No. SC97070

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ROBERT E. STEWART,

Appellant.

Appeal from the Circuit Court of St. Francois County
24th Judicial Circuit
The Honorable Sandra Martinez, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. Robert Stewart (Defendant) appeals from a St. Francois County Circuit Court judgment convicting him of unlawful use of a weapon, burglary in the first degree, armed criminal action, and domestic assault in the third degree, for which he received a total sentence of 15 years' imprisonment. (L.F. 50-51).

Defendant was charged by information in Count I with the class B felony of unlawful use of a weapon, for knowingly discharging a firearm at a habitable structure possessed by T.S.; in Count II with the class B felony of burglary in the first degree, for knowingly remaining unlawfully in an inhabitable structure possessed by T.S., while T.S. was present, for the purpose of committing domestic assault in the third degree therein; in Count III with the unclassified felony of armed criminal action, for committing burglary in the first degree by, with, and through the knowing use, assistance, and aid of a deadly weapon; and in Count IV with the class A misdemeanor of domestic assault in the third degree, for purposely placing T.S. in apprehension of immediate physical injury by threatening to kill her and firing a gun into her home. (L.F. 11-12). The jury found Defendant guilty on all four counts as charged. (L.F. 8, 35-38). The trial court subsequently followed the jury's recommendations and sentenced Defendant to 15 years' imprisonment on Count I, 5 years' imprisonment on Count II, 3 years'

imprisonment on Count III, and 1 day's imprisonment on Count IV, all to be served concurrently and with credit for time served. (L.F. 8-9, 43-46, 50-51; Tr. 216).

Defendant challenges the sufficiency of the evidence to support his convictions for burglary in the first degree, armed criminal action, and domestic assault in the third degree. (Def's Br. 9-10). Defendant does not challenge the sufficiency of the evidence to support his conviction for unlawful use of a weapon. (Def's Br. 9-10). Viewed in the light most favorable to the verdict, the evidence presented at trial showed the following:

On the morning of January 23, 2015, Defendant knocked on his ex-wife, T.S.'s (Victim), bedroom door, waking her up. (Tr. 94-98, 110). Victim testified that she and her friend, Chad, then exited the bedroom. (Tr. 96-98). Victim saw Defendant standing inside the house by the back door holding a black handgun. (Tr. 98-99). Victim immediately told Defendant, "Get the fuck out of the house." (Tr. 99, 111). In response, Defendant looked at Victim and fired the gun toward the ceiling. (Tr. 100, 111). Victim admitted that that "startled" her and that she was aware that being shot from that range would "do some damage." (Tr. 100). Victim then told Defendant "more forceful[ly]" to "get the fuck out." (Tr. 100). Defendant told Victim that "he'd kill [Chad] and kill [Victim] next." (Tr. 101-02, 112, 121). Defendant then walked out of the house. (Tr. 100-02). While Victim walked toward the back door to close it, she

immediately heard another gunshot and the sound of glass breaking. (Tr. 102-03). Victim saw a bullet hole in the window by the door. (Tr. 103). Victim couldn't see through the back door to where Defendant was, but she knew that he was somewhere outside. (Tr. 103, 106, 112). When asked if she was scared at that point that she could get hit by a bullet, Victim replied that she didn't remember how she felt but said, "I guess." (Tr. 105). Victim shut the door and heard Defendant's truck start up and leave the property. (Tr. 105-06).

On cross-examination, Victim testified that she wasn't afraid of Defendant and didn't think Defendant was trying to hurt her. (Tr. 107). Victim testified that she was not afraid when Defendant threatened to kill her and her friend and agreed that Defendant was "just blowing steam." (Tr. 112). Victim testified that she was never in apprehension of immediate physical injury. (Tr. 123). Victim admitted that both her friend, Chad, and another individual—possibly a neighbor—called the police following the incident. (Tr. 107, 113, 126). Victim also admitted that she continued to see Defendant at jail after he got arrested. (Tr. 113). Victim admitted that she had spoken to defense counsel two or three times prior to trial, and when asked if she did not want Defendant to "get into trouble here today," Victim replied, "I don't know." (Tr. 113-14).

Deputy Jim Wilson of the St. Francois County Sheriff's Department

responded to what he referred to as "[Victim's] residence" in reference to shots having been fired. (Tr. 124-25). Upon arrival, Deputy Wilson spoke to Victim. (Tr. 125). Defendant was not present. (Tr. 126). Deputy Wilson observed damage to the ceiling of the back porch consistent with the entrance of a bullet in the location where Victim told him that Defendant had been standing and had fired a gun. (Tr. 126). A P.P.U. .32 caliber shell casing was found on the floor inside the house. (Tr. 127-28, 130). The deputy also observed a hole in the window, fresh glass below the window, and another bullet entrance in the ceiling inside. (Tr. 128). A P.P.U. .32 caliber shell casing that matched the one found inside the house was also found outside the house. (Tr. 128, 130).

