

NO. 34354-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RALPH PEREZ, APPELLANT

FILED
COURT OF APPEALS
DIVISION II
06 DEC 27 PM 3:51
STATE OF WASHINGTON
BY _____
DEPUTY

Appeal from the Superior Court of Pierce County
The Honorable THOMAS LARKIN

No. 05-1-04938-5

Brief of Respondent

GERALD A. HORNE
Prosecuting Attorney

By
Todd A. Campbell
Deputy Prosecuting Attorney
WSB # 21457

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u>	1
	1. Did the trial court properly exercise its discretion when it permitted witness Ingram's testimony after properly conducting a competency hearing to determine whether Ingram was intoxicated? (Appellant's Assignment of Error No. 1).....	1
	2. Did the trial court properly exclude defendant's self-serving hearsay statement to the police where he claimed the victim Shaun Ingram "swung at [defendant] first." (Appellant's Assignment of Error No. 2).....	1
	3. Was there sufficient evidence for a rational trier of fact to conclude that the defendant was guilty of first degree burglary where every element for each offense was proven beyond a reasonable doubt? (Appellant's Assignment of Error No. 3)	1
B.	<u>STATEMENT OF THE CASE</u>	1
	1. Procedure.....	1
	2. Facts	4
C.	<u>ARGUMENT</u>	9
	1. THE TRIAL COURT PROPERLY CONDUCTED A HEARING TO DETERMINE INGRAM'S COMPETENCY AND DID NOT COMMIT A MANIFEST ABUSE OF DISCRETION BY PERMITTING INGRAM TO TESTIFY.....	9
	2. THE COURT PROPERLY EXERCISED ITS DISCRETION BY EXCLUDING DEFENDANT'S STATEMENT THAT INGRAM "SWUNG FIRST."	13

3.	THE STATE ADDUCED SUFFICIENT EVIDENCE FOR A RATIONAL JURY TO CONVICT DEFENDANT OF FIRST DEGREE BURGLARY	18
D.	<u>CONCLUSION</u>	23

Table of Authorities

Federal Cases

<u>Chambers v. Mississippi</u> , 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973).....	15
<u>State v. Velasco</u> , 953 F.2d 1467, 1475 (7 th Cir. 1992)	18
<u>United States v. Haddad</u> , 10 F.3d 1252, 1259 (7th cir. 1993)	17

State Cases

<u>In re Sego</u> , 82 Wn.2d 736, 513 P.2d 831 (1973)	20
<u>McCutcheon v. Brownfield</u> , 2 Wn. App. 348, 467 P.2d 868, review denied, 78 Wn.2d 993 (1970)	11
<u>Nissen v. Obde</u> , 55 Wn.2d 527, 348 P.2d 421 (1960)	20
<u>Seattle v. Gellein</u> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	19
<u>State v. Bennett</u> , 20 Wn. App. 783, 787, 582 P.2d 569 (1978)	15
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	19
<u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	19, 20
<u>State v. Dejarlais</u> , 88 Wn. App. 297, 305, 944 P.2d 1110 (1997)	20
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)	19
<u>State v. Finch</u> , 137 Wn.2d 792, 810, 975 P.2d 967 (1999)	14, 15
<u>State v. Froehlich</u> , 96 Wn.2d 301, 304, 635 P.2d 127 (1981)	10
<u>State v. Fullen</u> , 7 Wn. App. 369, 381, 499 P.2d 893 (1972)	15
<u>State v. Guloy</u> , 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).....	16
<u>State v. Haga</u> , 8 Wn. App. 481, 495, 507 P.2d 159 (1973)	15
<u>State v. Hall</u> , 104 Wn. App. 56, 63, 14 P.3d 884 (2000).....	21

