IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 97070
	)	
ROBERT E. STEWART,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF
ST. FRANCOIS COUNTY, MISSOURI
TWENTY-FOURTH JUDICIAL CIRCUIT
THE HONORABLE SANDRA MARTINEZ, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Robert Stewart appeals his convictions after a jury trial in St. Francois County, Missouri for one count of the class B felony of unlawful use of a weapon, one count of the class B felony of burglary in the first degree, one count of the unclassified felony of armed criminal action, and one count of the class A misdemeanor of domestic assault in the third degree. On December 13, 2016, the Honorable Sandra Martinez sentenced Mr. Stewart to a total of fifteen years in prison. (LF 49-50).

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Eastern District. Article V, section 3, Mo. Const.; section 477.050. This Court thereafter granted the State's application for transfer, so this Court has jurisdiction. Article V, sections 3 and 10, Mo. Const. and Rule 83.04.

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STATEMENT OF FACTS

Mr. Stewart was charged by felony information with one count of unlawful use of a weapon (Count I), one count of burglary in the first degree (Count II), one count of armed criminal action (Count III), and one count of domestic assault in the third degree (Count IV). (LF 11-12). Count I alleged that Mr. Stewart "knowingly discharged a firearm at a habitable structure, a house possessed by [T.S.]." (LF 11). Count II alleged that Mr. Stewart "knowingly remained unlawfully in an inhabitable structure . . . and possessed by [T.S.], for the purpose of committing domestic assault in the third degree[.]" (LF 11). Count III alleged that Mr. Stewart committed the burglary charged in Count II with the knowing use, assistance and aid of a deadly weapon. (LF 11-12). Finally, Count IV alleged that Mr. Stewart "purposely placed [T.S.] in apprehension of immediate physical injury by threatening to kill her and firing a gun into her home[.]" (LF 12).

At trial, T.S. testified that Mr. Stewart is her ex-husband. (TR 94). They were married in March of 2005, and they got divorced in January of 2014. (TR 94). After the divorce, they attempted to reconcile. (TR 94). They were not living together on January 23, 2015, but they had been living together the week before this. (TR 95). Mr. Stewart had not come home one night, so T.S. told him not to come back. (TR 96). Mr. Stewart was staying in a camper outside of the house. (TR 96).

On the date in question, T.S.'s grandma and uncle were in the house. (TR 96). A friend named Chad was also there. (TR 96). Sometime that morning, Mr.

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Stewart came into the house and knocked on T.S.'s bedroom door. (TR 97). Mr. Stewart had a gun with him. (TR 99). T.S. told him that he needed to get out of the house. (TR 99). Mr. Stewart looked at her and shot the ceiling of the house. (TR 100). T.S. told him again to get out of the house, and he turned around to leave. (TR 100). Mr. Stewart said that he would get Chad and that he would get her too. (TR 101).

After Mr. Stewart left, T.S. went to shut the door. (TR 102). Immediately after this, T.S. heard another gunshot. (TR 103). There was a gun hole in a window. (TR 103). T.S. then heard Mr. Stewart leaving in his truck. (TR 106). Chad called the police when he heard the first gunshot, but T.S. did not want him to. (TR 106). She did not believe Mr. Stewart was trying to hurt her, and she was not afraid of him. (TR 107). She testified that she was not in apprehension of immediate physical injury. (TR 123).

During cross-examination, T.S. testified that she and Mr. Stewart had pulled their resources to put a $5,000 down payment on the house in question. (TR 108). She clarified during the re-direct examination that there was a "rent to own" arrangement. (TR 118). Mr. Stewart still had his stuff in the house, including clothes in the closet and items in the bathroom. (TR 108-109). Even when Mr. Stewart was in the camper, he still came in to eat meals and take showers in the house. (TR 109). They were rehabbing and cleaning the house, and Mr. Stewart was helping with this. (TR 109). He was only sleeping in the camper. (TR 109). There was no restraining order filed against Mr. Stewart, and he was still a joint

owner of the house. (TR 110). On the date in question, T.S. had asked Mr. Stewart to chop firewood to heat the house. (TR 110). He brought the firewood into the basement where it was kept. (TR 110). On re-direct examination, T.S. testified that there was no formal lease, but that Mr. Stewart was no longer living in the house on the date in question. (TR 119).

