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MAY 18 2012

King County Prosecutor
Appellate Unit

NO. 66920-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

MIHAI MIHALCE

Appellant.

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

The Honorable Steven Gonzalez

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MIHALCE'S BURGLARY CONVICTION.

As discussed in the opening brief, whether an individual entered or remained unlawfully does not turn on legal title to the premises. It turns on 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)).

Thus, even if Mihalce had forced his way through the hotel room door and even if Keyser had told him to get out during the fight with Tomlinson, if he enjoyed a right of occupancy, possession, or habitation in the hotel room, neither act converted his actions into a burglary.

State v. Wilson supports Mihalce's argument. Wilson had been living in the residence in question and kept his personal property there (including his clothing and the couple's automobiles). He left the house angry, returned, was unable to gain access because he did not have his key, forced his way in by breaking a kitchen door, and assaulted his girlfriend (Sanders). He then went

outside, returned, and threatened to kill Sanders with a piece of splintered wood from the door. Wilson, 136 Wn. App. at 600-601.

Similarly, it is uncontroverted that Mihalce was staying in the hotel room, and kept his personal property there, including tools, electronics and clothing. 4RP 136; 5RP 57; 6RP 15, 19, 40. Accepting – for purposes of this issue – the State’s theory of Mihalce’s case, Mihalce left the hotel room angry, returned, was unable to gain access because he did not have a key card, and forced his way in as soon as Keyser opened the door. But such a forced entry did not result in a burglary any more than Wilson’s forced entry did.

In an attempt to distinguish Wilson, the State points out that Wilson was a co-signor on a lease with Sanders. Brief of Respondent, at 17. Again, however, the issue is not one of legal title. It is one of occupancy. Arguing revocation, the State focuses on the evidence that Keyser had asked everyone to leave earlier in the day and told Mihalce to leave during the fight with Tomlinson. Brief of Respondent, at 18. As in Wilson, however, Keyser could not lawfully revoke Mihalce’s lawful co-occupancy in this manner

because she did not have exclusive control over the premises.¹ See Wilson, 136 Wn. App. at 612 (finding no revocation because “it is uncontroverted that Sanders did not have exclusive control over the home”).

Because the State failed to prove beyond a reasonable doubt that Mihalce unlawfully entered or remained in the hotel room, his burglary conviction must be reversed.

2. THERE WAS NO EVIDENTIARY SUPPORT FOR THE FIRST AGGRESSOR INSTRUCTION.

In its attempt to justify an aggressor instruction, the State describes Mihalce’s entry into the hotel room as follows: “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.’” Brief of Respondent, at 8.

This truncated description – divorced from the immediate assault that the State itself alleges – is presumably intended to avoid decisions like State v. Brower, 43 Wn. App. 893, 721 P.2d 12 (1986), State v. Wasson, 54 Wn. App. 156, 772 P.2d 1039, review

¹ A no-contact order prohibiting Mihalce’s co-occupancy would obviously change the circumstances. See State v. Sanchez, 166 Wn. App. 304, 307-312, 271 P.3d 264 (2012) (expressing approval of Wilson, but distinguishing it based on the specific prohibitions in a no-contact order). There was no such order in Mihalce’s case.

denied, 113 Wn.2d 1014 (1989), and State v. Kidd, 57 Wn. App. 95, 786 P.2d 847, review denied, 115 Wn.2d 1010 (1990). These decisions make it clear the intentional act reasonably likely to provoke a belligerent response must be an act separate from the charged assaultive conduct.

The evidence at trial, however, undermines the State's position. That evidence reveals one of two scenarios. Either Mihalce simply entered the hotel room and Tomlinson attacked unprovoked. 5RP 61, 65, 78, 80-82; 6RP 24-25 (Mihalce and Keyser's version of events). Or, Mihalce burst through the door and assaulted Tomlinson. 4RP 110-112 (Tomlinson's version). While Tomlinson claimed that Mihalce screamed "are you F'ing my girlfriend," this was immediately followed by a strike to the head. 4RP 111.

This was not a situation where there was a provoking act, the victim responded with force, and the defendant then claimed self-defense for the charged conduct. Under either of the two scenarios, there simply was no evidence from which a reasonable trier of fact could find an intentional act – beyond the assault itself – reasonably likely to provoke a belligerent response and creating a

necessity for acting in self defense. Therefore, the instruction should not have been given.