<u>State v. Hettich</u> , 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).....	16
<u>State v. Holbrook</u> , 66 Wn.2d 278, 401 P.2d 971 (1965)	19
<u>State v. Huff</u> , 3 Wn. App. 632, 636, 477 P.2d 22 (1970)	15
<u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	19
<u>State v. Larry</u> , 108 Wn. App. 894, 34 P.3d 241 (2001), <u>review denied</u> , 146 Wn.2d 1022, 52 P.3d 521 (2002).....	14, 17, 18
<u>State v. Mabry</u> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	19
<u>State v. McCullum</u> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)	18
<u>State v. Nation</u> , 110 Wn. App. 651, 660, 41 P.3d 1204 (2002).....	14
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	19
<u>State v. Smith</u> , 30 Wn. App. 251, 633 P.2d 137, <u>affirmed</u> , 97 Wn.2d 801, 650 P.2d 201 (1981)	13
<u>State v. Stamm</u> , 16 Wn. App. 603, 605, 559 P.2d 1 (1976)	11
<u>State v. Swan</u> , 114 Wn.2d 613, 658, 790 P.2d 610 (1990).....	14
<u>State v. Thetford</u> , 109 Wn.2d 392, 397, 745 P.2d 496 (1987).....	16
<u>State v. Thomas</u> , 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004)	19
<u>State v. Tilton</u> , 149 Wn.2d 775, 786, 72 P.3d 735 (2003).....	19
<u>State v. Watkins</u> , 71 Wn. App. 164, 173, 857 P.2d 300 (1993)	10, 11
<u>State v. Woods</u> , 57 Wn. App. 792, 790 P.2d 220 (1990).....	10

Statutes

RCW 9A.48.090(1).....	1
RCW 9A.48.090(2)(a).....	1

RCW 9A.48.090(1)(b) and 2(a).....	4
RCW 9A.48.090(2)(b).....	4
RCW 5.60.050.....	9, 10, 11
RCW 9A.36.041.....	21
RCW 9A.36.041(1).....	2
RCW 9A.36.041(2).....	2
RCW 9A.48.080(1)(a).....	4
RCW 9A.52.020(1).....	20
RCW 9A.52.020(1)(b).....	1

Rules and Regulations

CrR 3.5.....	2
CrR 3.6.....	2
CrR 6.12(c).....	9, 10
ER 106.....	16, 17
ER 801(c).....	14
ER 801(d)(2)(ii).....	14
ER 802.....	14

Other Authorities

5 Karl B. Tegland, Washington Practice: Evidence § 103.11, at 48 (4th ed. 1999).....	16
WPIC 60.05.....	21
WPIC Nos. 65.03 and 65.02.....	22

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion when it permitted witness Ingram's testimony after properly conducting a competency hearing to determine whether Ingram was intoxicated? (Appellant's Assignment of Error No. 1).

2. Did the trial court properly exclude defendant's self-serving hearsay statement to the police where he claimed the victim Shaun Ingram "swung at [defendant] first." (Appellant's Assignment of Error No. 2).

3. Was there sufficient evidence for a rational trier of fact to conclude that the defendant was guilty of first degree burglary where every element for each offense was proven beyond a reasonable doubt? (Appellant's Assignment of Error No. 3).

B. STATEMENT OF THE CASE.

1. Procedure

On October 10, 2005, the State charged defendant by information with burglary in the first degree (Count I),¹ malicious mischief in the third degree (Count II),² and assault in the fourth degree (Count III).³

¹ RCW 9A.52.020(1)(b).

² RCW 9A.48.090(1), RCW 9A.090(2)(a).

On December 19, 2005, the Honorable Linda Lee heard pre-trial motions pursuant to CrR 3.5 and CrR 3.6. RP 1 (December 19, 2005).⁴ The court ruled that defendant's warrantless arrest inside his home was illegal and suppressed all evidence obtained after defendant's arrest, and suppressed his post arrest statements. CP 67-69, RP 75-76 (December 19, 2006). On January 6, 2006, the court entered formal Findings of Fact and Conclusions of Law regarding its earlier ruling. CP 67-69, RP 6 (January 6, 2006).