Officer Jim Wilson of the St. Francois County Sheriff's Department testified that on January 23, 2015, he was dispatched to the house in question. (TR 125). He began collecting evidence and taking photographs. (TR 126). He found one shell casing inside of the house, and he observed a damaged place on the ceiling. (TR 127). He observed a shot through a window, and he found the shell casing outside. (TR 128).

Mr. Stewart testified in his own defense. (TR 138). He testified that in January of 2015, he was living with T.S.. (TR 139). He testified that they had put $5,000 down on the house, and that they were waiting for the contract to be drawn up. (TR 139). He testified that on January 20, 2015, T.S. saw the phone number of another woman in his phone, and she told him to get out of the house. (TR 140). Mr. Stewart told her that he would be staying in the camper in the driveway. (TR 140).

Mr. Stewart testified that on January 23, 2015, he knocked on T.S.'s bedroom door after bringing in the firewood. (TR 143). A person walked out of her room, and Mr. Stewart accused the man of being more than T.S.'s friend. (TR 143). T.S. told him to "get the fuck out," and Mr. Stewart "fired a round off

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straight up." (TR 143). He stated that after he had left the house, he stumbled, and accidentally fired a shot through the house. (TR 144).

After deliberations, the jury found Mr. Stewart guilty of all charges. (TR 193; LF 35-38). This appeal follows.

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POINTS RELIED ON

POINT I.

The trial court erred in overruling Mr. Stewart's motion for judgment of acquittal after the close of all evidence and entering judgment and sentence for domestic assault in the third degree, because this violated Mr. Stewart's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 10 of the Missouri Constitution, in that there was insufficient evidence to prove beyond a reasonable doubt that Mr. Stewart placed T.S. in apprehension of immediate physical injury; T.S. testified that she was never afraid of Mr. Stewart and that she was never in apprehension of immediate physical injury.

Jackson v. Virginia, 443 U.S. 307 (1979);

Johnson v. State, 366 S.W.3d 11 (Mo. banc 2012);

J.D.B. v. Juvenile Officer, 2 S.W.3d 150 (Mo. App. W.D. 1999);

State v. Whalen, 49 S.W.3d 181 (Mo. banc 2001);

United States Constitution, Amendment XIV;

Missouri State Constitution, Article I, Section 10; and

Section 565.074, Cum Supp. 2015

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POINT II.

The trial court erred in overruling Mr. Stewart's motion for judgment of acquittal after the close of all evidence and entering judgment and sentence for burglary in the first degree, because this violated Mr. Stewart's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 10 of the Missouri Constitution, in that there was insufficient evidence to prove beyond a reasonable doubt that Mr. Stewart unlawfully remained in the house after T.S. asked him to leave because Mr. Stewart was licensed and privileged to be in the house; because the burglary charge served as the predicate offense for the armed criminal action charge, that charge must also be reversed.

Jackson v. Virginia, 443 U.S. 307 (1979);

State v. Grim, 854 S.W.2d 403 (Mo. banc 1993);

State v. Hill, 497 S.W.3d 391 (Mo. App. E.D. 2016);

State v. Hunt, 630 S.W.3d 211 (Mo. App. W.D. 1982);

United States Constitution, Amendment XIV;

Missouri State Constitution, Article I, Section 10;

Section 569.010, Cum Supp. 2015; and

Section 569.160, Cum Supp. 2015.

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ARGUMENT

POINT I.

The trial court erred in overruling Mr. Stewart's motion for judgment of acquittal after the close of all evidence and entering judgment and sentence for domestic assault in the third degree, because this violated Mr. Stewart's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 10 of the Missouri Constitution, in that there was insufficient evidence to prove beyond a reasonable doubt that Mr. Stewart placed T.S. in apprehension of immediate physical injury; T.S. testified that she was never afraid of Mr. Stewart and that she was never in apprehension of immediate physical injury.

A. Standard of Review

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const., Amend. 14; Mo. Const. Art. I, § 10. This impresses "upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused" and thereby symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). There must be more than a "mere modicum" of evidence, because "it could not seriously be argued that such a 'modicum' of

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evidence could by itself rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 320.

