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NO. 66920-6-I

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

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

MIHAI MIHALCE

Appellant.

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

The Honorable Steven Gonzalez

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 2

1. Procedural Facts 2

2. Substantive facts 3

a. The Alleged Crimes 3

b. The Defense Strategy 14

C. ARGUMENT 15

1. THIS COURT MUST REVERSE MIHALCE'S BURGLARY CONVICTION DUE TO INSUFFICIENT EVIDENCE. 15

2. THE FIRST AGGRESSOR INSTRUCTION IMPROPERLY PRECLUDED THE JURY FROM CONSIDERING MIHALCE'S SELF-DEFENSE CLAIM. 21

D. CONCLUSION 26

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Arthur
42 Wn. App. 120, 708 P.2d 1230 (1985) 21

State v. Birnel
89 Wn. App. 459, 949 P.2d 433 (1998) 22, 24

State v. Brower
43 Wn. App. 893, 721 P.2d 12 (1986) 22, 23

State v. Green
94 Wn.2d 216, 616 P.2d 628 (1980) 16

State v. Hickman
135 Wn.2d 97, 954 P.2d 900 (1998) 20

State v. Kidd
57 Wn. App. 95, 786 P.2d 847
review denied, 115 Wn.2d 1010 (1990) 24

State v. Klein
195 Wash. 338, 80 P.2d 825 (1938) 17

State v. Riley
137 Wn.2d 904, 976 P.2d 624 (1999) 22

State v. Schneider
36 Wn. App. 237, 673 P.2d 200 (1983) 17

State v. Stark
158 Wn. App. 952, 244 P.3d 433 (2010) 22

State v. Wasson
54 Wn. App. 156, 772 P.2d 1039
review denied, 113 Wn.2d 1014 (1989) 22, 23, 25

State v. Wingate
155 Wn.2d 817, 122 P.3d 908 (2005) 23

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

In re Winship
397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) 15

Jackson v. Virginia
443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) 16

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.52.010 16

RCW 9A.52.020 16

A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to sustain appellant's burglary conviction.

2. The trial court erred by giving a first aggressor instruction over appellant's objection.

Issues Pertaining to Assignments of Error

1. Appellant shared a hotel room with his girlfriend. He had stayed there multiple nights and kept personal belongings there. The State charged appellant with burglary under the theory that he unlawfully entered or remained in the hotel room while committing an assault. Is the evidence insufficient to sustain the burglary conviction where appellant was authorized to enter and stay in the hotel room?

2. In addition to burglary, appellant was charged with assault and claimed self-defense. Although there was no evidence that, prior to the alleged assault, appellant engaged in an intentional act reasonably likely to provoke a belligerent response, the court gave jurors a first aggressor instruction over appellant's objection. The State used the instruction to convince jurors that appellant was not entitled to claim self-defense. Is this reversible error?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Mihai Mihalce with (count 1) Burglary in the First Degree and (count 2) Assault in the First Degree. Each charge included a deadly weapon enhancement. CP 22-23.

The case was tried to a jury before the Honorable Steven Gonzalez. 1RP[1] 1. On count 1, the jury convicted Mihalce of Burglary in the First Degree. CP 91. On count 2, the jury acquitted Mihalce of Assault in the First Degree and, instead, found him guilty of the lesser-degree offense of Assault in the Second Degree. CP 93-94. The jury also found both deadly weapon allegations proved. CP 92-95.

Judge Gonzalez exercised his discretion to find that both crimes involved the "same criminal conduct," resulting in offender scores of 3. CP 153. He imposed concurrent high-end standard range sentences for each crime which, when combined with the mandatory deadly weapon sentencing enhancements, resulted in a

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[1] This brief refers to the verbatim report of proceedings 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; 10RP – 4/1/11.

total sentence of 77 months. CP 150, 152. Mihalce timely filed his Notice of Appeal. CP 131-142.