On January 3, 2006, motions in limine and jury trial commenced before the Honorable Thomas P. Larkin. At the close of the State's direct examination of victim Shaun Ingram, the court excused the jury and expressed its concerns about Ingram's sobriety. RP 92. After watching Ingram's movements as he took the stand and took the oath, the court was concerned defendant was under the influence of something. RP 92. The prosecutor responded that according to Ingram's mother, Ingram is mildly retarded. RP 92. The court questioned Ingram about his courtroom behavior. RP 94-96. Ingram indicated he was not under the influence of alcohol, drugs, or prescription medication. RP 94. Ingram told the court that he was sick, that his lungs were filled from cigarette smoke, and that

³ RCW 9A.36.041(1), RCW 9A.36.041(2).

⁴ The verbatim Report of Proceedings for this hearing is not paginated sequentially with the Verbatim Report of Proceedings for the trial or sentencing hearing. The State will refer to the Verbatim Report of Proceedings of the pre-trial hearings by "RP" followed by the date of the proceeding.

he was generally not in good health. RP 95. Ingram was under the care of a doctor for possible strep throat, but Ingram had not been prescribed medication. RP 95. When the court inquired whether Ingram's "current condition" was something he experienced every day, Ingram replied, "no." RP 95. Neither the prosecutor nor defense counsel inquired further. RP 96.

Trial counsel requested the court's permission to cross-examine Ingram about his court room behavior. RP 97. Defense counsel wanted Ingram to explain whether he suffered from a "physical limitation" or whether Ingram was under the influence. RP 97. The court limited this inquiry to the incident date. RP 98. The defendant did not present a case. RP 150.

During trial, defendant sought to admit his pre-arrest statement to the deputies that Ingram "swung at me first." RP 19. The defendant intended to admit his statement through the testimony of Deputy Brand. RP 20-21. The State objected on the basis that his evidence was self-serving hearsay. RR 18-19. The court agreed and excluded this evidence. RP 21, 41.

At the close of the case, the State proposed an instruction for the lesser misdemeanor offense of third degree assault for Count II. RP 174.⁵ The court gave this instruction over the defendant's objection. CP 72, RP 175-176. On January 6, 2006, a jury convicted defendant first degree burglary, malicious mischief and fourth degree assault CP 96-98, 208-212. This timely appeal follows.

2. Facts

On October 7, 2005, Pierce County Sheriff's deputies Brand and Inga Carey responded to a dispute between two neighbors that involved a forced entry and an assault. RP 32, 50, 58. While taking a statement from the victim, Shaun Ingram, defendant stood outside the apartment yelling and screaming. RP 33. Ingram advised the deputies that the defendant was the one who assaulted him. RP 52. The deputies attempted to contact defendant. RP 33, 52. Defendant yelled that Ingram was high and that the police should give Ingram a drug test. RP 33, 52. Defendant was aggressive,⁶ very belligerent, and frequently used the "F" word. RP 34, 52-

⁵ Third degree malicious mischief is a gross misdemeanor if the physical damage is in excess of \$50.00, but not exceeding \$250.00. RCW 9A.48.080(1)(a), RCW 9A.48.090(1)(b), and (2)(a). For damages valued less than \$50, the crime is a misdemeanor. RCW 9A.48.090(2)(b). The State originally charged the gross misdemeanor. CP 1-4. During discussion of the proposed jury instructions, the State "orally amended" Count II to reflect the misdemeanor offense. RP 175.

⁶ Deputy Carey compared defendant's behavior to an angry pit bull that barks and shows its teeth, but does not charge. RP 54.

53. When the Deputies tried to contact the defendant, he ran back into his apartment. RP 34. He refused to come outside but agreed to speak to the officers through an open window. RP 52-53. Defendant proceeded to yell from his window that the victim had started rumors about defendant with other residents at the apartments. RP 34. Defendant said he was angry when he knocked on the door, confronted Ingram about the rumors before defendant gave Ingram the “One, two, three.” RP 35, 53. He demonstrated what he meant by moving his hands in a boxing maneuver. RP 35, 53. Defendant would not explain what these rumors were about. RP 36, 40.

