

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

RYAN JAMES BREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D10-3893

Opinion filed August 23, 2011.

An appeal from the Circuit Court for Santa Rosa County.
Thomas R. Santurri, Judge.

Nancy A. Daniels, Public Defender, and Gail E. Anderson, Assistant Public
Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Heidi Milan Caballero, Assistant Attorney
General, Miami, for Appellee.

WOLF, J.

Appellant challenges his conviction and sentence for burglary of a dwelling with assault or battery. We find the trial court erred in denying appellant's motion for judgment of acquittal. The evidence established appellant entered the apartment he shared with his girlfriend, he was paying at least half of the bills and expenses for the apartment, and his belongings were still in the apartment. There

was no evidence presented that appellant had abandoned the apartment. Witnesses testified appellant intended to move out in the future, but he had not yet done so. See Whetstone v. State, 778 So. 2d 338, 342 (Fla. 1st DCA 2000) (“[P]roof of abandonment of leased premises requires that there must be ‘an intent to abandon and conduct by which the intention is carried into effect, or such a relinquishment by the tenant as will justify an immediate resumption of possession by the landlord.’”) (quoting Bobo v. Vanguard Bank & Trust Co., Inc., 512 So. 2d 246, 247 (Fla. 1st DCA 1987)).

Furthermore, there was no evidence presented that appellant’s girlfriend revoked her consent to him living in the apartment. To the contrary, a witness testified she called appellant on the night of the incident and asked him to continue living there. See D.R. v. State, 734 So. 2d 455, 459-60 (Fla. 1st DCA 1999) (finding insufficient evidence of burglary where “[n]othing in the record suggests that consent to enter, once given to [the defendant], was ever withdrawn expressly or by implication and communicated to him”). Therefore, we reverse and remand with instructions that appellant be discharged.

REVERSED AND REMANDED, with instructions.

DAVIS and MARSTILLER, JJ., CONCUR.