2. Substantive Facts

a. The Alleged Crimes

In February 2010, Tammy Keyser and Mihai Mihalce were in a romantic relationship. They had been dating for almost a year. 5RP 51-52; 6RP 14. Keyser's father, who lived in Oregon, was seriously ill and under hospice care. 5RP 54-55. One of Keyser's close friends – Donald Long – drove Keyser to Oregon, where she spent several days visiting her father. He then drove her back to the Seattle area. 5RP 52-55.

Keyser was extremely sad and told Long she needed some time away from most of the people she knew. 5RP 56. On February 5, 2010, Long drove Keyser to the Red Lion Hotel in Bellevue and booked a room for her using Keyser's money. 4RP 16-18, 52-54; 5RP 56-57. Keyser stayed in room 291 until the evening of February 12. 4RP 18-19. During her stay, friends stopped by to visit. Moreover, Mihalce stayed in the room some nights. 5RP 57.

At approximately 9:00 p.m. on the evening of February 12, a guest at the hotel called the front desk to report the sound of yelling

and a crash. 4RP 19. About the same time, Donald Long ran to the lobby and asked the hotel clerk to call 911 because "they were beating her with a pipe." 4RP 20. Long then exited the building as the clerk called police. 4RP 21.

Bellevue Police arrived within a few minutes. 4RP 21. Officers spotted Long running in the hotel parking lot with an axe handle in his hand and detained him. Long asserted that a female was being attacked and pointed to the second floor of the hotel. 3RP 9-10. Long smelled of alcohol and was not "acting normal" or making sense. 3RP 19.

Officers heard the sound of breaking glass and noticed a second-story window had been broken. Keyser was standing near the broken window and calling for help. 3RP 25-29, 126-127; exhibits 19-21. Officers also could see a male and a second female through the broken window. The man yelled something to police. 3RP 39, 98, 127.

Police entered the hotel and took the stairs to the second floor. Near the top of the stairs, they found the man who had yelled out the window – Dennis Tomlinson – bleeding and lying shirtless on the broken glass. 3RP 18-19, 28-29, 99-100, 128. He had in his possession a Methadone pill bottle – used for his heroin

addiction – and a "narcotics bag." 3RP 20, 22; 4RP 149. He had been smoking crack and it was apparent that he was under the influence. 3RP 108; 4RP 32, 149.

According to police, Keyser indicated that "Mihai and some black guy" had attacked Tomlinson and "ran that way," pointing to the opposite end of the hallway. She also mentioned that one of them might have a knife. 3RP 29, 128-129. Two officers ran to the end of the hall, proceeded down the stairs, and exited the hotel. 3RP 30, 129.

Once outside, the officers saw Mihai Mihalce and Troy Hardin, who is African-American, walking in the parking lot. 3RP 30-31. When officers told the men to put their hands up, Hardin complied. Mihalce ran or walked around the corner of the hotel. 3RP 31, 129-130. An officer followed and spotted him trying to unlock the driver's side door of his vehicle. 3RP 40-41, 130-132. Mihalce eventually complied with a command to show his hands and get on the ground, and he was handcuffed. 3RP 40, 133.

Mihalce had blood on his clothing and skin, had suffered a split lip that required six or seven stitches, 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. It

appeared as though he had taken a beating. 3RP 90. Mihalce was transported to the hospital for treatment. 3RP 67-68, 116-117; exhibits 57-62, 125-134. Although he was lethargic and "out of it," Mihalce was able to tell officers that Tomlinson attacked him and he had acted in self-defense. 3RP 42.

Hardin and Tomlinson also were bloodied and injured. Hardin had blood on his clothing and a broken leg. 3RP 32-33; 6RP 38; exhibits 8-11. Tomlinson claimed he had been hit with a baseball bat and stabbed. 4RP 28. He had lacerations on his face, head, neck and arms, a stab wound near his right hip, and a minor wound to his abdomen. He also was taken to a nearby hospital for treatment. 4RP 26-36; exhibits 5-7, 89-102.

