

63492-5

63492-5

NO. 63492-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDRE MONTEIRO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY YU

BRIEF OF RESPONDENT

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A. ISSUES

1. Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. A person commits first degree burglary when, with the intent to commit a crime against a person therein, he enters or remains unlawfully in a building, and assaults another person while inside. Here, Monteiro had a key to the house and slept there often, but he was not a party to the rental agreement, did not pay rent, and kept only some clothes and shoes at Santos's house. After Santos told Monteiro to leave and locked him out of her house, Monteiro broke two of Santos's doors to enter her bedroom and strangle her. Is there substantial evidence in the record to support Monteiro's first degree burglary conviction?

2. Jury instructions are sufficient if they allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law.

a. Objections to jury instructions must be specific and made at the time the instruction is given. A party may only argue on appeal the specific grounds for the objection made at trial unless the alleged error is a manifest one affecting a constitutional

right. The giving of a first aggressor instruction is not an error of constitutional magnitude. Monteiro objected to the court's submission of the first aggressor instruction based on insufficient evidence but did not object to the specific wording of the instruction. Has Monteiro waived any claim of error based on the wording of the instruction?

b. Each side is entitled to have the court instruct the jury on its theory of the case if there is evidence in the record to support the theory. A court may give an aggressor instruction if there is credible evidence from which a jury could reasonably determine that the defendant provoked the need to act in self-defense. Monteiro committed two separate assaults against Santos; Santos bit Monteiro once during each assault to get him to stop. The trial court instructed the jury on Monteiro's theory of self-defense, and the State's theory that Monteiro was the first aggressor of the second assault. Did the court properly instruct the jury?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State charged Alexandre Monteiro by Second Amended Information with four domestic violence offenses: Assault in the Second Degree (strangulation), Burglary in the First Degree, Assault in the Third Degree, and Malicious Mischief in the Second Degree. CP 15-17. Monteiro's girlfriend, Raquel Santos, was the victim of all four crimes. CP 15-17. A jury convicted Monteiro as charged. CP 125-28; 12RP 33-34.¹

The court denied Monteiro's request for an exceptional sentence downward and imposed a standard range sentence on each count: 36 months of confinement for the Burglary in the First Degree, 20 months of confinement for the Assault in the Second Degree, 12 months of confinement for the Assault in the Third Degree, and three months of confinement for the Malicious Mischief in the Second Degree.² CP 153. All counts were to be served concurrently. CP 153.

¹ The Verbatim Report of Proceedings consists of 13 volumes. The State has adopted the following reference system: 1RP (03/30/09), 2RP (03/31/09), 3RP (04/06/09), 4RP (04/07/09), 5RP (04/08/09), 6RP (04/09/09), 7RP (04/13/09), 8RP (04/14/09), 9RP (04/15/09), 10RP (04/16/09), 11RP (04/20/09), 12RP (04/21/09), and 13RP (05/08/09).

² Monteiro has not assigned error to the court's refusal to grant an exceptional sentence.

2. SUBSTANTIVE FACTS

Raquel Santos and Alexandre Monteiro, both of whom had recently moved to the United States from Brazil, began dating in September 2007. 5RP 17, 21; 8RP 56. In early 2008, Santos moved into a duplex in Kirkland. 5RP 21, 23, 26; Ex. 1. A few months later, Santos's sister, Elena, also moved into the house. 5RP 25-26; 6RP 59. Santos and her sister had an oral agreement with their landlord, Adensio Coimbra, who lived in the upstairs portion of the house, that they were the only two people living in the lower part of the house. 5RP 25, 37; 6RP 58-59. There was no written rental agreement. 6RP 60, 65.

In June, Monteiro was still living in Tacoma, but he got a job in Kirkland so that he could spend more time with Santos at her house. 5RP 21, 27. Santos gave Monteiro a key to her house so that he could let himself in when he worked late. 5RP 27. Monteiro also kept some clothes and shoes at Santos's house but did not live there. 5RP 108; Ex. 138. Monteiro did not pay any rent and the only mail in his name sent to Santos's address was for a cell phone that Monteiro purchased for her. 5RP 37, 110. Santos reimbursed Monteiro in cash for each phone bill. 5RP 110.

