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

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| STATE OF WASHINGTON, | ) | No. 67062-0-I |
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| Respondent, | ) | DIVISION ONE |
| | ) | |
| v. | ) | |
| | ) | |
| JOHN PATRICK CHOAT, | ) | UNPUBLISHED |
| | ) | |
| Appellant. | ) | FILED: September 17, 2012 |
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| | ) | |

Cox, J. — John Patrick Choat appeals his first degree burglary conviction, arguing that the State failed to prove beyond a reasonable doubt that he unlawfully entered a building with the requisite criminal intent. We hold that there was sufficient evidence for the trier of fact to find Choat guilty beyond a reasonable doubt. Choat also raises two additional issues in his Statement of Additional Grounds, neither of which requires reversal. We affirm.

Andrea Lukken and Choat were involved in a contentious romantic relationship until 2010. They often argued and broke up, only to resume their relationship. Prior to the incident in question, Lukken claims she had finally ended their relationship, though Choat felt that they were still together.

On the morning of the events leading to the burglary and assault charges, Lukken and Choat confronted each other in front of a local bar. They then went their separate ways. Choat reentered the bar and continued playing in a pool

tournament. Lukken spent the day at a friend's barbecue.

Later that day, Lukken and her friend, Dan Kowzan, returned to the house in which Lukken was staying. Lukken was housesitting for two friends, Dominic Cameron and Marco Pugh. Upon seeing Lukken return to the house, her neighbor called Choat to report her arrival. Choat then drove to the house, entered through an unlocked screen door at the front of the house, and proceeded to the kitchen. There he found a surprised Lukken and Kowzan. Choat claims that Kowzan picked up an empty beer bottle and held it at him threateningly. But both Kowzan and Lukken testified that Choat entered the kitchen and, unprovoked, began to attack Kowzan. As a result of the assault, Kowzan sustained multiple facial fractures and a torn retina.

The State charged Choat with first degree burglary and first degree assault. Choat waived his right to a jury trial, and claimed self-defense. The court convicted Choat of the lesser-included offense of second degree assault and of first degree burglary.

Choat appeals.

**SUFFICIENCY OF EVIDENCE**

Choat argues that the State presented insufficient evidence to prove the essential elements of first degree burglary, and that the trial court's findings of fact and conclusions of law did not support his conviction for first degree burglary. We disagree.

When a defendant claims insufficiency of the evidence, we must

determine whether any rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt.[1] In making this determination, we view the evidence in the light most favorable to the State.[2] All reasonable inferences are drawn in favor of the State, and the evidence is interpreted most strongly against the defendant.[3] We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence.[4]

A trial court's findings of fact are reviewed for substantial evidence.[5] Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth.[6] If this standard is satisfied, we will not substitute our judgment for that of the trial court.[7] Unchallenged findings of fact are verities on appeal.[8] This court reviews de novo the trial court's conclusions of law to

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[1] State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

[2] Id.

[3] State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999); State v. Joy, 121 Wn.2d 333, 339, 851 P.2d 654 (1993).

[4] State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000).

[5] Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

[6] Id.

[7] Croton Chem. Corp. v. Birkenwald, Inc., 50 Wn.2d 684, 685, 314 P.2d 622 (1957).

[8] State v. Luther, 157 Wn.2d 63, 78, 134 P.3d 205 (2006) (citing State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); State v. Alvarez, 105 Wn. App.

determine if they are supported by the findings of fact.[9]

To support a charge of burglary, the State must prove beyond a reasonable doubt that the defendant entered or remained unlawfully in a building with the intent to commit a crime.[1] It must also prove that while in the building, the defendant assaulted another.[11]

*Unlawful Entry*

First, Choat argues that the State presented insufficient evidence to prove that he entered the house unlawfully. We disagree. The trial court entered findings of fact regarding Choat's unlawful status in the house. These findings were supported by substantial evidence in the record.