Inside the hotel, there was blood on the hallway walls, carpet, and the doors to several rooms. 2RP 35; 3RP 19; exhibit 4. Room 291 was in disarray. Furniture and appliances had been tipped over and there was blood on various items. 3RP 58-64; exhibits 22-23, 25-26, 34-35, 38, 40, 42-47. Officers found cocaine and what appeared to be a cutting agent, used to make the quantity of cocaine appear larger. 3RP 60-61, 64; exhibits 29-30, 48-49. By the time officers decided to interview Tammy Keyser, she had

already left the hotel. They were able to reach her by phone, but she refused to speak with them. 2RP 24-25.

Outside the building, officers found a large knife in a flowerbed. 2RP 42; 3RP 54, 56-57; exhibit 65. The knife's handle had broken and pieces of that handle were found in the hallway on the second floor of the hotel. 2RP 42. In the parking lot, officers also found "an industrial rubber hose with brass fittings on each end." 2RP 42; 3RP 54-57; exhibits 71-74.

At trial, the parties stipulated that both Mihalce and Tomlinson had alcohol and cocaine in their systems the night of February 12, 2010. 5RP 90. But that was largely where agreements ended. Witnesses who were present in room 291 at the time of the fray offered differing accounts of what happened.

Only one witness – Dennis Tomlinson – claimed that Mihalce was the instigator. Tomlinson testified that he and Keyser sometimes did drugs together and, on the morning of February 12, the two had a "romantic encounter" in room 291. 4RP 100-102, 107. Prior to Mihalce's return to the room that evening, everyone was smoking crack. 4RP 105. He and Keyser were talking about Mihalce when they heard a knock on the door. 4RP 106. According to Tomlinson, Keyser became frantic when she realized

it was Mihalce. 4RP 109-110. Keyser opened the door and Mihalce, along with Troy Hardin, pushed their way into the room. Mihalce yelled, "are you F'ing my girlfriend"?[2] 4RP 110-111.

According to Tomlinson, Mihalce struck him with the rubber hose with brass fittings. Tomlinson denied that he did anything to provoke Mihalce, such as hitting or pushing him. 4RP 111-113. Tomlinson put his hands up to defend himself, but Mihalce hit him again and repeatedly said, "I'm going to do seven years for this." 4RP 114, 141. Tomlinson was able to push Mihalce into a corner and Mihalce told Hardin to "get him off me" and to "kill that motherfucker." 4RP 114-116. In response, Hardin began choking Tomlinson from behind and then cut or stabbed him on the neck, hip, and arms.[3] 4RP 116-118.

Tomlinson testified that somehow he ended up in the hotel hallway. 4RP 120. He knocked on the doors of other rooms in an

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[2] Tomlinson also testified that, as far as he knew, Mihalce could not have known about his sexual encounter with Keyser earlier that day. 4RP 146. Keyser denied the encounter. 4RP 53.

[3] Hardin's DNA and Tomlinson's DNA were found on the knife in the flowerbed and handle pieces in the hallway. 5RP 29-35.

attempt to summon help.[4] 4RP 121, 123. He heard screaming from inside the room and saw that Mihalce had pinned Keyser on the bed. 4RP 120-121. Mihalce then returned his attention to Tomlinson, attacking him in the hallway. Tomlinson pulled a framed picture from the wall and struck Mihalce over the head. 4RP 122-124. Tomlinson claimed that when he saw police arrive outside the building, he shattered the second-story window to get their attention. 4RP 125.

Tomlinson conceded he was "pretty high" the night of February 12, he "can be kind of out of control" when using drugs, and that things "set [him] off pretty quickly" in that state. 4RP 143-144. But he denied that he attacked Mihalce in a jealous rage when Mihalce first entered the room. 4RP 130. His credibility was impeached with multiple prior convictions for crimes of dishonesty. 4RP 132-133.

Both Tammy Keyser and Mihai Mihalce contradicted Tomlinson's version of events, testifying that Mihalce had permission to enter the hotel room and acted in self-defense when Tomlinson attacked him without provocation.

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[4] A guest at the hotel, who also was staying in a room on the second floor, testified that he heard the argument and commotion and that an unidentified male knocked on his door. 4RP 3-15.