The deputies observed that Ingram’s T-shirt was torn, the neck area was stretched out, and Ingram had red marks on his chest. RP 37, 56, State’s Exhibit No. 1. Ingram had a bruise on his left forearm that was red and swollen. RP 38, 55-56, State’s Exhibit No. 2. The deputies observed recent damage to the wall behind Ingram’s front door. RP 36, 46, 55, State’s Exhibit No. 3. The deputies observed white powder on the floor below the hole in the dry wall. RP 47, 62-66. The wall damage was consistent with Ingram’s explanation to the deputies of what had occurred. RP 46, 66. The door was closed when the deputies first arrived. RP 67. Ingram opened it to let the officers inside. RP 67. Unsuccessful with their effort to coax defendant from his apartment, the deputies returned to Ingram’s apartment to complete his statement 36, 56.

Defendant again came out of his apartment and repeated his screaming and yelling about Ingram's sobriety and his desire for the deputies to "check [Ingram] for drugs." RP 39, 57. Ingram did not exhibit signs of being under the influence of drugs or alcohol. RP 39. Defendant repeated his statement that "I went over there, I had to do what I had to do, I gave him the one-two-three." RP 40-41. When the deputies attempted to contact defendant, he ran back into his apartment and refused to come outside. RP 39, 57. The deputies did not observe any signs of harm to defendant or his clothing. RP 40, 58.

Shaun Ingram lived in the same eight unit apartment building as defendant. RP 83. They were friends. RP 83. Defendant sometimes employed Ingram to clean defendant's apartment. RP 84. On October 7, 2005, defendant came over to Ingram's apartment and knocked on the door. RP 84. Ingram opened the door but did not see anyone there. RP 84. Defendant was standing off to the side of the door. RP 84. The window blinds were closed, and Ingram did not see defendant until he looked around the corner. RP 84, 100. At that point defendant forced his way inside Ingram's apartment. RP 84. Defendant shoved the door into the wall causing a hole in the wall behind the door inside the apartment.

RP 85.⁷ Ingram tried to force defendant back outside by pushing the door. RP 85. This action pushed Ingram back. RP 85. Defendant was angry and yelled at Ingram to come outside. RP 87. Defendant was angry at Ingram about rumors defendant believed were being spread to his ex-wife about his actions when his children are around. RP 87. While yelling at Ingram, defendant hit Ingram “in the front” and on his arm. RP 87. Ingram indicated for the jury where defendant struck him. RP 87. Ingram said he never hit him back, but used the door to “glide [defendant] out ...” RP 88. Defendant tried to stop the door with his foot. RP 88. Ingram immediately called the police after he closed the door. RP 88. Defendant remained outside yelling and screaming at Ingram. RP 88.

Prior to the arrival of the police, defendant again knocked on Ingram’s door and yelled at him to come outside. RP 89. When Ingram opened the door, defendant ripped Ingram’s shirt. RP 89-90. Ingram heard the defendant continue to yell after the police arrived. RP 90.

During cross-examination, Ingram indicated he lived with his mother and her boyfriend, though he was alone when the incident occurred. RP 101. Ingram is six foot three inches tall. RP 101. Ingram testified that his ID indicated he was 315 pounds, but he did not feel that was accurate.⁸

⁷ Ingram identified this damage as depicted in State’s Exhibit No. 3.

⁸ The police report indicated his weight was six feet tall and 270 pounds. RP 47.

RP 101. Ingram is 24 years old and has never had a job. RP 103. Ingram was under the care of Center South at Gravelly Lake at the time of the incident, but was expecting a transfer to Reflections Recovery on January 9, 2006. RP 104-05. Defendant denied drinking malt liquor on the date of the incident. RP 105.

Ingram explained that when defendant came into his apartment, defendant was going to kick his butt.⁹ RP 143. In Ingram's written statement, he said, "He [defendant] came down and knocked on my door and shoved his way into my house." RP 141. The court admitted this document as evidence upon defendant's motion. RP 144, Defendant's Exhibit No. 4.