At trial, Santos testified that late in the afternoon on July 12th she was preparing food at her house to take to a surprise birthday party for her friend Marconi Demoraes. 5RP 31-32. While she was cooking, Monteiro argued with Santos about her involvement in planning the party and called her names. 5RP 32-33, 115. Santos's other sister, Reslena, picked her up at the house and drove her to Demoraes's home, arriving about 7:00 p.m. 5RP 34. Santos had two Piña Coladas with Malibu rum and a shot of tequila before Monteiro arrived at the party about 11:00 p.m. 5RP 40, 113; 6RP 16, 28-30. Monteiro was still angry about their earlier argument. 5RP 39. Once Santos saw that Monteiro was drinking lots of beer and shots of alcohol, she stopped drinking. 5RP 40, 113.

Monteiro and Santos left the party together about 3:00 a.m. 5RP 41, 113. Although Monteiro was very intoxicated, he would not allow Santos to drive his car back to her house. 5RP 41. During the short drive, Monteiro cursed at Santos and told her that nobody liked her. 5RP 42. Santos asked Monteiro to stop, but he continued to belittle her as they entered the house and walked into the living room. 5RP 43-44. Monteiro then told Santos that she

abandoned her son in Brazil.³ 5RP 44-45. Santos put her finger in Monteiro's face and told him that what he said was not true. 5RP 45. Monteiro hit Santos's hand and slapped her across the face. 5RP 46, 117-18; Ex. 113. Monteiro threw Santos over the sofa in the living room, causing her to hit her head against the wall. 6RP 33; Ex. 15, 121. Monteiro shoved Santos against the wall, and then pushed her, causing Santos to fall onto the floor. 5RP 46-47, 118. Monteiro then kicked or stepped on her back several times while she was on the floor with such force that the imprint of the sole of his shoe was visible. 5RP 46-47, 118; 6RP 9; 10RP 69-70, 75; Ex. 10, 121, 123. When Monteiro turned away, Santos bit him in the back, but he did not stop beating her until Santos ran out of the house into the front yard. 5RP 50, 118; 6RP 33; Ex. 54, 143.

Monteiro chased after Santos with a car stereo speaker and a screwdriver while yelling at her and calling her names. 5RP 50-51, 54, 119. Santos ran back to the entrance of her house, told Monteiro to leave, and locked the glass French doors behind her. 5RP 55; 6RP 63. Terrified, Santos ran into her bedroom and locked the door. 5RP 57, 61, 120; Ex. 7. As she called Demoraes to ask for help, Santos heard Monteiro break the glass doors and

³ Santos had a six-year-old son who remained in Brazil with her family. 5RP 19.

enter her home. 5RP 52-58; Ex. 5, 81, 142. Monteiro then banged on her bedroom door and told her that she had until he counted to three to open the door. 5RP 59, 122. When Santos did not comply, Monteiro broke it down, went over to the bed where Santos was sitting, climbed on top of her and started squeezing her neck with both hands. 5RP 59, 61, 122; Ex. 7, 8, 142. Santos pushed him away and tried to stand up, but Monteiro spread Santos's legs apart to gain leverage and strangled her again until she was unable to breathe. 5RP 62, 64, 73; 6RP 10-11. Monteiro called Santos a prostitute and said that he did not care if she died. 5RP 61-62.

Before she passed out, Santos managed to bite Monteiro in his stomach. 5RP 62, 64; 6RP 11, 34; Ex. 54, 143. Monteiro left the bedroom and went to his car to retrieve some one-dollar bills. 5RP 64. Monteiro threw the bills on Santos as she lay on her bed, calling her a prostitute and telling her that the money was her pay. 5RP 64-65. Monteiro then left Santos's house, drove to a nearby gas station, parked his car and fell asleep. 6RP 85, 90-91.