Specifically, Keyser testified that Mihalce had stayed with her in the motel room for "a couple of nights." 5RP 57. On the afternoon of February 12, she and Mihalce had a small argument and Keyser asked everyone to leave the room so that she could have some time alone. 5RP 74. Despite their disagreement, Keyser testified that Mihalce always had permission to be in the hotel room and this was true when he returned to the room that evening. 5RP 74-75.

According to Keyser, when Mihalce returned at 9:00 p.m., he knocked on the door. Both Tomlinson and Long were in the room, and Keyser had fallen asleep. 5RP 59-60. Long woke Keyser and indicated someone was at the door. Keyser got up, saw through the peephole that it was Mihalce, opened the door, and let him in. Immediately, Tomlinson attacked Mihalce. Keyser had a panic attack and could not recall anything thereafter. 5RP 60-63, 82. But she was certain that Tomlinson had attacked Mihalce. 5RP 65, 78, 80-82. And she denied that Mihalce ever pinned her on the bed or struck her.[5] 5RP 89.

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[5] Two Bellevue Police Officers who saw Keyser briefly before she left the hotel testified that she did not appear injured. 3RP 18, 35-36.

Mihalce's version of events was similar. He had stayed in the room with Keyser for several days preceding the incident. 6RP 15. Keyser had been a little upset on February 12 and asked everyone to leave. Mihalce was not happy with the request, but decided to give her some time alone. 6RP 18. After visiting a friend, and picking up Hardin, he returned to the hotel. He denied going there with the intent to assault anybody and denied knowing that Hardin was armed with a knife. 6RP 20-24, 33-34.

Mihalce knocked on the door to room 291. Someone looked through the peephole and Keyser let him in. Tomlinson immediately charged and attacked Mihalce. 6RP 24-25. Tomlinson repeatedly punched Mihalce in the face, used his greater size to control Mihalce,[6] and pulled Mihalce's shirt up over his face. Mihalce called out for Hardin's help and Hardin was able to pull Tomlinson away. 6RP 26.

Mihalce is a refrigeration technician. 6RP 19, 35. In the closet of the hotel room, he kept a hose that is used to transfer refrigerant from one container to another. 6RP 35-36. Mihalce grabbed the hose and used it in an attempt to fend off Tomlinson's

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[6] At 5' 10 ½ " tall and 230 pounds, Tomlinson was larger than Mihalce, who is about 5'6" or 5'7" tall. 4RP 84, 137.

attack.[7] 6RP 26-27. Mihalce denied asking Hardin to stab or kill Tomlinson and he did not see Hardin using the knife. 6RP 28.

Mihalce testified that during the fight, two friends – Diane Foust and Doug Vance – arrived and attempted to calm everyone down. 6RP 29. According to Mihalce, he left the room and headed for the parking lot. When Keyser did not follow, he returned to the room and Tomlinson attacked him again, this time hitting him over the head with the framed picture. 6RP 29. He discovered Keyser was no longer in the room and returned to the parking lot, which is where he encountered police. 6RP 31-32.

In an attempt to impeach Mihalce's version of events, the State introduced a recording of a February 12 phone call that occurred two hours prior to the incident at the hotel. An inmate – Vernon Thompson – placed the call to Mihalce from a prison facility. 5RP 90-91; exhibit 103. On the recording, Mihalce can be heard complaining (using sometimes harsh language) about the fact Keyser had asked him to leave earlier that day. Exhibit 103.

The State argued this was evidence that Mihalce was angry when he returned to the hotel that evening. 6RP 105. Mihalce

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[7] Mihalce's DNA and Tomlinson's DNA were found on the hose. 5RP 35-39.

testified that the State was misinterpreting what was said, he was under the influence of alcohol when the call was made, and he was only a little upset that he had been asked to leave. 6RP 21-23, 51-58, 62-65. He was simply "blowing off steam" and returned to the hotel shortly thereafter to make up with Keyser after what he characterized as a small argument. 6RP 63-65.