In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). The State may rely upon direct and circumstantial evidence to meet its burden of proof. *State v. Howell*, 143 S.W.3d 747, 752 (Mo. App. W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative, or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375. "[T]he relevant question is whether, after viewing the evidence in a 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. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010).

B. Analysis

Section 565.074, Cum Supp. 2015 states that a "person commits the crime of domestic assault in the third degree if . . .(3) The person purposely places such family or household member in apprehension of immediate physical injury by any

means[.]" Count IV of the information tracked this language, and alleged that Mr. Stewart "purposely placed [T.S.] in apprehension of immediate physical injury by threatening to kill her and firing a gun into her home[.]" (LF 12).

The Western District Court of Appeals analyzed the general third degree assault statute in *J.D.B. v. Juvenile Officer*, 2 S.W.3d 150, 152 (Mo. App. W.D. 1999). That statute also requires the State to prove that the defendant purposely placed "another person in apprehension of immediate physical injury." *Id.* The Court explained that to be guilty under this statute, the State was required to show that the defendant intended to place the victim in apprehension of immediate physical injury, and that the victim must have actually been placed in such apprehension. *Id.* The Court stated that "[t]o apprehend something means to 'conceive, believe, fear, [or] dread' it." *Id.* at 153, quoting *State v. McGuire*, 924 S.W.2d 38, 40 (Mo. App. E.D. 1996).

In *J.D.B.*, the victim testified that the defendant and two of his friends surrounded her car and began gyrating their hips; they were carrying Halloween masks, and one of the boys was holding a plastic machete. *Id.* at 151-152. The victim testified, though, that "she was not frightened, only alarmed, that since her car doors were locked she didn't think the boys could do anything to her, and that she knew the 'weapon' was plastic and thought it was part of an early Halloween event." *Id.* at 153. The Court determined that "[t]his testimony gives absolutely no indication that [the victim] was placed in fear for her physical well-being, nor is there any other evidence in the record that would warrant such a finding." *Id.* The

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Court therefore reversed the defendant's conviction for assault in the third degree. *Id.*

The same result is necessary in the present case. Whether or not T.S. was placed in apprehension of immediate physical injury is a subjective standard rather than an objective one. This Court has stated that an objective standard is a "legal standard that is based on conduct and perception external to a particular person." *Johnson v. State*, 366 S.W.3d 11, 38 n. 7 (Mo. banc 2012), citing BLACK'S LAW DICTIONARY 1535 (9th ed. 2009). A subjective standard, on the other hand, is a "legal standard that is peculiar to a particular person and based on the person's individual views and experiences." *Id.* Here, T.S. specifically testified that she did not believe Mr. Stewart was trying to hurt her. (TR 107). She further testified that she was not afraid of him. (TR 107). Finally, T.S. testified that she was not in apprehension of immediate physical injury. (TR 123). This testimony was not contradicted by any prior statements or any other person's testimony. Under Section 565.074, Cum Supp. 2015, the State was required to prove that T.S. was in apprehension of immediate physical injury. Based on T.S.'s testimony, the State failed to prove this element.

In the Court of Appeals, the State cited two cases to support its argument that there was sufficient evidence to support Mr. Stewart's conviction for domestic assault in the third degree. *See Schumer v. Lee*, 404 S.W.3d 443 (Mo. App. W.D. 2013); *State v. M.L.S.*, 275 S.W.3d 293 (Mo. App. W.D. 2008). However, both of these cases are inapposite.

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In *M.L.S.*, for instance, although the victim testified that she was not upset or crying after the assault, other witnesses contradicted this testimony. *Id.* at 298-99. A concerned neighbor who went to the victim's apartment, for instance, testified that the victim's "face was red and she seemed scared." *Id.* at 298. A police officer testified that the victim had told him on the night in question that she had felt threatened by the defendant and had to push him away. *Id.* at 299. The testimony from the neighbor and the officer was clearly sufficient in the light most favorable to the verdict to show that the victim was subjectively in apprehension of immediate physical injury. In the present case, no witness testified that T.S. looked scared after Mr. Stewart fired the gun.