"Entry into a residence is unlawful if it is made without invitation, license[,] or privilege. License to enter a premises may be granted only by the person who resides in or otherwise has authority over the property."[12] The trier of fact may infer "a limitation on or revocation of the privilege to be on the premises . . . from the circumstances of the case."[13]

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215, 220, 19 P.3d 485 (2001)).

[9] Bingham v. Lechner, 111 Wn. App. 118, 127, 45 P.3d 562 (2002) (citing City of Seattle v. Megrey, 93 Wn. App. 391, 393, 968 P.2d 900 (1998)).

[1] RCW 9A.52.020.

[11] Id.

[12] State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d 394 (1998) (citing State v. Thomson, 71 Wn. App. 634, 637-38, 861 P.2d 492 (1993); see State v. Woods, 63 Wn. App. 588, 590, 821 P.2d 1235 (1991); RCW 9A.52.025(1)).

[13] State v. Collins, 110 Wn.2d 253, 261, 751 P.2d 837 (1988).

> Here, the trial court entered the following challenged finding of fact:
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> 14. There was nothing that even approximated an open invitation for Choat at that house. The house was not his residence or building and was the building of another. ***On the date of this incident Choat was not expressly or impliedly invited into the house***.[14]

This finding was supported by substantial evidence in the record. One of the renters of the house, Dominick Cameron, testified that "[Choat] been over there a couple times early on when I first met him. But as far as later, no, . . . [Lukken] was having a few problems with their relationship. And she kind of wanted to have a little getaway place, a peace place where he was ***not allowed to go. So he wasn't really supposed to be over there***.[15]

Similarly, during her testimony, Lukken stated that Choat had only visited the house on two occasions when she was housesitting, thus confirming that he did not have a general privilege to enter. "Other than that, no, he did not go inside the residence or backyard."[16] She testified that Choat was "quite aware [that] he was not allowed to be" at the house.

Further, in Lukken's reports to the police given on the night of the incident, she stated that "Choat arrived uninvited, just came inside the residence . . . ." Thus, there was sufficient evidence in the record to support the trial court's finding that Choat was not invited, nor did he have either license or

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[14] Clerk's Papers at 29 (emphasis added).

[15] Report of Proceedings (March 1, 2011) at 49 (emphasis added).

[16] Report of Proceedings (Feb. 28, 2011) at 74.

privilege, to enter the house.

Choat relies on State v. Miller[17] to support his argument that the State failed to prove that he had a criminal intent when he entered the house, but that case is unpersuasive. There, the defendant entered an open self-service car wash and broke into several coin boxes.[18] Division Three of this court reversed Miller's conviction for second degree burglary.[19] It held that "Washington law does not provide that entry or remaining in a business open to the public is rendered unlawful by the defendant's intent to commit a crime. . . . Burglary requires proof of an unlawful entry or remaining and intent to commit a crime."[2] Because Miller's theft occurred at a car wash, which was open 24 hours a day to the public, there was no unlawful entry or remaining.[21] But, here, as we have discussed above, the trial court's finding that Choat did not impliedly or expressly have an invitation to enter the house was supported by substantial evidence in the record. Further, an open car wash is distinct from a private residence that Choat had no authority to enter.

Choat also contends that the court did not resolve the disputed question whether Lukken had invited Choat to the home on the day in question. Thus, he

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[17] 90 Wn. App. 720, 954 P.2d 925 (1998).

[18] Id. at 722.

[19] Id.

[2] Id. at 725

[21] Id. at 722.

argues that the State did not prove the essential element of Choat's unlawful entry. This argument is unpersuasive. As noted above, finding of fact 14 stated that "[o]n the date of this incident Choat was not expressly or impliedly invited into the house."[22] This applies both to Lukken and the owners of the house. This finding was supported by substantial evidence in the record. Thus, no absence of an essential finding existed. While Choat testified that Lukken told him earlier in the day that they needed to talk, Lukken testified otherwise. We do not reweigh witness credibility.[23]

Choat also argues that the fact that the front door was open on the night in question signaled an invitation to someone in his position. This argument is unpersuasive. The trial court found that Lukken "did not lock the door. The screen door was open." But, whether or not the front door was open, Choat still did not have license or privilege to enter the house.

