

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, )  
 )  
 Respondent, ) No. 63492-5-I  
 )  
 v. ) DIVISION ONE  
 )  
 ALEXANDRE MONTEIRO, ) UNPUBLISHED OPINION  
 )  
 Appellant. ) FILED: July 26, 2010

Grosse, J. — Undisputed evidence that the defendant broke into the victim’s house and assaulted the victim is sufficient to support a conviction for first degree burglary. The mere fact that the defendant had a key to the residence and sometimes stayed there is insufficient to establish a lawful right to be on the premises. Moreover, here, the defendant told police that he lived at a different address, which was verified by his driver’s license. A rational trier of fact could find from this evidence that the defendant committed first degree burglary.

Alexandre Monteiro argues that the first aggressor instruction precluded the jury from considering his claim that he acted in self-defense on the third degree assault. While it was error to give the instruction, any error was harmless. Monteiro also raises additional issues in his statement of additional grounds, but none have merit. Accordingly, we affirm the judgment and sentence.

**FACTS**

Raquel Santos testified that she and Monteiro started dating each other in September 2007. At that time Monteiro was living with his grandmother in Tacoma, where he went to school and worked. In approximately February 2008, Santos and her

sister rented the lower portion of a three bedroom house in Kirkland. Monteiro travelled between Tacoma and Kirkland. Eventually he obtained a job with Costco in Kirkland and spent more time at Santos' house. Monteiro had a key to the house and sometimes stayed over.

On July 12, 2008, Santos and Monteiro attended a birthday celebration for Marconi Demoraes, a mutual friend. Prior to going to the party, the two argued about Santos' friendship with Demoraes. Santos and Monteiro arrived at the party separately, where both consumed alcohol. They left together in Monteiro's car and started arguing again on the way home. Monteiro cursed at Santos and belittled her as they arrived at the house. Monteiro accused Santos of abandoning her son in Brazil.<sup>1</sup> Santos put her finger in Monteiro's face and told him to stop. Monteiro hit her hand and Santos pushed back. Monteiro slapped her face and Santos ran to the bathroom. Monteiro threw Santos against the wall, she fell, and Monteiro kicked her and pushed her down. Santos had bruises on her back from his shoes. She managed to stand up and push back, but Monteiro banged her head repeatedly against the wall. At some point, Santos bit Monteiro on the back. She finally escaped outside and he followed with a car stereo speaker in his hand.

Santos circled around the yard and the car and went back into the house. She told Monteiro to leave and locked the door. She ran into her bedroom and locked that door also. Monteiro broke into the house by smashing the glass in the patio doors. He then broke into her bedroom door and tried to strangle her. He called her a prostitute and told her he did not care if she died. Santos bit Monteiro on his stomach as he was

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<sup>1</sup> Santos had a 6-year-old child who remained in Brazil with her family.

strangling her.

Monteiro left Santos' house and drove to a nearby gas station. He parked the car and fell asleep. Monteiro was awoken by a police officer conducting a welfare check in response to a call. Officer Brian Farman observed Monteiro sleeping in the driver's seat with the car door open, and vomit on the ground nearby. He noticed that Monteiro had alcohol on his breath and appeared to be bleeding from his hand, arm, and eye. Monteiro told the officer that he had broken up with his girl friend and that he lived in Tacoma, at the address listed on his driver's license.

After paramedics arrived, Officer Farman drove to Santos' house to check on her. He went through the back gate and saw the shattered glass door. Santos had significant bruises on her arms, neck, and face, as well as blood on her clothes. Officer Farman photographed Santos' numerous injuries: a swollen left eye, visible fingerprint marks on her right 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' upper left shoulder.

Officer Julie Valencia testified that Santos reported to her that her boyfriend had hit, kicked, and strangled her, and knocked her around. Monteiro was arrested at home in Tacoma. While being transported to King County, Monteiro told Officer Robert Deal that he and his girl friend had attended a party the night before where he had drunk between 10 and 15 beers and that his elbow and wrist were bandaged because he put his fist through the glass door after Santos had locked him out.

Monteiro did not testify, but called two witnesses on his behalf, his mother and a

forensic pathologist. His mother testified that Monteiro had been living with Santos the previous June and that a few days before the incident, he had purchased a dresser for his clothes that he moved into Santos' house. Santos testified that Monteiro's mother had given the dresser to her to replace one that had been broken.

A jury convicted Monteiro of second degree assault (strangulation), first degree burglary, third degree assault, and second degree malicious mischief. Monteiro appeals his convictions for burglary and third degree assault.

### ANALYSIS

#### Burglary

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.<sup>2</sup> "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."<sup>3</sup> "Credibility determinations are for the trier of fact and are not subject to review."<sup>4</sup> We must defer to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.<sup>5</sup> A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather whether any rational trier of fact could be so convinced."<sup>6</sup>

Monteiro was charged with first degree burglary under RCW 9A.52.020(1),

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<sup>2</sup> State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).

<sup>3</sup> State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

<sup>4</sup> State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

<sup>5</sup> Thomas, 150 Wn.2d at 874-75.

<sup>6</sup> State v. Smith, 31 Wn. App. 226, 228, 640 P.2d 25 (1982) (emphasis omitted).

which provides in pertinent part:

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 . . . assaults any person.