In its summary of the law on first aggressor instructions, the State indicates, "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." Brief of Respondent, at 10 (citing State v. Thompson, 47 Wn. App. 1, 7, 733 P.2d 584, review denied, 108 Wn.2d 1014 (1987)). This statement is apparently aimed at the possibility, under Tomlinson's version of events, Mihalce burst into the room with the rubber hose with brass fittings already in hand. But the State's summary of Thompson is grossly overbroad.

Thompson was one of several individuals involved in a dispute over comments made in a bar. Thompson, 47 Wn. App. at 3. According to Thompson, he felt threatened and pulled out a gun. He then turned to see a man (Knoth) advancing toward him, possibly with a knife, and shot him. A second man (Dapping) then lunged at Thompson and also was shot. Id. at 3-4. In contrast, Dapping testified that there was no provocation before Thompson pulled out his gun and shot Knoth. Dapping then ran toward Thompson in an attempt to stop him, and Thompson shot Dapping.

Id. at 4. Two other witnesses testified that Thompson had been brandishing the gun well before the shooting and, according to one of these witnesses, yelling, "I'm going to kill the bastard." Id.

Thompson was charged with murder in the second degree for the shooting death of Knoth and assault in the first degree (with a deadly weapon) for shooting Dapping. He was convicted of the lesser-included offenses of manslaughter in the first degree and assault in the second degree. Id. at 2.

On appeal, this Court rejected Thompson's challenge to the evidence supporting a first-aggressor instruction:

The State's evidence tended to show that although neither Knoth nor Dapping said anything to Thompson, Thompson made the first move by drawing his gun on them. Although this evidence was disputed . . . the evidence presented by the State was sufficient to allow the instruction to be given.

Id. at 7.

The result in Thompson is correct. There was evidence Thompson pulled out a gun, which caused the victims to take defensive action, and ultimately led to Thompson's use of the gun against them, for which he was charged. By pulling out his gun, Thompson engaged in an intentional act – beyond the charged homicide and assault – that provoked a belligerent response and

created a necessity for acting in self-defense. Therefore the instruction was properly given.

The difference, of course, is that even under the State's theory of Mihalce's case, Mihalce burst through the hotel room door and immediately began assaulting Tomlinson. There was no provoking act beyond the charged assault itself necessitating the use of force in claimed self-defense. Under Brower, Wasson, and Kidd, therefore, an aggressor instruction was improper. Thompson does not indicate otherwise.

Finally, the State argues that any error in giving the first aggressor instruction was harmless beyond a reasonable doubt. Brief of Respondent, at 12-13. This is incorrect. If jurors believed Mihalce's version of events – that he was the victim of an unprovoked attack by Tomlinson – there was certainly a possibility they would find he acted in self-defense in the absence of the improper first aggressor instruction. Indeed, Tammy Keyser's testimony was fully consistent with Mihalce's on this point. She made it clear that Tomlinson attacked Mihalce as soon as she opened the door. 5RP 65, 78.

The State contends that the instructional error is harmless because jurors would necessarily have found that Mihalce used

excessive force against Tomlinson. Specifically, it notes that Tomlinson, who was unarmed and outnumbered, was beaten with the hose and stabbed. Brief of Respondent, at 13.

But Mihalce testified that he grabbed the hose only after Tomlinson repeatedly and severely punched him in the face, pulled his shirt up over his face, and had Mihalce at his mercy.² 6RP 26-27. Moreover, it is undisputed that Mihalce never stabbed Tomlinson. He testified he was unaware Hardin had even used the knife. 6RP 28; see also 6RP 114 (defense counsel argues Mihalce did not know about knife). And Tomlinson's significant size advantage over Mihalce helped offset any benefit Mihalce received from Hardin's assistance.³ See 4RP 84, 137 (Tomlinson weighs 230 lbs and is several inches taller than Mihalce).

² Mihalce suffered a split lip that required six or seven stitches to close, broke a tooth, had a large lump on his temple, suffered a closed head injury, and had multiple bruises and lacerations. 3RP 40-42, 90-91; 6RP 33.

³ Hardin also was seriously injured, suffering a broken leg. 6RP 38.

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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 18TH DAY OF MAY, 2012, 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] MIHAI MIHALCE
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COYOTE RIDGE CORECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON THE 18TH DAY OF MAY, 2012.

x  _____