Defendant and Victim were married from 2005 until they divorced in January 2014, approximately a year before the charged incident. (Tr. 94-95). Afterwards, they attempted to reconcile and resided together at times, though they remained divorced. (Tr. 94-95). Defendant and Victim "pool[ed]" their resources and paid a "$5,000 down payment" on the house in which the incident later took place. (Tr. 108, 120). Victim described it as a "rent-to-own" agreement and that they had planned on buying the house, though they didn't yet own the house at the time of the incident. (Tr. 108, 118-20). There was no formal lease or contract. (Tr. 118, 120). Victim agreed that both she and Defendant had contributed money toward the house. (Tr. 110, 119-21).

Victim testified that "about a week" before the charged incident, Defendant did not come home one night and Victim told Defendant not to come back to the house, at which point Defendant stopped living in the house. (Tr. 95-96, 119). Defendant "stayed" in a camper outside the house "some." (Tr. 96, 109, 119). Victim agreed that Defendant still had "all of his stuff" inside the house, including clothes and toiletries, on the date of the incident. (Tr. 108-09). Victim did not get a protection order against Defendant prior to the charged incident. (Tr. 110-11). Victim testified that even after Defendant stopped living inside the house, he would still come into the house to eat meals, shower, and "rehab" or "fix" the house up. (Tr. 109-10). Victim testified that they continued to "live together all through the rest of 2015." (Tr. 113).

On January 23, 2015, the date of the incident, Victim, Victim's grandmother, Victim's uncle, and Victim's friend, Chad, were all inside the house. (Tr. 96). Victim agreed that at some point prior to the incident she had told Defendant that she needed firewood for the wood stove in order to heat the house. (Tr. 110, 117). But Victim testified that she had been asleep and did not know that Defendant was inside the house on the date of the incident until he "pounded" on her bedroom door. (Tr. 110-11, 117-18). Victim testified that she told Defendant to "get out" because he was no longer living in the house. (Tr. 119). When Victim told Defendant to leave, Defendant did not claim any right to be in the house and eventually left. (Tr. 119-20).

At the close of the State's evidence, Defendant filed a motion for judgment of acquittal, arguing that the State had failed to prove both that Victim had been placed in apprehension of immediate physical injury and that Defendant had unlawfully remained in the house. (Tr. 133-34; L.F. 15-16). After hearing argument, the trial court denied Defendant's motion. (Tr. 133-35).

Defendant testified on his own behalf. (Tr. 138-65). Defendant testified that he and Victim divorced on January 15, 2014, but that they tried to "get back together" after that. (Tr. 138, 145-46). Defendant testified that from November 2014 until January 2015 he and Victim lived in the house in which the incident subsequently took place. (Tr. 148-49). Defendant testified that he and Victim had been "doing a lease with [an] option to buy" the house, "had put $5,000 down," and "were waiting for the contract to get drawn up" prior to the incident. (Tr. 139).

Defendant testified that on January 20th, three days before the incident, Victim told him to "get out" after catching him "red-handed" and learning that he was in a relationship with another woman. (Tr. 140). Defendant responded by telling Victim that he would be staying in the camper in the driveway next to the house. (Tr. 140). Defendant testified that he then "left for a couple of days and [Victim] left a message on [his] phone not to come back, [and that] all [his] stuff would be out in the yard and she'd burn it." (Tr.

140-41). Defendant testified that everything he owned was still in the house on the date of the incident. (Tr. 141). Defendant confirmed that he was not sleeping inside the house on the date of the incident and had not been for two days. (Tr. 150). Defendant testified, "I wasn't even on the property for those two days, because I did not want to argue with [Victim]," and that he only came back late at night to sleep in the camper. (Tr. 150-51). Defendant testified that he was "at that friend's house." (Tr. 142).

Defendant testified that Victim called him on the day before the incident and told him that her grandmother and uncle were coming to stay and that she was out of firewood to heat the house. (Tr. 141). Defendant testified that he told her he would cut some and bring it in the house. (Tr. 141). On the morning of the incident, Defendant arrived at the house and backed up to the basement door, upon which Victim's grandmother and uncle opened the door, and Defendant and Victim's uncle brought the firewood into the house. (Tr. 142). Defendant asked about Victim, and he was told that she was upstairs sleeping. (Tr. 142). Defendant then walked upstairs and knocked on Victim's bedroom door. (Tr. 142).