Kirkland Police Officer Brian Farman was dispatched shortly after 6:00 a.m. to a Shell gas station to conduct a welfare check on a man in a black Toyota. 6RP 90. Farman testified that when he pulled up, he saw that Monteiro was asleep in the driver's seat with

the door open and vomit on the ground. 6RP 91-92. Farman also noticed that Monteiro had alcohol on his breath and that his hand, arm, and eye appeared to be bleeding. 6RP 91.

After a few attempts, Farman was able to wake Monteiro and ask him what happened. 6RP 92. Monteiro told Farman that he and his girlfriend had broken up and that he lived at the Tacoma address listed on his driver's license. 6RP 92-94; Ex. 138. Monteiro eventually provided Farman with Santos's address. 6RP 94. Once the paramedics arrived, Farman drove to Santos's house to check on her. 6RP 97-98.

Farman went through the back gate and saw the shattered glass door. 6RP 100. Farman yelled through the open doorway several times before Santos emerged from the house to talk to him. 6RP 100-01. Farman immediately noticed that Santos had significant bruises on her arms, neck and face, as well as blood on her clothes. 6RP 101. Farman asked Santos what happened, but obtained only limited information due to Santos's reluctance to cooperate and the language barrier.⁴ 6RP 101, 114. Once other officers showed up, Farman photographed the scene, which had

⁴ Although Santos spoke some conversational English, her primary language was Portuguese. 5RP 19. Santos was scared to speak with the officers because she was in the United States illegally. 5RP 68, 104.

been partially cleaned up by Demoraes before Farman arrived. 6RP 42, 44-45, 48, 63-64, 103. Farman also photographed Santos's numerous injuries: a swollen left eye, visible fingerprint marks on her left arm, a cut and swollen lip, bruising on the left side of her neck, bruising to both arms, and the visible shoe tread on the back of Santos's upper left shoulder. 6RP 117-25; Ex.10, 15, 16, 22, 88, 106, 113, 121, 123.

Officer Julie Valencia testified that she arrived at Santos's house not long after Farman and spoke with Santos, who told Valencia that her boyfriend hit, kicked, strangled and knocked her around the house. 6RP 145. Valencia also saw the distinctive pattern of the bruise on Santos's left shoulder. 6RP 143-44; Ex. 10, 123, 146. Based on what Santos told Farman and Valencia, and the physical injuries they observed, Farman provided the dispatcher with Monteiro's address and asked that an officer from that jurisdiction be sent to arrest him. 6RP 115.

About 8:30 a.m., Fircrest Police Detective Robert Deal drove to Monteiro's apartment in Tacoma. 6RP 87. Deal testified that he arrested Monteiro at the apartment and later drove him to a park and ride in Federal Way where an officer from the Kirkland Police Department met them and took custody of Monteiro. 6RP 82, 85.

During the drive to Federal Way, Monteiro told Deal that he and his girlfriend had attended a party the night before where he consumed between 10 and 15 beers, and that his elbow and wrist were bandaged because he put his fist through the front door or window of his girlfriend's Kirkland apartment when she locked him out after returning from the party. 6RP 85. Monteiro further stated that after he broke the window, he retrieved his car keys and drove to a gas station where he parked his car and fell asleep. 6RP 85. After Monteiro arrived at the Kirkland Police Department, Officer Valencia took photos of Monteiro's injuries and his shoes, because it appeared to her that the tread pattern on his shoes matched the tread pattern visible on Santos's back. 6RP 147-48, 154; Ex. 10, 123, 146.

Monteiro called two witnesses to testify at trial on his behalf: his mother, Betania Andrade-Spate, and Dr. Clifford Nelson, a forensic pathologist and medical examiner. Andrade-Spate testified that Monteiro began living with Santos the previous June and that a few days before this incident, he had purchased and moved a dresser into Santos's house to store his clothes. 8RP 64-66.