The third individual in the room when the fight started – Donald Long – was unable to say who started it. 4RP 59. Long testified that in response to the knock at the door, he got up and saw that it was Mihalce. 4RP 57. He roused Keyser, who looked like she was sleeping, and told her that Mihalce was at the door. Keyser responded "oh," got up, and opened the door. Long could not see the entry from where he was sitting, but could hear Mihalce and Keyser talking. 4RP 57-58, 66-67. At that point, Tomlinson got up and walked to the door. The next thing Long heard was a scuffle. 4RP 58.

Long stood up and saw the two men fighting near the door. 4RP 59. Mihalce had the hose in his hand and was hitting Tomlinson. 4RP 59. Tomlinson was also hitting Mihalce and it looked like "mutual combat." 4RP 84. Hardin was standing in the doorway and holding a knife. 4RP 60. At some point, according to

Long, Mihalce and Keyser began scuffling on the bed. 4RP 61-62. Long ran down to the front desk to summon help. 4RP 62-63. He then ran to his vehicle in the parking lot and grabbed an axe handle, intending to return to the room. At that point, police detained him. 4RP 77.

Diane Foust and her husband, Doug Vance, also testified. They were visiting Keyser the evening of February 12. 5RP 96, 129. As they approached her room, they heard loud arguing from within. 5RP 97-98, 130. The couple banged on the door in an attempt to gain entry. 5RP 98, 131. Foust heard Keyser "yelling for them to stop it and to get out." 5RP 99, 120. When the door opened, Tomlinson and Mihalce had a hold of each other. Vance got in between them. 5RP 100-101, 131. Tomlinson went in to the bathroom and Foust pushed Mihalce out of the room. Out in the hallway, Tomlinson was throwing furniture and appeared to have a towel bar in his hand. 5RP 101-102. Foust tried to calm Tomlinson and also helped Keyser leave the building. 5RP 104-105, 124-125.

b. <u>The Defense Strategy</u>

The defense theory of the case was that Mihalce did not commit burglary because he had permission to be in the hotel room. 6RP 123-124. Nor was he guilty of assault because

Tomlinson attacked him, he acted in lawful self-defense, and Hardin used the knife without Mihalce's knowledge. 6RP 114-115, 120-122.

After the prosecution had rested its case, the defense moved to dismiss the burglary charge based on the State's failure to prove that Mihalce unlawfully entered or remained in the hotel room. 6RP 75-77. The court denied the motion, finding that Foust's testimony – that she overheard Keyser saying "get out" – was the "only saving grace." 6RP 78.

In response to Mihalce's self-defense claim on the assault charge, the State proposed a first aggressor instruction. 6RP 86-87. Defense counsel objected, arguing it was not warranted under the facts of this case. The objection was overruled. 6RP 87; CP 110 (instruction 31).

C. ARGUMENT

1. THIS COURT MUST REVERSE MIHALCE'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 or another participant in the crime . . . assaults any person.

RCW 9A.52.020(1); CP 81 (modified instruction 9); CP 102 (instruction 10).

"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); CP 103 (instruction 12). 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)).

Every witness in room 291 testified that Keyser, knowing Mihalce was the individual that knocked, opened the door for him. 4RP 57-58, 109-110; 5RP 60-62, 82. Mihalce also testified to this. 6RP 25. Therefore, the only theory under which jurors could have convicted Mihalce of burglary was that he unlawfully remained in the room after his initial entry. It is clear jurors struggled with this issue. At one point during deliberations, they asked, "How does one lose the license, invitation, or privilege to lawfully remain on the premises"? CP 89. They were not given any additional guidance beyond the standard jury instructions. CP 90.

In denying the defense motion to dismiss the burglary charge, Judge Gonzalez relied on Foust's testimony that she heard, through the closed door, Keyser "yelling for them to stop it and to get out." 5RP 99, 120; 6RP 78. But even in the light most favorable to the State, this testimony is too vague and speculative on which to base revocation of Mihalce's permission to be in the room. Keyser never testified to making this statement, and it was impossible for Foust to identify "them" from the other side of the

door. The statement could have been directed at Tomlinson and Hardin.