Defendant admitted that Victim told him to get out of the house before she even came out of the bedroom, but Defendant insisted on talking to her about "some things here that [they] need[ed] to get taken care of." (Tr. 142-43, 152). Defendant testified that he then stood by the back door and was "ready to go

out." (Tr. 143, 154). When Victim came out, Defendant saw Victim's friend, Chad, whom he assumed was "not just a friend" and told Victim so. (Tr. 143). Defendant admitted that he was "pissed off that [Victim] was with somebody else." (Tr. 156, 163-64). Victim then told Defendant to "get the fuck out." (Tr. 143). Defendant admitted that he intentionally fired his gun into the ceiling at that point, and told her, "Now that's bullshit. You throw me out and you've got somebody in bed." (Tr. 143, 153, 162). Defendant denied threatening to kill anybody. (Tr. 156). Defendant claimed that after he turned to leave, Victim slammed the door, which knocked him down the steps, and caused the gun to fire through the window and into the house accidentally. (Tr. 143-44, 158). Defendant testified that he then got into his truck, drove away, and didn't come back until four to six days later to bring more firewood. (Tr. 144). Defendant testified, "She told me to leave, I left." (Tr. 163).

Defendant filed a motion for judgment of acquittal at the close of all evidence, and defense counsel asked to "incorporate . . . the argument [he] made on the motion for judgment of acquittal at the close of the State's case by reference." (Tr. 166; L.F. 17-18). The trial court again denied Defendant's motion for judgment of acquittal. (Tr. 166-67).

In his post-trial motion for judgment of acquittal notwithstanding the verdict, Defendant alleged that "[t]he evidence was insufficient to support [ ] burglary in the first degree in that the defendant was a part owner of the

home and thus had the license to be in the home." (L.F. 47). Additionally, during the hearing on Defendant's motion, defense counsel argued that "[Defendant] was licensed to be in there because . . . he was living there," relying on the fact that while "[Defendant] had agreed to sleep in the trailer which was still on the property[,] there was no evidence that that was a permanent thing" and that "his clothes were still there, his toothbrush was still there, everything was still there." (Tr. 206).

The trial court denied Defendant's motion, stating that it "felt that that was a factual issue as to whether or not the jury – it was not a legal question, . . . and [defense counsel] did argue that to the jury, and the jury did in fact find the defendant guilty of burglary first and the other charges." (Tr. 207).

ARGUMENT

I. (Sufficiency – Domestic Assault)

The record contains sufficient evidence to support Defendant's conviction for domestic assault in the third degree because a reasonable juror could have found that Defendant placed Victim in apprehension of immediate physical injury, in that: Defendant threatened to kill Victim and twice fired a gun near Victim; Victim testified that she was "startled" as a result and that she was scared that she could get hit by a bullet; and Victim repeatedly and increasingly more forcefully demanded that Defendant "get out" of the house.

A. Standard of review.

When considering sufficiency-of-evidence claims, this Court's review is limited to determining whether the evidence is sufficient for a reasonable fact-finder to find each essential element of the crime beyond a reasonable doubt. *See State v. Nash*, 339 S.W.3d 500, 508–09 (Mo. banc 2011); *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008). "This is not an assessment of whether the Court believes that the evidence at trial established guilt beyond a reasonable doubt . . . ." *Nash*, 339 S.W.3d at 509. "[A]ll evidence favorable to the State is accepted as true, including all favorable inferences drawn from

the evidence." *Id.* "All evidence and inferences to the contrary are disregarded." *Id.* "As such, this Court will not weigh the evidence anew since 'the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances and other testimony in the case.'" *Freeman*, 269 S.W.3d at 425 (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002)); *see also State v. O'Brien*, 857 S.W.2d 212, 215–16 (Mo. banc 1993) ("To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ 'a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.'") (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

"An appellate court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *State v. Chaney*, 967 S.W.2d 47, 53 (Mo. banc 1998) (quoting *Jackson*, 443 U.S. at 326). Appellate courts do not act as a "'super juror with veto powers,' but give great deference to the trier of fact." *Id.* at 52 (quoting *State v. Grim*, 854 S.W.2d 403, 414 (Mo. banc 1993)); *see also Nash*, 339 S.W.3d at 509. The "equally valid inferences rule," which stated that "where two equally valid inferences can be drawn from the same evidence, the evidence does not establish guilty beyond a reasonable

doubt," was abolished by this Court in *Grim* and is no longer applied. *Chaney*, 967 S.W.2d at 54.

Circumstantial evidence is given the same weight as direct evidence in considering the sufficiency of the evidence. *Grim*, 854 S.W.2d at 406.