Ingram was nervous during his testimony. RP 82, 86. He had difficulty answering leading questions with a "yes" or "no."¹⁰ RP 86, 91, 105-06, 109-110, 113-114, 119, 121, 128. Ingram explained he was feeling sick. RP 98. When beginning cross examination, trial counsel mistakenly greeted Ingram, "Good afternoon." Ingram corrected counsel by saying, "It's still morning." RP 98. Ingram exhibited limited language skills. For

⁹ Trial counsel initially objected to Ingram's testimony as nonresponsive during his direct testimony, but later inquired about the statement on cross-examination. RP 86, 143.

¹⁰ While the jurors were present, the court commented to Ingram that he tended "to want to ad-lib a little bit and talk about other things that aren't related to the question" and advised Ingram to "focus on just the question." RP 128.

example, when trial counsel referred to the grassy area outside Ingram's apartment as a courtyard, Ingram stated he did not understand the use of this word in conjunction with an apartment complex. RP 120. He thought a courtyard was an area inside the jail. RP 120. Contributing to the confusion was trial counsel's repetitive form of questioning. RP 113, 115, 130, 133-35, 143-144. Even Ingram recognized counsel's behavior and told him so. RP 130, 143. In addition, counsel's quick pace of examination often did not permit Ingram to answer the question before the next question was asked. RP 100. Counsel's questioning was not a model of clarity (RP 116, 117¹¹, 129, 130), and he mischaracterized Ingram's testimony when asking some follow-up questions. RP 116, 133.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY CONDUCTED A HEARING TO DETERMINE INGRAM'S COMPETENCY AND DID NOT COMMIT A MANIFEST ABUSE OF DISCRETION BY PERMITTING INGRAM TO TESTIFY.

“Witness competency is to be determined by the trial court within the framework of RCW 5.60.050 and CrR 6.12(c), and the court's

¹¹ Counsel stated, “ I apologize, Your honor. I'm sorry. That's my fault. I'm the one who has to slow it down, and I get quick on the draw sometimes.” RP 100. Later, counsel stated, “My fault. I have to make myself clearer on that question.”

determination will not be disturbed on appeal except for abuse of discretion. State v. Woods, 57 Wn. App. 792, 790 P.2d 220 (1990)(citing State v. Froehlich, 96 Wn.2d 301, 304, 635 P.2d 127 (1981)). A trial court's opinion on the competency of a witness carries great weight in the appellate courts and will not be disturbed except for manifest abuse of discretion. Froehlich, 96 Wn.2d at 304. Once the judge has determined a witness is competent to testify, the extent to which the witness has the capacity to observe, recollect, and communicate is a matter for the jury to decide. State v. Froehlich, 96 Wn.2d 301, 307, 635 P.2d 127 (1981). The burden is on the party opposing the witness to prove that the witness is incompetent. See State v. Watkins, 71 Wn. App. 164, 173, 857 P.2d 300 (1993).

RCW 5.60.050 states: Who are incompetent. The following persons shall not be competent to testify:

- (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
- (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050, CrR 6.12(c)¹². The trial court is especially cloaked with authority to judge whether a prosecution witness should be compelled to

¹² CrR 6.12(c) states in relevant part: Persons Incompetent to Testify. . . (1) Those who are of unsound mind, or intoxicated at the time of their production for examination . . .

submit to a psychiatric examination. State v. Stamm, 16 Wn. App. 603, 605, 559 P.2d 1 (1976).”

Defendant challenges Ingram’s competency under subsection (2) of RCW 5.60.050, claiming that the trial court “abdicated its duty to resolve the issue of Mr. Ingram’s intoxication.” Opening Brief of Appellant at 18. Defendant’s claim lacks merit.

The first subsection of the mental capacity provision, "unsound mind," refers only to those with no comprehension at all, not to those with merely limited comprehension; a person with a previous history of mental disorders is not necessarily incompetent. State v. Watkins, 71 Wn. App. 164, 857 P.2d 300 (1993). Under this statute, a person is competent to testify if, at the time, he understands the nature of an oath and is capable of giving a correct account of what he has seen and heard. The trial court and its determination will not be disturbed on appeal in the absence of abuse of that discretion. McCutcheon v. Brownfield, 2 Wn. App. 348, 467 P.2d 868, review denied, 78 Wn.2d 993 (1970).