*Intent*

Choat also argues that the facts found by the trial court "strongly imply" an absence of criminal intent, and thus, the State failed to present sufficient evidence to support Choat's conviction. We disagree.

First degree burglary requires that the State prove beyond a reasonable doubt that a person who unlawfully enters a building also has the intent to

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[22] Clerk's Papers at 29.

[23] State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997) (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

commit a crime against a person or property therein.[24] "Intent, being a state of mind, can be inferred by the [trier of fact] from all of the facts and circumstances surrounding the act."[25] This inference must be reasonably based on the evidence presented.[26]

Here, the court entered findings of fact, supported by substantial evidence in the record. The court entered the following challenged findings of fact:

> 21. Choat [entered the house] quietly and then probably says [sic] something along the lines of "what is going on? What is happening here?" He took both [Kowzan and Lukken] by surprise, since they didn't expect him.
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> 22. Choat went in angry and upset and was not walking slowly but was moving quickly.
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> 23. Kowzan stood up and turned slightly and [then] was hit on the right side of the face by Choat's right hand.
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> 24. Kowzan appeared to be trying to figure out some way to react to a surprise invader in the house. But before he could do anything he was struck. . . .
> . . . .
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> 26. Choat was not defending himself.[27]

These findings were supported by both Lukken's and Kowzan's testimony. Kowzan stated that, when Choat entered the kitchen, "all I have a recollection of is the look of shock and surprise on Andrea's face . . . ."[28] In response to

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[24] RCW 9A.52.020.

[25] State v. Lewis, 69 Wn.2d 120, 123, 417 P.2d 618 (1966) (citing State v. Willis, 67 Wn.2d 681, 409 P.2d 669 (1966)).

[26] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[27] Clerk's Papers at 30.

whether he saw Choat come into the kitchen, Kowzan said, "[a]s far as I recollect I never saw him at all. It happened awfully fast. I don't think she had time to utter a word."[29]

Lukken also testified that, after entering the kitchen, Choat "went straight at Dan, basically sucker punched him. Dan didn't see it coming. Dan tried to get up. At that time, John picked him up, pushed him into the glass table."[3] This testimony substantially supports the findings that Choat entered the house quietly, surprising Lukken and Kowzan, and then attacked Kowzan almost immediately.

In turn, these findings could fairly lead the court to infer that Choat entered with the intent to commit a crime. Thus, the court's conclusion of law that Choat entered the building with the intent to commit a crime was supported by the factual findings. The State presented sufficient evidence for the trial court to find that Choat had the requisite intent for first degree burglary.

**STATEMENT OF ADDITIONALGROUND**

Choat raises two additional issues in his statement of additional grounds for review. Neither is persuasive.

First, Choat argues that a State witness's testimony was improper as he was not properly "qualified" to take the stand. This argument is unsupported by

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[28] Report of Proceedings (March 1, 2011) at 66.

[29] Id.

[3] Report of Proceedings (Feb. 28, 2011) at 83.

either rational argument or citation to pertinent authority. Accordingly, we do not address it further.

Second, Choat argues that the court should have accepted an argument that his assault and burglary were the "same criminal content." Thus, he contends that the court erred when it applied the burglary antimerger statute.

RCW 9A.52.050, the burglary antimerger statute, provides: "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." This statute "gives the sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct."[31] Here, after a lengthy discussion regarding the antimerger statute, the trial court ruled that it was "going to exercise [its] discretion and apply the anti-merger statute."[32] That decision was not an abuse of discretion.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Appelwick, J.

Ellington, J.

[31] State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992).

[32] Report of Proceedings (March 31, 2011) at 13.