B. The law applicable to this claim.

Defendant was convicted of domestic assault in the third degree in violation of section 565.074, which stated in pertinent part: "A person commits the crime of domestic assault in the third degree if the act involves a family or household member, . . . as defined in section 455.010 and . . . [t]he person purposely places such family or household member in apprehension of immediate physical injury by any means." § 565.074.1(3), RSMo Cum. Supp. 2012. "To apprehend something means to 'conceive, believe, fear, or dread' it." *J.D.B. v. Juvenile Officer*, 2 S.W.3d 150, 153 (Mo. App. W.D. 1999) (quoting *State v. McGuire*, 924 S.W.2d 38, 39 (Mo. App. E.D. 1996)). "Physical injury" is defined as "physical pain, illness, or any impairment of physical condition." § 556.061(20), RSMo Cum. Supp. 2013.

"[I]n order to be convicted of third degree assault under subdivision three, the victim must actually have been placed in apprehension of immediate physical injury." *J.D.B.*, 2 S.W.3d at 153 (interpreting the similarly phrased elements of section 565.070.1(3), RSMo Cum. Supp. 1998); *see* § 565.070.1(3), RSMo Cum. Supp. 1998 ("A person commits the crime of assault in the third

degree if . . . [t]he person purposely places another person in apprehension of immediate physical injury.").

C. There was sufficient evidence from which a reasonable juror could have found that Defendant actually placed Victim in apprehension of immediate physical injury.

Defendant claims that "there was insufficient evidence to prove beyond a reasonable doubt that [Defendant] placed [Victim] in apprehension of immediate physical injury." (Def's Br. 10). Defendant does not claim that he did not intend to place her in such apprehension, nor does he claim that he and Victim were not "family or household members." (Def's Br. 10). In support of his claim, Defendant relies on Victim's testimony that she was not afraid of Defendant, did not believe that Defendant was trying to hurt her, and was not in apprehension of immediate physical injury. (Def's Br. 10, 15). But despite Victim's testimony to the contrary, there was sufficient evidence from which a reasonable juror could have found that Defendant did place Victim in apprehension of immediate physical injury.

First, under this Court's standard of review, it must disregard Victim's testimony that she was not in apprehension of immediate physical injury because the jury was not obligated to believe it—especially when considered with Victim's testimony regarding her and Defendant's longstanding relationship, their continued relationship even after this incident, and her

uncertainty about whether Defendant should be criminally punished for the incident—and because it was contrary to the jury's verdict.[1] (Tr. 94-95, 113-14). *See Freeman*, 269 S.W.3d at 425; *Nash*, 339 S.W.3d at 509. Indeed, such testimony was contradicted by Victim's other testimony admitting that she was "startled" when Defendant first fired his gun inside the house and that she was aware that being shot from that range would "do some damage." (Tr. 100). Additionally, when asked if she was scared that she could get hit by a bullet after Defendant had again fired his gun into the house from somewhere outside, Victim admitted, "I guess." (Tr. 105). There was therefore sufficient direct evidence from which a reasonable juror could have found that Victim was in apprehension of immediate physical injury.

Additonally, "[n]umerous appellate opinions have concluded that there was sufficient evidence to support a criminal conviction for assault in the third degree listing circumstantial evidence not including the assault victim's testimony." *Schumer v. Lee*, 404 S.W.3d 443, 449 (Mo. App. W.D. 2013). For

[1] In overruling Defendant's motion for judgment of acquittal at the close of all the evidence, the trial court stated, "[T]hat's a question that should go to the jury because it's a credibility issue, and especially on a case where you have domestic violence the jury can decide to believe [Victim] or not believe her." (Tr. 166-67).

example, in *State v. M.L.S.*, the defendant became upset with the victim, approached her, and said, "Don't piss me off." *State v. M.L.S.*, 275 S.W.3d 293, 298 (Mo. App. W.D. 2008). A police officer testified at trial that the victim told the officer that she felt threatened by the defendant and pushed him away, after which the defendant pushed the victim, causing her to fall over the couch and onto the floor. *Id.* at 298-99. A neighbor heard the noise, made contact with the victim, and testified that the victim was sniffling, seemed scared, and told her not to say anything. *Id.* at 298. But the victim testified at trial that she hadn't been crying, wasn't upset, and that she had told the neighbor, "Everything's fine. Not a big deal." *Id.* Despite the victim's testimony to the contrary, the Western District held that there was "ample evidence from which a reasonable juror could determine [the victim] was placed in apprehension of immediate physical injury," relying on the contrasting statures of the victim and the defendant, the defendant's intoxicated condition, his angry manner, his threatening words, and the victim's reaction of pushing him away. *Id.* at 299.