In this case, when viewing in isolation, parts of Ingram’s testimony may seem confusing and disjointed. When viewed in the context of his entire testimony, however, Ingram was actually an articulate witness who was capable of recollecting the incident and communicating the details of the incident in detail. Ingram testified that defendant came over to Ingram’s apartment and knocked on the door. RP 84. Ingram opened the

door but did not initially see anyone there. RP 84. Defendant was standing off to the side of the door and at the corner of the apartment. RP 84, 107-108. The window blinds were closed, and Ingram did not see defendant until he looked around the corner. RP 84, 100. Defendant then ran up behind Ingram as Ingram was going back inside his apartment. RP 109. Defendant forced his way inside Ingram's apartment. RP 84. He shoved open the door forcing the door knob into the wall, which left a hole in the wall behind the door inside the apartment. RP 85.¹³ While defendant is pushing Ingram back inside the apartment, Ingram tried to force defendant back outside the apartment by pushing the door.

Defendant was angry at Ingram about rumors defendant believed were being spread to his ex-wife about his actions when his children are around. RP 87. While yelling at Ingram, defendant hit Ingram "in the front", and on his arm. RP 87. Ingram said he never hit him back, but used the door to "glide [defendant] out ..." RP 88. Defendant tried to stop the door with his foot. RP 88. Ingram immediately called the police after he closed the door. RP 88. Defendant remained outside yelling and screaming at Ingram. RP 88. Ingram testified that defendant ripped Ingram's shirt when Ingram opened the door a second time after defendant returned and knocked on the door. RP 89-90.

¹³ Ingram identified this damage as depicted in State's Exhibit No. 3.

Though Ingram tended to elaborate, the answers he gave were responsive to the questions being asked by counsel and the court. In addition, Ingram's testimony is corroborated by the officer's testimony about the damage to the wall, injuries to Ingram's chest and arm, and defendant's admission to the deputies. Ingram was nervous, was feeling sick, and there was some indication he was mildly retarded. RP 82, 86, 92, 98. In addition, much of the confusion in Ingram's testimony can be explained by the repetitive and sometimes confusing method of trial counsel's examination. Based on this record, Ingram presented himself as a competent and articulate witness. See State v. Smith, 30 Wn. App. 251, 633 P.2d 137, affirmed, 97 Wn.2d 801, 650 P.2d 201 (1981)(although 38-year-old witness with mental age of four and I.Q. of 23 was severely retarded, trial court did not abuse discretion in allowing witness' testimony since witness was able to understand obligation to tell truth and was able to relate basic facts of incident). Defendant has not established Ingram was incompetent. The record here does not disclose the trial court abused its discretion by permitting Ingram's testimony.

2. THE COURT PROPERLY EXERCISED ITS DISCRETION BY EXCLUDING DEFENDANT'S STATEMENT THAT INGRAM "SWUNG FIRST."

Admission of evidence is within the sound discretion of the trial court and will not be disturbed on review absent a showing of abuse of

discretion. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990).

Abuse occurs when the trial court's ruling was manifestly unreasonable or discretion was exercised on untenable grounds. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

Hearsay is generally inadmissible. ER 802. "Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Under the "Admission by Party-Opponent" exception to the hearsay rule, a statement is admissible if offered against a party and is "a statement of which the party has manifested an adoption or belief in its truth[.]" ER 801(d)(2)(ii). Out-of-court admissions of a party are not, however, admissible under this rule when the admissions are self-serving. State v. Nation, 110 Wn. App. 651, 660, 41 P.3d 1204 (2002). "Such out-of-court statements by a nontestifying party are admissible only if offered *against*, not in favor of, that party." State v. Larry, 108 Wn. App. 894, 908, 34 P.3d 241 (2001)(emphasis in original). As noted in Finch, courts have repeatedly recognized:

Out-of-court admissions by a party, although hearsay, may be admissible against the party if they are relevant. However, if an out-of-court admission by a party is self-serving, and in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible under the admission exception to the hearsay rule.