Dr. Nelson testified that Santos's neck injuries, as depicted in the photographs and described in the medical records, were not

consistent with manual strangulation because she had no petechial hemorrhaging, and a vertical bruise rather than a horizontal one on her neck. 10RP 12, 33-34, 42. Dr. Nelson further testified that the bruise was consistent with blunt force trauma inflicted by Monteiro to get Santos to release her bite. 10RP 12, 33-34, 42. Dr. Nelson also told the jury that he could not determine if the tread pattern on Monteiro's shoes matched the pattern on Santos's back, but that the pattern was more consistent with a hiking shoe than an athletic shoe. 10RP 27, 67. On cross examination, Dr. Nelson admitted that, contrary to his direct testimony, he had stated in his initial report that it was his opinion that the tread on Santos's back appeared to be from an athletic shoe. 10RP 67, 99. Dr. Nelson stated that his opinion changed after viewing the photos of Monteiro's shoes and Santos's back at a higher resolution on a larger monitor the night before. 10RP 67, 99, 106-12; Ex. 123.

In rebuttal, King County Chief Medical Examiner Dr. Richard Harruff testified that, based on his review of the photos taken of Santos and Monteiro, the medical records, and police reports, along with his interview of Santos, it was his opinion that her injuries and symptoms were consistent with manual strangulation. 10RP 174-77.

C. ARGUMENT

1. MONTEIRO'S BURGLARY CONVICTION IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Monteiro argues that there is not sufficient evidence in the record to sustain his first degree burglary conviction because the State did not prove beyond a reasonable doubt that he entered and remained unlawfully in Santos's house. In particular, Monteiro contends that because the evidence showed that he lived with Santos at the time and that she did not unequivocally revoke his privilege to be in her house during their argument, his presence was lawful. This argument should be rejected because Monteiro was not living at the house with Santos and her sister, he was told to leave and was locked out of the house after he assaulted Santos the first time, and he broke into the house in order to commit a second assault against Santos.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime

beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences that reasonably can be drawn therefrom.” Id. at 201. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

A person is guilty of Burglary in the First Degree if, with the intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building, and while in the building, he assaults any person. RCW 9A.52.020; WPIC 60.02. A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain. RCW 9A.52.010(3); WPIC 65.02.

Monteiro relies on State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007), to support his argument that there is

insufficient evidence to conclude that he unlawfully entered or remained in Santos's house; however, Wilson is distinguishable. In Wilson, a trial court issued a no-contact order between Wilson and his girlfriend that prohibited contact in person, by telephone, or through a third party. 136 Wn. App. at 600. The no-contact order listed the girlfriend's address, where she and Wilson had been living, but did not specifically prohibit Wilson's presence at that address. Id.

The evidence at trial established that, shortly after the order was entered, Wilson and his girlfriend co-signed a lease for the house. Id. Wilson's clothing and car were kept at the house, and he had his own key. Id. Four months later, Wilson and his girlfriend got into an argument, and Wilson left the house without his key. Id. at 601. At 2:30 a.m., Wilson returned and forced open the kitchen door. Id. Wilson then went into the bedroom, grabbed his girlfriend by her hair, and pulled her out of bed. Id. Later, Wilson left momentarily, but returned, picked up a piece of splintered wood from the broken kitchen door, and threatened to kill his girlfriend with it. Id. Wilson did not present any evidence at trial. Id. at 602.

After the jury convicted him, Wilson moved to dismiss the burglary conviction on the basis that he could not have unlawfully entered a home that he shared with his girlfriend. Id. The trial court agreed because the no-contact order did not prohibit Wilson's presence at the house, the girlfriend authorized him to be there and gave him a key, Wilson had been residing there for several months, the girlfriend never revoked his right to be at the house, and she told the 911 dispatcher that Wilson lived there. Id. The Court of Appeals affirmed the trial court, concluding that while Wilson's acts committed inside the house were unlawful, his acts of entering and remaining in the home were not themselves unlawful because the no-contact order did not exclude Wilson from the house that he shared with his girlfriend. Id. at 604.