Similarly, here, there was sufficient circumstantial evidence from which a reasonable juror could have found that Victim was placed in apprehension of immediate physical injury by Defendant's threatening conduct. Victim testified that she was asleep in her bedroom with another man when Defendant "pounded" on her bedroom door. (Tr. 110-11, 117-18). Defendant

testified that Victim told him to get out of the house before she even came out of the bedroom, from which a reasonable juror could have inferred that Victim was attempting to avoid a potential conflict with Defendant that might occur if he saw Victim's guest. (Tr. 142-43, 152). Victim testified that once she exited her bedroom she saw Defendant holding a black handgun. (Tr. 98-99). Victim immediately told Defendant, "Get the fuck out of the house." (Tr. 99, 111). Defendant admitted that he was "pissed off" when he saw that Victim was with another man in her bedroom. (Tr. 156, 164). Defendant testified that he intentionally fired his gun into the ceiling at that point, and told her, "Now that's bullshit. You throw me out and you've got somebody in bed." (Tr. 143, 153, 162). Victim admitted that that "startled" her and that she was aware that being shot from that range would "do some damage." (Tr. 100). Victim testified that she then told Defendant "more forceful[ly]" to "get the fuck out." (Tr. 100). Before leaving, Defendant threatened to kill Victim's friend and then her. (Tr. 101-02, 121). While Victim walked toward the back door to close it, she immediately heard another gunshot and the sound of glass breaking. (Tr. 102-03). Victim saw a bullet hole in the window by the door. (Tr. 103). Victim couldn't see through the back door to where Defendant was, but she knew that he was somewhere outside. (Tr. 103, 106, 112). When asked if she was scared at that point that she could get hit by a bullet, Victim testified that she didn't remember how

she felt but said, "I guess." (Tr. 105).

Defendant concedes that a victim's testimony "is not the sole evidence that can be used" "for proving the subjective apprehension of the victim," but argues that "the State should be required to point to some evidence of the victim's response that indicates a subjective apprehension of immediate physical injury." (Def's Br. 18-19). Even assuming *arguendo* that some evidence of the victim's response is necessary to prove that the victim was placed in apprehension of immediate physical injury, such evidence was present here. Victim repeatedly told Defendant to get out of the house in response to: 1) Defendant's "pounding" on her door while another man was present in her bedroom; 2) her observation that Defendant was holding a gun; and 3) Defendant's firing of the gun inside her house. (Tr. 98-100, 110-11, 117-18). Moreover, Victim became steadily more "forceful" in telling Defendant to leave as the severity of Defendant's actions and the potential for injury increased. (Tr. 99-100, 142-43, 152, 154). Viewed in the light most favorable to the verdict, a reasonable juror could have inferred that Victim was attempting to avoid injury by telling Defendant to get out of her house and that she was therefore in apprehension of immediate physical injury. *See M.L.S.*, 275 S.W.3d at 299 (holding that the victim's reaction of pushing the defendant away because she felt threatened was evidence from which a reasonable juror could find that she was in apprehension of physical injury);

Schumer, 404 S.W.3d at 450 (holding that the victim's act of putting his hands up to shield himself from the defendant's use of force was evidence supporting a finding that the victim was in apprehension of immediate physical injury).

Given Victim's testimony that she was "startled" when Defendant fired a gun inside her house and that she was scared that she could get hit by a bullet after Defendant subsequently shot into her house from the outside, as well as the circumstantial evidence regarding Defendant's threatening conduct involving the use of a gun and Victim's increasingly insistent attempts to convince Defendant to leave the house in response, there was sufficient evidence from which a reasonable juror could have found that Defendant placed Victim in apprehension of immediate physical injury, despite Victim's presumably incredible testimony to the contrary.

Defendant's first point should be denied.

II. (Sufficiency – Burglary)

There was sufficient evidence from which a reasonable juror could have found that Defendant was guilty of first-degree burglary because he was not licensed or privileged to remain in Victim's home after she told him to leave, in that Defendant had voluntarily agreed to stop living in the house and was not an occupant of the house at the time of the incident.

A. Standard of review.

The standard of review applicable to sufficiency claims is outlined in Point I. *See supra* pp. 13-15.

B. The law applicable to this claim.

Defendant was convicted of burglary in the first degree in violation of section 569.160, which stated in pertinent part: "A person commits the crime of burglary in the first degree if he . . . knowingly remains unlawfully in a[n] . . . inhabitable structure for the purpose of committing a crime therein, and . . . while in the . . . inhabitable structure . . . [t]here is present in the structure another person who is not a participant in the crime." § 569.160.1(3), RSMo 2000.

"A person . . . 'remains unlawfully' in or upon premises when he is not licensed or privileged to do so." § 569.010(8), RSMo 2000.

"'Inhabitable structure' includes a . . . structure: [w]here any person lives or carries on business or other calling; or . . . [w]hich is used for overnight accommodation of persons." § 569.010(2), RSMo 2000.

C. There was sufficient evidence from which a reasonable juror could have found that Defendant was not licensed or privileged to remain in Victim's home because Defendant was not an occupant or in possession of the home when the incident occurred.

