteiro acted in self-defense during the fight with Santos. 11RP 88-89. Monteiro also challenged the validity of the burglary charge by demonstrating that he lived with Santos at the time of their fight. 11RP 102.

Santos testified that she gave Monteiro a key to the home. 5RP 27. Monteiro moved in a dresser that both he and Santos used to store clothes. 5RP 107-08. He also moved a speaker into the living room. 5RP 28. Monteiro received some mail at the

Kirkland address. 5RP 37. Santos acknowledged Monteiro had authority to invite his friends over to spend the night whenever he wished. 5RP 37-38.

At the close of the State's case, defense counsel moved to dismiss the burglary charge for failure to prove that Monteiro lacked the lawful authority to enter or remain in the house: "[A] victim who jointly possesses a residence with an alleged perpetrator cannot revoke their consent or license of privilege to the perpetrator to remain in a residence jointly held." 8RP 39. The court denied the motion. 8RP 50.

Monteiro renewed the motion at the close of evidence: "So, we have plenty of evidence under State v. Wilson that he was living with her, that this was his residence. He was no longer residing with his grandmother, and, because of that, I think the only proper thing to do is to dismiss Count One and have a directed verdict." 11RP 14. Again, the court denied the motion. 11RP 15. During closing argument, defense counsel argued that Monteiro's forced entry into the Kirkland home did not amount to burglary because he lived there and Santos had not revoked that privilege. 11RP 102.

After the jury returned its verdict, Monteiro moved to arrest judgment based on insufficient evidence to support the burglary conviction. CP 144-45. This motion was also denied. 13RP 12.

C. ARGUMENT

1. THIS COURT MUST REVERSE MONTEIRO'S BURGLARY CONVICTION DUE TO INSUFFICIENT EVIDENCE.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Under Washington law:

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 . . . assaults any person.

RCW 9A.52.020(1).

“A person ‘enters or remains unlawfully’ in or upon the premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010(3). The test is not who holds legal title to the premises. Rather, the test is one of occupancy, possession, or habitation. State v. Wilson, 136 Wn. App. 596, 606, 150 P.3d 144 (2007); State v. Schneider, 36 Wn. App. 237, 241, 673 P.2d 200 (1983) (citing State v. Klein, 195 Wash. 338, 342, 80 P.2d 825 (1938)).

In State v. Wilson, the defendant broke into a home that he shared with his girlfriend, Sanders, and assaulted her in violation of a no-contact order. Wilson, 136 Wn. App. at 601. At the time of the incident, Wilson had keys to the residence, his clothing and his car were at the residence, there was no evidence he had a separate primary residence, and the victim had referred to the residence as “our house.” Wilson, 136 Wn. App. at 600, 607. During the fight, Sanders called 911 and asked for police to come to the house because Wilson was assaulting and threatening her. Wilson, 136 Wn. App. at 602.

The State argued that breaking the kitchen door to enter the home amounted to burglary. Wilson, 136 Wn. App. at 601-02. The jury convicted Wilson of burglary, but the trial court dismissed the conviction in response to a post-verdict motion. Wilson, 136 Wn. App. at 602. The State appealed and Division Two concluded that even though Wilson entered with the express purpose of harming Sanders, “his acts of entering and remaining inside were not themselves unlawful because the no-contact order did not exclude him from the residence he shared with Sanders.” Wilson, 136 Wn. App. at 604, 606.

Further, the call Sanders placed to 911 did not amount to revocation of consent for Wilson to be at the house. Wilson, 136 Wn. App. at 612. “Wilson could not have burglarized the 1123 East Park residence by entering and remaining unlawfully because it was his residence and neither a court order nor Sanders had lawfully excluded him from it.” Wilson, 136 Wn. App. 612.