But even if it is assumed Keyser directed the statement at Mihalce, it was not a valid revocation of his right to be in the room. The situation is analogous to that in State v. Wilson. In Wilson, the defendant argued with his girlfriend, Sanders, and angrily left the home they shared. Later, he returned, forced open the kitchen door, and assaulted her in violation of a no-contact order. Wilson, 136 Wn. App. at 601.

At the time of the incident, Wilson had a key to the residence (although he had left it in the home), his clothing and his car were at the residence, there was no evidence he had a separate primary residence, and Sanders 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, but the trial court dismissed the burglary conviction in response to a post-verdict motion, finding that Wilson

was authorized to be in the home and that authorization had never been revoked. 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. at 612.

As in Wilson, Mihalce established that he lawfully occupied, possessed, and inhabited the premises in question. Both Keyser and Mihalce testified that Mihalce had been staying in room 291. 5RP 57; 6RP 15, 40. Keyser testified that Mihalce was always welcome in the room and she may have given him a key card at some point; she could not recall. 5RP 70, 74-75. Mihalce testified that he had personal belongings in the room, including tools, electronics, and clothing. 6RP 19. Keyser did not remember, but

testified this was likely true. 5RP 79, 83-84. Even Tomlinson testified that Mihalce was staying in room 291 and had some of his belongings there. 4RP 136.

These facts establish that Mihalce had authority to enter and remain in the hotel room. Even if Keyser's statement to "get out" was directed at Mihalce, like the victim's 911 call in Wilson, this was legally insufficient to revoke his privilege to be there. Keyser did not demand that Mihalce return his key card (assuming she gave him one) or remove his possessions. Her statement to "get out" during the fray cannot be construed – even in the light most favorable to the State – as lawfully excluding Mihalce from the room they shared.

Because the State failed to prove that Mihalce entered or remained unlawfully in the hotel room, there is insufficient evidence to support the burglary conviction. The conviction should be dismissed. 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 IMPROPERLY PRECLUDED THE JURY FROM CONSIDERING MIHALCE'S SELF-DEFENSE CLAIM.

Mihalce's defense to the assault charge was that he acted in lawful self-defense. CP 108-110. As noted above, the trial court provided jurors with a first aggressor instruction over a defense objection. 6RP 87. The instruction provides:

> 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, offer, or attempt to 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 110 (instruction 31). This was reversible error.

"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).

To support an aggressor instruction, there must be evidence that the defendant engaged in an intentional act reasonably likely to provoke a belligerent response, which precipitated the incident. And, notably, this act must be an act separate from the assaultive conduct. State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989); State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986). Mistakenly giving an aggressor instruction is constitutional error and cannot be deemed harmless unless harmless beyond a reasonable doubt. State v. Stark, 158 Wn. App. 952, 961, 244 P.3d 433 (2010) (citing State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998)), review denied, 171 Wn.2d 1017 (2011).

Several decisions from this Court demonstrate that an aggressor instruction was inappropriate at Mihalce's trial.

In State v. Brower, the defendant's companion argued with the victim over a drug deal. The defendant, who testified that the victim was acting aggressively toward him, drew a gun and pointed it at the victim, for which he was charged with assault. Brower, 43 Wn. App. 896-97. The trial court gave the jury an aggressor

instruction. The jury rejected Brower's self-defense claim and convicted him. Brower, 43 Wn. App. at 897, 901. This Court reversed, stating:

> Here, there is no indication Mr. Brower was involved in any wrongful or unlawful conduct which might have precipitated the incident with [the victim]. . . . If Mr. Brower was to be perceived as the aggressor, it was only in terms of the assault itself. Under the facts of this case, the aggressor instruction was improper. The inclusion of the instruction effectively deprived him of his theory of self-defense . . . .

Brower, 43 Wn. App. at 902 (citation omitted); but see State v. Wingate, 155 Wn.2d 817, 822, 122 P.3d 908 (2005) (limiting reliance on Brower given different instructional language).