Defendant claims that "there was insufficient evidence to prove beyond a reasonable doubt that [Defendant] unlawfully remained in the house after [Victim] asked him to leave because [Defendant] was licensed and privileged to be in the house." (Def's Br. 11). Defendant concedes that "[Defendant and Victim] were not living together" at the time of the incident, but he argues that Defendant had been living with Victim in the house the week before the incident and was "staying in a camper outside of the house" thereafter. (Def's Br. 22). Defendant argues that because both he and Victim had financially contributed toward renting the house, he was "still a joint owner of the house" at the time of the incident. (Def's Br. 22-23). Defendant further relies on evidence that his possessions were still in the house at the time of the incident and that he allegedly continued to eat meals in, take showers in, and repair the house even though he slept in the camper outside the house. (Def's Br. 22-23). Finally, Defendant argues, "The fact that [Defendant] had

voluntarily stopped sleeping in the house does not mean that he relinquished his license and privilege to be in the house" and notes that there was no restraining order preventing him from being present inside the house. (Def's Br. 23). Contrary to Defendant's claim, and disregarding evidence and inferences contrary to the jury's verdict, there was sufficient evidence from which a reasonable juror could have found that Defendant was not licensed or privileged to remain in Victim's home after she told him to leave.

In *State v. Chandler*, the defendant claimed that the burglary statute was "void for vagueness" and overly broad because "a person could offend against the statute by entering his own home because the statute does not require the property entered be the property of another." *State v. Chandler*, 635 S.W.2d 338, 341 (Mo. banc 1982). Without deciding whether "one might be theoretically guilty of burglary in his own home," this Court noted that "suffice it to say that if the person was privileged to enter it when he did he would not be guilty of the crime of burglary" and held that the statute was not facially unconstitutional. *Id*.

In *State v. Hill*, the defendant claimed that "the State cannot charge an owner with trespassing upon his or her own property." *State v. Hill*, 497 S.W.3d 391, 393 (Mo. App. E.D. 2016). The Eastern District interpreted the elements of trespassing identical to the ones at issue in this case—"knowingly remains unlawfully"—and found that "the statute defining

criminal trespass does not contain any language referring specifically to the owner of the property" and that "[t]hus, the plain meaning of the statute . . . does not explicitly rule out the possibility of the owner of the property being charged . . . if it is determined that he or she has . . . remained upon it unlawfully." *Id.* at 393-94. The court stated that "[t]he legislature could have chosen to write [the statute] to limit the offense to cases in which a person remains unlawfully upon property owned by another, but they did not do so." *Id.* at 394. The court therefore held that there was sufficient evidence supporting the defendant's conviction for trespassing when he refused to leave the mobile home after being served with an ex parte order of protection that prohibited him from staying there, even though he had been living in the mobile home, jointly owned it, and had made the rent payments for the lot. *Id.* at 392, 394.

> The majority of jurisdictions hold that legal ownership, while certainly a factor, is not dispositive of the right to be in a home. Instead, most jurisdictions answer the 'license or privilege' question by asking whether a defendant had possession of or an occupancy interest in the home. This issue is decided upon consideration of the totality of the circumstances.

South Dakota v. Pentecost, 887 N.W.2d 877, 882 (S.D. 2016); *see also New Hampshire v. McMillan*, 973 A.2d 287, 291 (N.H. 2009) ("[M]any jurisdictions

have determined that an ownership interest is not conclusive on the question of license or privilege to enter the property for purposes of burglary."); *Iowa v. Hagedorn*, 679 N.W.2d 666, 670 (Iowa 2004) ("We conclude . . . that whether one has a right or privilege to enter property is not determined solely by his or her ownership interest in the property . . . . Rather the focus . . . is on whether the defendant had any possessory or occupancy interest in the premises at the time."); *State v. Weicht*, 23 S.W.3d 922, 926 (Mo. App. S.D. 2000) (quoting *State v. Wilhite*, 587 S.W.2d 321, 323 (Mo. App. E.D. 1979)) ("Proof of ownership of a building burglarized does not refer to the title but the occupancy.").