Here, in contrast to Wilson, Santos testified that Monteiro did not reside at her house, was not a party to the oral rental agreement between Santos and her landlord, and did not pay rent. 5RP 25, 37, 108; 6RP 58-59, 65. Monteiro also did not keep his personal belongings or even the majority of his clothing at Santos's house, despite having his own key. 5RP 28, 44, 108-10. Additionally, the only mail that came to Santos's house in Monteiro's name was a cell phone bill that Santos paid. 5RP 37,

110. When Santos told Monteiro to leave and locked the doors to her house, any privilege or license Monteiro may have had was revoked. Moreover, Monteiro told Officer Farman that he lived at the Tacoma address listed on his driver's license, not at Santos's address. 6RP 93-94. Monteiro told Detective Deal that he injured his hand when he put his fist through the front door or window of his girlfriend's apartment in Kirkland after she locked him out. 6RP 85. At no time during his interaction with the officers did Monteiro state that he lived with Santos at her Kirkland home.

Because a rational trier of fact, viewing the evidence and all reasonable inferences therefrom in a light most favorable to the State could, and did, find that the State proved every element of first degree burglary beyond a reasonable doubt, Monteiro's burglary conviction should be affirmed.

**2. THE TRIAL COURT PROPERLY SUBMITTED
SELF-DEFENSE AND FIRST AGGRESSOR
INSTRUCTIONS TO THE JURY.**

Monteiro argues that the trial court erred when it gave the first aggressor instruction as written because it precluded the jury from considering Monteiro's self-defense claim as to the third degree assault charge and lessened the State's burden of proof on

that charge. Specifically, Monteiro asserts that because the first aggressor instruction did not contain language limiting its application to only the second degree assault charge, the jury could have improperly concluded that, had Monteiro been the initial aggressor at any point during the entire incident, he could not assert self-defense.

This argument should be rejected for two reasons. First, because the sole basis of Monteiro's objection to the court giving the first aggressor instruction was insufficiency of the evidence, he has waived any claim of error by his failure to make a specific objection to the wording of the instruction. Second, the court's instructions were proper because, when taken as a whole, they were a correct statement of the law, permitted each party to argue its theory of the case, and did not prevent the jury from considering Monteiro's self-defense claim to both assault charges.

a. Relevant Facts

Monteiro asserted a claim of self-defense to the assault charges and proposed the standard, pattern self-defense

instructions. CP 55; 10RP 3-42, 210-11; WPIC 17.02, 17.04.⁵ The State objected to the proposed instructions, arguing that insufficient evidence of self-defense had been presented. 10RP 210-11. The court concluded that there was sufficient evidence to support instructing the jury as to self-defense because there were factual questions about whether Santos had touched Monteiro with her finger at the beginning of the argument, and whether Santos's biting of Monteiro initiated his assaultive acts toward her. 6RP 5-12, 33-34; 10RP 211.

The State then requested a first aggressor instruction, arguing that Monteiro committed an intentional act that was reasonably likely to provoke a belligerent response, and thereby created the necessity for Monteiro to defend himself from Santos's bite, when he broke Santos's front glass doors and her bedroom door to force entry and assault her. CP 159-97; 10RP 210-12. Monteiro objected, arguing that there was no evidence to support the theory that he had been the first aggressor. 10RP 211. The court agreed with the State, concluding that Monteiro's breaking of the glass doors to gain entry to Santos's house provided a factual basis for giving the first aggressor instruction. 10RP 211.

⁵ Washington Pattern Jury Instruction—Criminal.

The court instructed the jury on self-defense:

It is a defense to a charge of assault in the second degree and assault in the third degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the use of force was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to the charges.

CP 113; WPIC 17.02.

The court also instructed the jury as to the first aggressor:

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; WPIC 16.04.

In closing argument, the prosecutor paraphrased the self-defense instruction to the jury and argued that there was no evidence justifying Monteiro's claim of self-defense for either assault charge because by the time Santos bit him, he had already beaten Santos significantly and knew that she was not a threat to him. 11RP 65-66. The prosecutor further asserted that even if the jurors believed that Santos attacked Monteiro by biting him and that he then grabbed her neck, which caused the injury, Monteiro could not claim self-defense because he created the reaction against which he believed it necessary to defend himself when he broke the glass doors and Santos's bedroom door to gain entry to her home and strangle her. 11RP 66-68.