As in Wilson, Monteiro established that he lived with Santos at the time the fight occurred. Santos testified that they decided Monteiro should move in and she gave him a key. 5RP 27, 36-37. Monteiro moved in clothing, shoes, furniture, and speakers. 5RP 28, 107-08. Monteiro stopped working in Tacoma and found a new

job in Kirkland. 5RP 27. He received mail at the Kirkland house. 5RP 37. And he could invite friends to spend the night whenever he wished. 5RP 37-38. These facts establish that Monteiro had permission to be in the residence.

Santos testified that after arguing with Monteiro outside, she told him to leave and locked the door. 5RP 54-55. These acts are insufficient to revoke Monteiro's privilege to live at the house. Santos did not demand that Monteiro return his key, remove any of his possessions from the house, or explicitly state that he no longer had permission to be in the house at any time. Santos's statement that Monteiro should leave during the couple's fight cannot be construed – even in the light most favorable to the State – as permanently revoking his privilege to enter the house.

Because Santos did not unequivocally revoke Monteiro's privilege to enter the house, there is insufficient evidence to support an element of the burglary charge: that Monteiro unlawfully entered or remained in the Kirkland home. CP 105. Monteiro's burglary conviction should be dismissed and his case remanded for resentencing. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice where there is insufficient evidence of an element for which the State has the burden of proof).

2. THE FIRST AGGRESSOR INSTRUCTION PRECLUDED THE JURY FROM CONSIDERING MONTEIRO'S CLAIM THAT HE ACTED IN SELF-DEFENSE DURING THE FIRST ASSAULT.

The State proposed that the court issue an aggressor instruction, WPIC 16.04, to the jury. 10RP 211-12. Defense counsel objected to this instruction. 10RP 212. The State responded that the instruction was appropriate "because all the evidence points to the defendant breaking the glass door, breaking Ms. Santos' bedroom door and entering her bedroom By any explanation that could be considered a belligerent response creating a necessity for acting in self-defense." 10RP 212.

The trial court decided to give the aggressor instruction: "And it's the breaking of the two doors that is the factual predicate for the Court including this instruction. I think the evidence supports it and that's why we have included 16.04. Again, the exception is noted." 10RP 212. The court issued the aggressor instruction that reads:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon 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 is not available as a defense.

CP 115.

“Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction.” State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985). “While an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant’s claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction.” State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999).

In terms of the first assault (Assault in the Third Degree), Monteiro’s only aggressive act toward Santos was the assault itself and that sole aggressive act could not support an aggressor instruction. See State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989) (aggressive act cannot be the assault itself). The “belligerent response” identified by both the State and the trial court occurred after this initial assault. Yet, the instruction did not expressly limit its application to the second assault (Assault in the

Second Degree – Strangulation). Based on a plain reading of the instruction, the jury would have concluded that if Monteiro was the aggressor at any point in time during the altercation, he could not claim self-defense. By issuing an aggressor instruction that applied to the initial alleged assault, the trial court eased the State's burden of proving that Monteiro did not act in self-defense.

The trial court committed reversible error when it gave the aggressor instruction because there was no evidence that Monteiro's conduct precipitated the need to use self-defense in the first assault. The proper remedy is reversal and remand for a new trial. Wasson, 54 Wn. App. at 158-59.

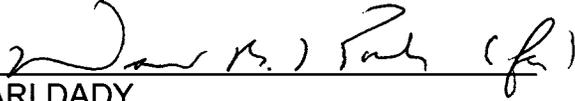
D. CONCLUSION

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. The aggressor instruction issued to the jury improperly eased the State's burden to disprove Monteiro's self-defense claim on Assault in the Third Degree. This Court should reverse his conviction for that crime.

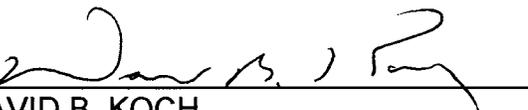
DATED this 29th day of December 2009.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 63492-5-I
)	
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 29TH DAY OF DECEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING 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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AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF DECEMBER 2009.

x *Patrick Mayovsky*