In *Schumer v. Lee*, the victim did not testify at the evidentiary hearing, but the Western District nonetheless found that there was sufficient evidence that a police officer had placed the victim in apprehension of immediate physical injury. 404 S.W.3d 443, 449-50 (Mo. App. W.D. 2013). In that case, the officer had grabbed the victim by the throat, forcefully removed him from a car, and tried to push his head onto the trunk of the car. *Id.* Had this been the only evidence, it very well may not have been enough to show the subjective apprehension of the victim. However, the Court pointed out that the victim had "put his hands up to shield himself from Schumer's use of force," that the victim was "visibly upset," and that the victim "was so upset by [the officer's] actions that he filed a complaint against [the officer] with the police department." *Id.* at 450. The Court therefore pointed to specific actions taken by the victim to show his subjective apprehension. There is

no evidence in the present case that T.S. took specific actions that indicated she was in apprehension of immediate physical injury.

In *Schumer*, the Court asserted that "[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." *Id.* at 449 (emphasis in original). The Court cited two cases for this proposition. *Id.*, citing *State v. Vaughn*, 940 S.W.2d 60, 61 (Mo. App. W.D. 1997) and *State v. Snell*, 845 S.W.2d 96, 97 (Mo. App. E.D. 1993). However, neither of these cases actually support the Court's proposition.

In *Vaughn*, the defendant hit the victim over the head with a beer bottle, stabbed her with the butcher knife in the abdomen, neck, back, and shoulder, hit her over the head with a lamp, and attempted to strangle her by wrapping the cord around her neck. 940 S.W.2d at 61. He also cut her throat with a piece of glass and hit her over the head with a glass table top. *Id.* The defendant told the victim to take a shower, and while she was in the shower, the defendant took a knife and poked her in the chest with it. *Id.* On appeal, the defendant only challenged the sufficiency that he had committed assault in the first degree in the shower with the knife. *Id.* The Court determined that there was insufficient evidence to support this conviction, but that the case should be remanded for a new trial for assault in the third degree. *Id.* at 63. The Court stated that "[t]here was evidence that defendant's conduct in poking Bennett in the chest put her in apprehension of immediate physical injury," but that the jury was not asked to find this element. *Id.* It is true

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that the Court did not specifically cite to the victim's testimony, but the Court did not cite to *any* evidence to support its conclusion regarding the sufficiency of the evidence. Nowhere in the opinion does it state that the victim did not testify. In fact, it is almost certain that the victim *did* testify considering that only the defendant and the victim would have been in the shower. *Vaughn* does not support the conclusion that circumstantial evidence not including the victim's testimony can support a finding of subjective apprehension.

In *Snell*, the defendant drove his car at the victim, and had the victim not gotten out of the way, he would have been hit by the car. 845 S.W.2d at 97. On appeal, the defendant did not challenge the victim's subjective apprehension, but instead only challenged that there was sufficient evidence to prove his own intent to cause injury with the car. *Id.* While the Court did not did list the testimony that would have supported a finding of subjective apprehension in its two page opinion, it was not necessary to do so because that element was not challenged. *Id.* *Snell* also does not support that conclusion that circumstantial evidence not including the victim's testimony can support a finding of subjective apprehension.

The ideal evidence for proving the subjective apprehension of the victim is the victim's testimony. While undersigned counsel agrees with the State that this is not the sole evidence that can be used, a victim's subjective apprehension should not be found based entirely on how a reasonable person would view the defendant's actions. This would turn a subjective standard into an objective one. Instead, to prove this element, the State should be required to point to some

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evidence of the victim's response that indicates a subjective apprehension of immediate physical injury. Because the State failed to do this in the present case, there was insufficient evidence to support Mr. Stewart's conviction for domestic assault in the third degree.

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POINT II.

The trial court erred in overruling Mr. Stewart's motion for judgment of acquittal after the close of all evidence and entering judgment and sentence for burglary in the first degree, because this violated Mr. Stewart's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 10 of the Missouri Constitution, in that there was insufficient evidence to prove beyond a reasonable doubt that Mr. Stewart unlawfully remained in the house after T.S. asked him to leave because Mr. Stewart was licensed and privileged to be in the house; because the burglary charge served as the predicate offense for the armed criminal action charge, that charge must also be reversed.