Finch, 137 Wn.2d at 824 (citing State v. Haga, 8 Wn. App. 481, 495, 507 P.2d 159 (1973) (citation omitted); State v. Fullen, 7 Wn. App. 369, 381, 499 P.2d 893 (1972); State v. Huff, 3 Wn. App. 632, 636, 477 P.2d 22 (1970) (other citations omitted).

The court in Finch further observed that:

The problem with allowing such testimony is that it places the defendant's version of the facts before the jury without subjecting the defendant to cross-examination. State v. Bennett, 20 Wn. App. 783, 787, 582 P.2d 569 (1978). This deprives the State of the benefit of testing the credibility of the statements and also denies the jury an objective basis for weighing the probative value of the evidence. Id.

Finch, 137 Wn.2d at 825.

“A defendant's right to admit evidence pursuant to his right to compulsory process is subject to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” Finch, 137 Wn.2d at 825 (citing Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973)).

Defendant contends that the trial court erroneously excluded exculpatory hearsay statement that he made to Deputy Brand shortly after the incident. Defendant told Deputy Brand that “He [Ingram] swung at me first.” RP 18, 33 (December 19, 2005), RP 18. This hearsay statement is clearly inadmissible as self-serving hearsay. Defendant was simply trying

to put forth his version of the facts before the jury without facing the crucible of cross-examination. The trial court did not err when it excluded this evidence.

For the first time on appeal, defendant next contends that the trial court violated the “rule of completeness” under ER 106 when it refused to admit defendant’s hearsay statement. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). "If a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial." 5 Karl B. Tegland, Washington Practice: Evidence § 103.11, at 48 (4th ed. 1999)(footnote omitted) See also State v. Hettich, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993)(holding that Hettich could not raise a Frye objection on appeal because he did not make a Frye objection at trial).

Here, trial counsel sought to have defendant’s statement admitted under the “admission by party-opponent” exception to the hearsay rule. RP 19-21. As such, defendant has not adequately preserved this issue for appeal.

Even if this court reaches the merits of defendant's claim, his claim fails. ER 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it. ER 106.

By its plain terms, the rule covers written or recorded statements. Here defendant's oral statement falls outside the scope of this rule.

Defendant, upon State v. Larry, 108 Wn. App. 894, 34 P.3d 241 (2001), review denied, 146 Wn.2d 1022, 52 P.3d 521 (2002), which adopted the following test requiring the court to determine, "whether the offered portion of the statement is necessary to: 1) Explain the admitted evidence, 2) Place the admitted portions in context, 3) Avoid misleading the trier of fact, and 4) Insure fair and impartial understanding of the evidence." Larry, 108 Wn. App. at 910 (quoting, United States v. Haddad, 10 F.3d 1252, 1259 (7th cir. 1993)).¹⁴ Defendant's reliance on Larry is misplaced. Larry is distinguishable. In Larry, the offered statements were redacted from defendant's tape recorded confession. Larry, 108 Wn.App. at 908. Here, defendant's oral statements were made prior to his arrest and were never part of a formal confession. Indeed, trial counsel explained to the court that defendant's statement "was unresponsive to any true question, but it was (sic) when the law enforcement initially arrived at the

scene.” RP 19. As such, his statements to the police were never reduced to writing or tape recorded.

Even if this court applied the four-part test as adopted by this court in Larry, defendant’s claim fails. Here, the admission of defendant’s statement that Ingram “swung first” is not necessary to explain the admitted evidence. Without more, the statement is not even exculpatory. Defendant’s statement does not exonerate his behavior or explain his decision to confront Ingram in his home with violence as a form of revenge. Whether Ingram hit defendant while defendant barged into Ingram’s home is inadequate grounds for self-defense. Moreover, the exclusion of the defendant’s statement did not mislead the jury or prevent defendant from receiving a fair and impartial understanding of the evidence. Accordingly, the trial court did not abuse its discretion when it excluded defendant’s statement.

3. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR A RATIONAL JURY TO CONVICT DEFENDANT OF FIRST DEGREE BURGLARY.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle

¹⁴ State v. Velasco, 953 F.2d 1467, 1475 (7th Cir. 1992).

v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003), State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965). All reasonable inferences from the evidence must be drawn in favor of the State, and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, courts must defer to the trier of fact on issues of conflicting testimony, credibility determinations, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations;

the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given, should make these. On this issue, the Supreme Court has said:

great deference . . . is to be given to the trial court's factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witnesses' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld. "In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case." State v. Dejarlais, 88 Wn. App. 297, 305, 944 P.2d 1110 (1997).

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 (a) is armed with a deadly weapon, or (b) assaults any person. RCW 9A.52.020(1). The court instructed the jury that a person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime. CP 83, Instruction No. 9. The jury was permitted to infer defendant's intent to commit a crime

against Ingram from his unlawful entrance into the apartment. CP 87, Instruction No. 13.¹⁵ The court further instructed the jury that “the term enter includes the entrance of the person, or the insertion of any part of the person’s body” and that a person enters or remains unlawfully when he or she is not then licensed, invited, or otherwise privileged to so remain.” CP 85, Instruction No. 11, CP 84, Instruction No. 10.¹⁶

To convict defendant of fourth degree assault, the State must prove that under circumstances not amounting to assault in the first, second, or third, or custodial assault, he or she assaults another. RCW 9A.36.041. “Washington recognizes three means of assault: (1) assault by actual battery; (2) assault by attempting to inflict bodily injury on another while having the apparent present ability to inflict such injury; and (3) assault by placing the victim in reasonable apprehension of bodily harm.” State v. Hall, 104 Wn. App. 56, 63, 14 P.3d 884 (2000). The trial similarly instructed the jury. CP 88, Instruction No. 14.

In this case, Ingram did not give defendant permission to enter Ingram’s apartment. RP 85. Defendant believed Ingram was the source of alleged rumors that defendant believed were spread from residents at his apartment to his ex-wife. RP 34-35, 87. Determined to confront Ingram about these rumors, defendant knocked on Ingram’s door then retreated around the corner to avoid being seen. RP 84-85, 100. Defendant was

¹⁵ WPIC 60.05

angry. RP 35, 40, 87. When Ingram started back inside his apartment, defendant forced his way inside with such force that the door knob punched a hole in the dry wall inside the apartment. RP 37, 55, 84-85, State's Exhibit No. 3. As defendant pushed open the door, he pushed Ingram into the apartment. RP 85.

Once inside, defendant yelled at Ingram and hit him in the chest and left arm causing redness and swelling. RP 37, 56, 87. State's Exhibit Nos. 1 & 2. Defendant attempted to prevent Ingram from closing the door. RP 88. Defendant also tore Ingram's shirt. RP 37, 56, 90, State's Exhibit No. 1. As defendant told Deputy Brand, "I had to do what I had to do, I gave him the one-two-three." RP 40. Defendant continued to show his hostile demeanor after the deputies arrived. RP 33, 52-53, 88, 90. Ingram was so "shook up" after the incident he had trouble including details of the incident in his written statement to the police. RP 116.

Based on this evidence, a rational jury did reasonably conclude that defendant intended to enter, and did enter, Ingram's dwelling to intimidate and assault him. As such, the State presented sufficient evidence for a rational fact finder to find defendant guilty of first degree burglary.

¹⁶ WPIC Nos. 65.03 and 65.02.

D. CONCLUSION.

For the foregoing reasons, the State requests this court affirm defendant's convictions for first degree burglary, malicious mischief, and fourth degree assault.

DATED: December 27, 2006

GERALD A. HORNE
Pierce County
Prosecuting Attorney

Michelle [unclear] WSBA 32724 for
Todd A. Campbell
Deputy Prosecuting Attorney
WSB# 21457

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/27/06 [unclear]
Date Signature

FILED
COURT OF APPEALS
DIVISION II
06 DEC 27 PM 3:51
STATE OF WASHINGTON
BY DEPUTY