Monteiro's counsel argued that the evidence supported the conclusion that this was a mutual combat situation, and that Monteiro's actions and Santos's injuries were consistent with Monteiro defending himself from the injuries Santos inflicted on his abdomen and back. 11RP 98-99, 103.

In rebuttal, the prosecutor reiterated that the self-defense theory did not make sense because the jurors would have to believe that Monteiro went back into the house just to look for his

keys, that Santos went up to him and bit him, and that Monteiro did what was necessary to get Santos to quit biting him. 11RP 108-09.

b. Monteiro Waived Any Challenge To The Wording Of The Aggressor Instruction By Failing To State A Specific Exception.

Objections to the giving of an instruction or the refusal to give a requested instruction must be timely and specifically made to the trial court. State v. Sanders, 66 Wn. App. 878, 888, 833 P.2d 452 (1992) (citing Reed v. Pennwalt Corp., 93 Wn.2d 5, 6, 604 P.2d 164 (1979), rev. denied, 120 Wn.2d 1027 (1993)). A party is required to object to an erroneous instruction at the time it is given in order to afford the trial court the opportunity to correct the error. CrR 6.15(c); State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). Generally, a defendant on appeal is limited to claimed errors in jury instructions that were specifically raised by exception at trial. Van Hout v. Celotex Corp., 121 Wn.2d 697, 702, 853 P.2d 908 (1993). An objection to a jury instruction cannot be raised for the first time on appeal unless the alleged instructional error is a manifest error affecting a constitutional right. RAP 2.5(a); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001); State v. Dent, 123 Wn.2d 467, 478, 869 P.2d 392 (1994). A claim of error based

on a trial court's giving of a first aggressor instruction is not an error of constitutional magnitude and may not be raised for the first time on appeal. State v. Davis, 60 Wn. App. 813, 822-23, 808 P.2d 167 (1991), aff'd, 119 Wn.2d 657 (1992).

Monteiro objected to the court giving the first aggressor instruction on the ground that there was insufficient evidence to support it. 10RP 212. Monteiro 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.⁶ 10RP 212; CP 39-77. For the first time on appeal, Monteiro claims that the trial court erred because there was no evidence to support giving the aggressor instruction in relation to the third degree assault charge (the first assault), and the instruction did not contain language limiting its use to the second degree assault (the second assault/strangulation) charge. Because this specific objection was not raised below and the alleged error is not of constitutional

⁶ Monteiro's failure to request or propose an alternative instruction that limited the application of the first aggressor instruction is akin to a defendant's failure to request a limiting instruction regarding the admission of certain evidence. A defendant's failure to request a limiting instruction, even if clearly entitled to it, waives the right to such an instruction and to challenge the admission of the evidence. State v. Newbern, 95 Wn. App. 277, 295-96, 975 P.2d 1041, rev. denied, 138 Wn.2d 1018 (1999); State v. Ortega, 134 Wn. App. 617, 625, 142 P.3d 175 (2006) (failure to request a limiting instruction waives any error that an instruction could have corrected), rev. denied, 160 Wn.2d 1016 (2007).

magnitude, Monteiro has waived this claim and his assault convictions should be affirmed. Davis, 60 Wn. App. 813; see also State v. Leevans, 70 Wn.2d 681, 683, 424 P.2d 1016 (1967) (holding that because trial counsel's exception to the instruction went only to the form of the instruction rather than to the subject matter, a new basis for the exception could not be considered for the first time on appeal).

c. The Jury Instructions Were Sufficient.

Even if this Court finds that Monteiro's objection to the first aggressor instruction on a different basis is sufficient to preserve the issue, his claim fails because the jury was properly instructed.

Jury instructions are sufficient "if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002); State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). The defendant bears the initial burden of producing some evidence that his actions occurred in circumstances amounting to self-defense, such as a reasonable apprehension of great bodily harm and imminent danger to himself. State v. Riley, 137 Wn.2d

904, 909, 976 P.2d 624 (1999). The defendant need not show actual danger, but must establish that he reasonably believed that he was in danger of imminent harm. Id. The evidence of self-defense must be assessed from the perspective of a reasonably prudent person standing in the defendant's shoes, knowing all the defendant knows and seeing all the defendant sees. Id. However, a defendant whose aggression provokes the contact eliminates his right of self-defense. Id.