"It is generally accepted that burglary statutes are intended to protect the occupant or possessor of real property." *McMillan*, 973 A.2d at 291. "At common law, 'the crime of burglary was considered to be an offense against the security of habitation or occupancy. It was not designed to protect property or ownership, rather the notion that people should be able to feel secure in their homes.'" *Hagedorn*, 679 N.W.2d at 669 (internal citation omitted); *see also South Carolina v. Singley*, 709 S.E.2d 603, 606 (S.C. 2011) ("Thus the core of a dwelling constituting one's home for burglary purposes is the expectation of peace and security therein."); *New York v. Glanda*, 5 A.D.3d 945, 950 (N.Y. App. Div. 2004) ("[S]ince the purpose of the burglary statute is to protect habitation rights, the security of the occupant is

paramount. Thus, an owner can properly be convicted of burglarizing premises he owns but which are occupied by another.") Such a purpose has been held to be "consistent" with the Model Penal Code, and by extension it is also therefore consistent with Missouri's burglary statute. *See McMillan*, 973 A.2d at 292 (quoting *Model Penal Code* § 221.1, cmt. 2 (Official Draft and Revised Comments 1980)) ("Comment two of section 221.1(1) states that the offense of burglary 'has been limited in the Model Code to the invasion of premises under circumstances especially likely to terrorize *occupants*.'"); *see also* § 569.170, Comment to the 1973 Proposed Code ("The [Missouri] Code sections on burglary (and trespass) are based primarily on the New York Penal Code and the Model Penal Code."). Additionally, "protecting the possessory interests of a person occupying the marital home after his or her spouse has moved out promotes the public policy [of] the prevention of domestic violence." *Hagedorn*, 679 N.W.2d at 672.

Here, even if Defendant had an ownership interest in the house due to his prior financial contributions toward the lease, there was sufficient evidence from which a reasonable juror could have found that he was not an occupant or in possession of the house at the time of the incident and therefore did not have a license or privilege to remain after Victim told him to leave. Both Victim and Defendant testified that at least three days before the incident Victim had asked Defendant to "get out" of the house because he was

cheating on her and that Defendant had agreed to leave and stay in the camper outside. (Tr. 95-96, 109, 119, 140). Victim repeatedly testified that Defendant was not living inside the house at the time of the incident and that that was the reason she told him to "get out." (Tr. 95-96, 119). Defendant similarly testified that he was not even on the property after Victim told him to leave, except to sleep in the camper outside. (Tr. 140-42, 150-51). Defendant concedes on appeal that "[t]hey were not living together on January 23, 2015." (Def's Br. 22).

Despite the evidence showing that Defendant was not living in the house at the time of the incident, he relies on other circumstantial evidence, such as testimony that his possessions were still inside the house at the time of the incident and his alleged continuing use of the house for limited purposes such as eating and bathing, in an attempt to establish that he retained a license or privilege to remain in the house. (Def's Br. 22-23). But whether Defendant was an occupant or in possession of the house at the time of the incident and therefore retained a license or privilege to remain in the house was an issue of fact for the jury to decide, and this Court defers to the jury's determination regarding the weight of the evidence. *See Pentecost*, 887 N.W.2d at 886-87 ("[T]he trier of fact must make this determination [as to whether the defendant was in possession or control of the premises at the time] based upon an examination of the totality of the circumstances."); *State v. O'Brien*,

857 S.W.2d 212, 215–16 (Mo. banc 1993) ("To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ 'a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.'") (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). As a result, this Court must disregard evidence contrary to the jury's verdict such as that relied on by Defendant. *See State v. Nash*, 339 S.W.3d 500, 509 (Mo. banc 2011); *State v. Dixon*, 495 S.W.3d 812, 821 (Mo. App. S.D. 2016).

Indeed, the record shows that it was reasonable for the jury to discount such evidence for reasons beside the fact that both Victim and Defendant testified that he was not staying inside the house at the time of the incident. As for Defendant's possessions still being present inside the house, he testified that Victim had told him over the phone that she would remove them from the house and place them in the yard where they would be accessible to him without the need for him to enter the house. (Tr. 140-41). Moreover, even assuming that Defendant was licensed or privileged to be in the house in order to make use of or retrieve his possessions, there was no evidence presented at trial that that was his purpose in remaining in the house at the time of the incident; instead, it was clear that Defendant remained in the house unlawfully after Victim repeatedly told him to leave so that he could confront Victim about sleeping with another man, fire a gun

toward the ceiling, and threaten to kill Victim's friend and then her. (Tr. 98-102, 110-12, 121, 141-43, 153, 156, 162-64). Additionally, the jury could have reasonably understood from Victim's testimony that Defendant continued to enter the house to eat, bathe, and help with repairs at some point after the incident rather than at the time of the incident, given Victim's testimony that they "continued to live together all through the rest of 2015" and Defendant's testimony that he was not even on the property after Victim discovered his relationship with another woman until the incident. (Tr. 109-10, 113, 140-41, 150-51).