Monteiro argues that he lived with the victim and that he had a legal right to be on the premises. Monteiro cites State v Wilson<sup>7</sup> to support his legal status. But the facts in Wilson are markedly different from those here. Wilson was a co-signer on the lease, the assault victim stated that Wilson lived there, and a prior no contact order did not prohibit Wilson's presence at the residence.<sup>8</sup> Here, the victim testified that Monteiro did not live at her house, was not a party to the oral rental agreement with her landlord and, further, did not pay any rent. Additionally, Monteiro told the police that he lived in Tacoma.

Even if we were to construe Monteiro's possession of a key to the house as giving him permission to be there, any privilege or license to be there was revoked when the victim told him to leave and locked the doors to her house. Under these circumstances, a rational trier of fact could find that Monteiro was guilty of burglary beyond a reasonable doubt.

#### First Aggressor Instruction

A first aggressor instruction is appropriate when there is credible evidence that the defendant provoked the use of force, including provoking an attack that necessitated the defendant's use of force in self-defense.<sup>9</sup> Aggressor instructions are

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<sup>7</sup> 136 Wn. App. 596, 150 P.3d 144 (2007).

<sup>8</sup> Wilson, 136 Wn. App. at 612.

<sup>9</sup> State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999).

not favored and trial courts should employ caution in giving them.<sup>10</sup>

Monteiro's theory of the case was that he was acting in self-defense. Over the State's objection, the trial court gave a self-defense instruction.<sup>11</sup> The trial court based its decision to give that instruction on the evidence presented that Santos had bitten Monteiro twice and wagged her finger at him. The State then argued for an aggressor instruction, basing its request primarily on Monteiro's smashing the door of the victim's apartment before the second assault for strangulation. Monteiro objected, arguing insufficient evidence.<sup>12</sup> The trial court issued an aggressor instruction but did not specifically limit its application to the second degree assault. The court issued the approved aggressor instruction:

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

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<sup>10</sup> Riley, 137 Wn.2d at 910 n.2.

<sup>11</sup> The self-defense instruction was in accord with WPIC 17.02 and provided:

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.

<sup>12</sup> The State argues that Monteiro waived his right to appeal the instructional error because he only argued insufficient evidence at trial and did not specifically object to the wording of the instruction. This claim has no merit as the issue on appeal is whether there was sufficient evidence to offer this instruction for the third degree assault.

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.<sup>[13]</sup>

Monteiro argues that it was error to give the instruction because there was no credible evidence that Monteiro acted as the first aggressor for the third degree assault. The State concedes in its brief that the "evidence did not show that Monteiro acted as the first aggressor of the first assault." We agree it was error to give the aggressor instruction. Indeed, it was also error to give the instruction for self-defense. Under the circumstances here, no rational trier of fact could conclude that Monteiro acted in self-defense. Thus, any error was harmless.

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that "any reasonable jury would have reached the same result in the absence of the error."<sup>14</sup> The record here reveals physical abuse heaped upon the victim, none of which can be characterized as self-defense. Wagging a finger in front of someone's face might be cause for annoyance, but certainly not for the response it generated. Monteiro's reaction was to slap Santos, throw her against the wall, and kick her with such force that his shoes left a visible imprint on her shoulder. These actions are not the response a "reasonably prudent person would use." Under the facts of this case, no rational trier of fact could reasonably conclude that self-defense was available to the defendant. A self-defense claim is not valid when the defendant himself provoked the situation through intentional actions that were reasonably likely to cause

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<sup>13</sup> 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 16.04, at 241 (3rd ed. 2008) (WPIC).

<sup>14</sup> State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

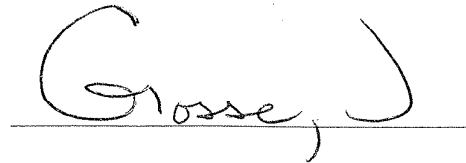
a hostile response.<sup>15</sup> No reasonable jury could have found that Monteiro's acts were acts of lawful self-defense.<sup>16</sup> Thus, the erroneous first aggressor instruction did not interfere with Monteiro's right to self-defense.

Statement of Additional Grounds

Monteiro argues that the court should reconsider Santos' testimony and examine her motives for testifying against him. Monteiro's counsel vigorously cross-examined Santos when she was on the witness stand. The credibility of witnesses is for the trier of fact and is not subject to review.<sup>17</sup>

Next, Monteiro claims that Santos engaged in witness tampering. There is nothing in the record to support this allegation.<sup>18</sup> Monteiro's third assignment of error essentially raises the same arguments regarding the burglary conviction that his appellate attorney raises in her brief. For the reasons discussed above, we have already rejected these claims.

We affirm.

A handwritten signature in black ink, reading "Grosse, J.", is written over a horizontal line. The signature is cursive and appears to be the name of a judge.

WE CONCUR:

<sup>15</sup> State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989).

<sup>16</sup> State v. Stephens, 93 Wn.2d 186, 190-191, 607 P.2d 304 (1980).

<sup>17</sup> Thomas, 150 Wn.2d at 874-75.

<sup>18</sup> See RAP 10.10(c).



Spencer, J.

Appelwick, J.