A first aggressor instruction is appropriate when there is some credible evidence from which a jury can reasonably determine that the defendant engaged in conduct that precipitated the fight and provoked the need to act in self-defense. Id. The trial court may give a first aggressor instruction despite conflicting evidence about whether the defendant's conduct in fact precipitated the fight. Id. at 910. To determine whether there is sufficient evidence to support giving the instruction, this Court views the evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

The evidence at trial established that Monteiro perpetrated two assaults on Santos. The first assault occurred when Monteiro

and Santos argued and Santos put her finger in Monteiro's face. 5RP 45. Angered, Monteiro grabbed Santos, shoved her and caused her to fall onto the floor, and then kicked and stomped on Santos's back with such force that he left an imprint of the sole of his shoe. 5RP 46-47, 49, 118; Ex. 123, 146. Santos bit Monteiro in the back, but he continued to beat her until she escaped by running out of the house. 5RP 50, 118; 6RP 33. Monteiro chased her into the front yard and threw his car stereo speaker. 5RP 52-53. Santos ran back inside and locked the glass doors and her bedroom door. 5RP 55, 57, 61, 120; 6RP 63.

The second assault occurred after Monteiro broke both doors down, and began strangling Santos on top of her bed. 5RP 59, 61, 122; Ex. 7, 8, 142. Santos was struggling to breathe, but was able to bite Monteiro in the abdomen before she blacked out. 5RP 62, 64; 6RP 11, 34. There was also conflicting expert testimony about the likely cause of Santos's injuries and whether those physical injuries were consistent with Santos's version of events. 10RP 33-34, 174-77.

The jury was instructed that it was a defense to second and third degree assault that the force used was lawful, and that the State had the burden of proving beyond a reasonable doubt that

the force was not lawful. CP 113. Lawful force was defined as force used that is not more than necessary by a person who reasonably believes that he is about to be injured. CP 113. The court also gave a first aggressor instruction, which further instructed the jurors that if they were convinced beyond a reasonable doubt that Monteiro committed an intentional act that was reasonably likely to provoke a belligerent response, thereby creating the necessity to act in self-defense, then self-defense was not available to Monteiro as a defense. CP 115. The instructions also informed the jurors they were to consider each count separately. CP 99.

Monteiro asserts that, as written, the aggressor instruction applied to both assault counts and eased the State's burden of disproving self-defense as to the first assault. On the contrary, the jury instructions, when taken as a whole, were a correct statement of the law, allowed both parties to argue their theories of the case, and did not preclude the jury from considering Monteiro's self-defense claim as to the first assault.

During closing argument, the prosecutor confined his remarks regarding the aggressor instruction to the second assault

and told the jury that Monteiro could not claim self-defense for the second assault because his intentional act of breaking into Santos's home provoked Santos into biting him. 11RP 66-68. The prosecutor also addressed the elements and facts pertaining to the first assault, but did not argue that Monteiro provoked this assault. Monteiro's counsel did not address the first aggressor instruction specifically, instead focusing his argument on the evidence that supported Monteiro's self-defense claim. 11RP 98-99, 103.

Furthermore, the evidence did not show that Monteiro acted as the first aggressor of the first assault; therefore, the aggressor instruction, by its plain language did not apply to the first assault. Thus, the jury would not have considered the first aggressor instruction as relating to the first assault. Rather, the jury necessarily considered whether Monteiro acted in self-defense as to each assault count separately, and as to the second assault, whether Monteiro acted as the first aggressor, as instructed. Accordingly, the trial court properly instructed the jury and Monteiro's assault convictions should be affirmed.

D. **CONCLUSION**

For the foregoing reasons, the State requests that all of Monteiro's convictions be affirmed.

DATED this 2nd day of April, 2010.

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 Kary Dady & 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 Brief of Respondent, in STATE V. ALEXANDRE MONTEIRO, Cause No. 63492-5-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.

W Brame
Name Wynne Brame
Done in Seattle, Washington

4/2/10
Date

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