Defendant also argues that "[t]he fact that [he] had voluntarily stopped sleeping in the house does not mean that he relinquished his license and privilege to be in the house." (Def's Br. 23). Contrary to Defendant's claim, "[o]ther states that have examined this question have found that a spouse may relinquish a possessory interest in a dwelling the couple had previously shared as tenants in common, but that such a relinquishment could only be achieved through mutual consent." *Utah v. Machan*, 322 P.3d 655, 659 (Utah 2013). "The question whether one spouse has the sole possessory interest in [the house] depends on whether the evidence shows that both parties had decided to live separately." *Id.* (quoting *Colorado v. Hollenbeck*, 944 P.2d 537, 539 (Colo. App. 1996)). "Both parties must have understood that the possessory interest of one was being relinquished, even if such interest is

relinquished begrudgingly or reluctantly." *Id.* (quoting *Hollenbeck*, 944 P.2d at 539). "Other jurisdictions that have examined the question of whether a spouse or cotenant has relinquished possessory rights to a previously shared dwelling in the context of a burglary charge . . . look foremost to whether [the defendant] has voluntarily moved out of a shared home and established a separate residence." *Id.* at 660. "Surreptitious entry or obtaining admittance through violence may also support an inference that a spouse or cotenant understood that he or she had relinquished possessory rights to the home." *Id.* "[A]ny conduct that tends to prove or disprove the existence of a mutual agreement for one spouse to relinquish a possessory right in the marital home is relevant." *Id.*

Here, both Victim and Defendant testified that after Victim discovered that Defendant was in a relationship with another woman, Defendant agreed to stay in the camper outside of the house. (Tr. 95-96, 109, 119, 140). Defendant testified that he "wasn't even on the property for those two days, because [he] did not want to argue with [Victim]." (Tr. 150-51). Defendant also concedes on appeal that he "voluntarily stopped sleeping in the house." (Def's Br. 23). Additionally, Defendant surreptitiously entered the house on the date of the incident while Victim was asleep and without her knowledge, used violence to remain in the house after Victim told him twice to get out of the house by firing a gun toward the ceiling, and at no point voiced a belief

that he had a license or privilege to remain in the house. (Tr. 99-100, 110-11, 117-20, 142-43, 153, 162). Furthermore, Defendant's actions in knocking on Victim's bedroom door, standing by the back door ready to leave, subsequently leaving because Victim told him to leave, and staying away from the property for four to six days after the incident provided additional evidence of Defendant's understanding that he had relinquished his possessory rights of the house. (Tr. 142-44, 154, 163). There was therefore sufficient evidence from which a reasonable juror could have found that Defendant had voluntarily and knowingly relinquished his possessory interest in the house when he agreed to stay in the camper. *See Hagedorn*, 679 N.W.2d at 671 ("There was evidence the defendant by his own volition no longer resided at the duplex where his wife lived."); *McMillan*, 973 A.2d at 761-62 ("[A] rational trier of fact could have found beyond a reasonable doubt that the defendant did not possess license or privilege to enter the apartment" based on evidence that "the defendant had moved out of the apartment" and "the nature of the defendant's violent entry into the apartment on the day in question."); *Singley*, 709 S.E.2d at 277-78 ("[T]he jury could find that the home was not [the defendant's] 'own home' for burglary purposes" when "[h]e left with little protest when his mother requested he leave [and] took up residence elsewhere.").

Finally, any limited license Defendant might have had to enter Victim's basement in order to supply the house with firewood did not extend to confronting Victim and her friend at her bedroom while she was sleeping, subsequently shooting a firearm at the ceiling, and threatening to kill Victim and her friend after Victim explicitly and repeatedly told Defendant to leave. (Tr. 94-100, 110-12, 117-18, 121, 141-43, 152-53, 156, 162-64). *See State v. Girardier*, 484 S.W.3d 356, 361 (Mo. App. E.D. 2015) ("A license is a privilege . . . to do one or more acts on the real estate . . . and [is] ordinarily revocable. . . . When the scope of the license is exceeded or abused, then the acts of the licensee committed in excess of such authority or after the license is revoked may become a trespass."); *Hamilton v. Delaware*, 82 A.3d 723, 728 (Del. 2013) (holding that the defendant did not have a license or privilege to remain in the house in part because "the lawful occupants of the house repeatedly demanded that [he] leave."); *Hagedorn*, 679 N.W.2d at 671 (holding that the defendant did not have a right, license, or privilege to enter the house in part because "[he] had been told emphatically on multiple occasions that he was no longer welcome and should stay away"). There was therefore sufficient evidence from which a reasonable juror could have found both that Defendant was not acting within the scope of any license to remain in Victim's home at the time of the incident and that Victim revoked any license Defendant might have otherwise had.

There was sufficient evidence from which the jury could have reasonably found that Defendant knowingly remained unlawfully in Victim's home for the purpose of committing domestic assault therein. As such there was sufficient evidence supporting Defendant's convictions for first-degree burglary and armed criminal action that was predicated on that burglary.

Defendant's second point should be denied.

CONCLUSION

This Court should affirm Defendant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 7,809 words, excluding the cover, the signature block, and this certification, as counted by Microsoft Word 2010 software.

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