A. Standard of Review

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const., Amend. 14; Mo. Const. Art. I, § 10. This impresses "upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused" and thereby symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). There must be more than a "mere modicum" of evidence, because "it could not seriously be argued that such a 'modicum' of

evidence could by itself rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 320.

In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). The State may rely upon direct and circumstantial evidence to meet its burden of proof. *State v. Howell*, 143 S.W.3d 747, 752 (Mo. App. W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative, or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375. "[T]he relevant question is whether, after viewing the evidence in a 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. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010).

B. Analysis

Section 569.160, Cum Supp. 2015 states that "[a] person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of

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committing a crime therein, and when in effecting entry or while in the building or inhabitable structure . . . he or another participant in the crime: . . . (3) There is present in the structure another person who is not a participant in the crime.

Section 569.010, Cum Supp. 2015 states that "[a] person 'enters or remains unlawfully' in or upon premises when he or she is not licensed or privileged to do so[.]"

Under these statutes, the State was required to prove that Mr. Stewart was remaining unlawfully in the house when T.S. told him to leave. However, the State failed to prove that Mr. Stewart did not have a license and privilege to be present in the house.

T.S. testified that Mr. Stewart is her ex-husband. (TR 94). They were married in March of 2005, and they got divorced in January of 2014. (TR 94). After the divorce, they attempted to reconcile. (TR 94). They were not living together on January 23, 2015 because Mr. Stewart had not come home one night, and T.S. told him not to come back. (TR 95-96). However, they had been living together the week before this. (TR 95). Furthermore, although Mr. Stewart was not staying in the house on January 23, 2015, he was staying in a camper outside of the house. (TR 96).

During cross-examination, T.S. testified that she and Mr. Stewart had pulled their resources to put a $5,000 down payment on the house in question. (TR 108). She described this as a "rent to own" arrangement. (TR 118). Mr. Stewart still had his stuff in the house, including clothes in the closet and items in the

bathroom. (TR 108-109). Even when Mr. Stewart was in the camper, he still came in to eat meals and take showers in the house. (TR 109). They were rehabbing and cleaning the house, and Mr. Stewart was helping with this. (TR 109). He was only sleeping in the camper. (TR 109). There was no restraining order filed against Mr. Stewart, and he was still a joint owner of the house. (TR 110).

Based on the testimony of T.S., it is clear that Mr. Stewart had a license and privilege to be present in the house. At the very least, the State failed to prove that Mr. Stewart's remaining in the house was unlawful. The Western District Court of Appeals has stated that "[i]f the defendant has a license or a privilege to be on the property, the entry cannot be unlawful and, therefore, no offense has been committed." *State v. Hunt*, 630 S.W.3d 211, 215 (Mo. App. W.D. 1982)(discussing trespass in the second degree). The fact that Mr. Stewart had voluntarily stopped sleeping in the house does not mean that he relinquished his license and privilege to be in the house, especially when considering his continuing use of the house.

The present case is different from *State v. Hill*, 497 S.W.3d 391 (Mo. App. E.D. 2016). In that case, the defendant argued he was not guilty of first-degree trespass because he jointly owned the property on which he was trespassing. *Id.* at 393. The Eastern District Court of Appeals, though, determined that because the co-owner of the property had received an ex parte order of protection against the defendant, he *was* trespassing on the property after he was told to leave. *Id.* at 394.

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Unlike in *Hill*, there was no order of protection against Mr. Stewart in the present case. (TR 110).

In sum, the State failed to prove that Mr. Stewart remained unlawfully in the house after T.S. told him to leave. Therefore, Mr. Stewart's conviction for burglary in the first degree must be reversed. Additionally, because this burglary conviction served as the predicate offense for the armed criminal action conviction, that conviction must also be reversed.

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CONCLUSION

As argued in Mr. Stewart's first Point Relied On, his conviction for domestic assault in the third degree should be reversed.

As argued in Mr. Stewart's second Point Relied On, his convictions for burglary in the first degree and armed criminal action should be reversed.

Respectfully submitted,

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Certificate of Compliance

I, Samuel Buffaloe, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b) and Special Rule 360. The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,997 words, which does not exceed the words allowed for an appellant's brief.

/s/ Samuel Buffaloe

____

Samuel Buffaloe

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