Similarly, in State v. Wasson, there was an absence of any intentional, provoking act that precipitated the assaultive conduct. Wasson had been fighting with his cousin when a man named Reed approached and told them to quiet down. Wasson, 54 Wn. App. at 157. A fight then broke out between Wasson's cousin and Reed; the fight ended with Reed knocking Wasson's cousin to the ground. Reed then took several rapid steps toward Wasson, whereupon Wasson shot him in the chest. Wasson was convicted of second degree assault. Wasson, 54 Wn. App. at 157.

On appeal, Wasson claimed there was insufficient evidence to support the aggressor instruction because there was no showing that he was an aggressor toward Reed. Wasson, 54 Wn. App. at 158. The Court of Appeals concluded that it was reversible error for the trial court to issue an aggressor instruction where there was no provoking act prior to the assault: "there is no evidence that Mr. Wasson acted intentionally to provoke an assault from Mr. Reed. In fact, there is evidence Mr. Wasson never initiated any act toward Mr. Reed until the final assault." Wasson, 54 Wn. App. at 159. The court held that giving the aggressor instruction "effectively deprived Mr. Wasson of his ability to claim self-defense." Wasson, 54 Wn. App. at 160; see also Birnel, 89 Wn. App. at 473-74 (reversing where instruction not supported by evidence and "effectively deprived [defendant] of his ability to claim self-defense.").

Similarly, in State v. Kidd, this Court concluded it was error for a trial court to issue an aggressor instruction where the defendant shot two passengers on a bus. State v. Kidd, 57 Wn. App. 95, 101, 786 P.2d 847, review denied, 115 Wn.2d 1010 (1990). The defendant believed that the two victims were drug dealers and became suspicious when they changed seats in a manner that corresponded to his own seat changes. Kidd, 57 Wn.

App. at 98. When one of the men put a hand in his coat, Kidd shot him. Kidd, 57 Wn. App. at 98. Kidd shot the other man when he jumped after the first victim was shot. Kidd, 57 Wn. App. at 98. The evidence did not support giving the aggressor instruction because the "provoking act" referred to in the instruction cannot be the actual assault. Kidd, 57 Wn. App. at 100 (citing Wasson, 54 Wn. App. at 159).

Here, both Mihalce and Keyser testified that Mihalce simply entered the hotel room and Tomlinson attacked. 5RP 61, 65, 78, 80-82; 6RP 24-25. In contrast, Tomlinson testified that Mihalce entered through the door and immediately assaulted him. 4RP 110-112. Under either scenario, there was no aggressive act – other than the assault itself in Tomlinson's version of events – that provoked a belligerent response. Therefore, the first aggressor instruction was improper. Yet, because the instruction was given, the State was permitted to argue that Mihalce was not entitled to claim self-defense. See 6RP 131.

In the absence of the improper aggressor instruction, Mihalce had a plausible self-defense claim. Keyser supported his version of events. Because the State cannot demonstrate this error

was harmless beyond a reasonable doubt, the assault conviction must be reversed.

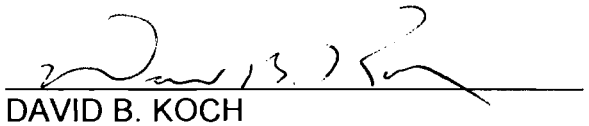
D. CONCLUSION

This Court should reverse and vacate the burglary conviction. Mihalce is entitled to a new trial on the assault charge.

DATED this 30th day of December 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66920-6-I
	)	
MIHAI MIHALCE,	)	
	)	
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 30TH DAY OF DECEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KING COUNTY PROS/APPELLATE UNIT SUPERVISOR
W554 KING COUNTY COURTHOUSE
516 THIRD AVENUE
SEATTLE, WA 98104

[X] MIHAI MIHALCE
[redacted] 754564
COYOTE RIDGE COREECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON THE 30TH DAY OF DECEMBER, 2011.

x Patrick Mayovsky