

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 REPLY BRIEF

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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.

Undersigned counsel largely rests on Mr. Stewart’s initial substitute brief. However, the State seems to have changed a key word in describing T.S.’s testimony in its brief. After Mr. Stewart fired a bullet into the house, the State asserts the following occurred:

When asked if she was scared at that point that she could get hit by a bullet, Victim replied that she did not remember how she felt but said, “I guess.” (TR 105).

(Sub. Rsp. Brf. 6, 17, 20). This assertion makes it sound as if T.S. admitted to being scared of Mr. Stewart’s actions.

However, when actually reading page 105 of the transcript, it is clear that this is not what occurred. Instead, the following testimony took place:

The State: And you said, you testified, you didn't know where he was at that point.

T.S.: Right.

The State: Correct? I'm asking you were you concerned when you heard that gunshot or the glass break that you could have been hit by that bullet?

T.S.: I don't know. I don't remember what I felt. I guess.

The State: So is your answer you don't remember?

T.S.: Yeah.

(TR 105)(emphasis added).

From this excerpt, T.S. was only asked if she was "concerned" after the bullet, rather than if she was "scared." Being "concerned" is obviously much more subdued than being "scared." Furthermore, the prosecutor at trial only took T.S.'s testimony to mean that she did remember how she felt. (TR 105). Under T.S.'s testimony here, the State cannot prove that she was placed in immediate apprehension of immediate physical injury as required by Section 565.074.1(3), Cum Supp. 2015.

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.

Section 569.160, Cum Supp. 2015 states that a person commits the crime of burglary in the first degree if he “knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein[.]” Undersigned counsel argued in Mr. Stewart’s initial substitute brief that he could not be guilty of this crime because he was licensed and privileged to enter and remain in the house. (App. Sub. Brf. 21-24). This argument was based on the facts that Mr. Stewart was a partial owner of the house, he still possessed items in a closet and bathroom of the house, he still ate and showered in the house, he was helping to rehab the house, and no restraining order had been filed to keep him out of the house. (App. Sub. Brf. 22-23).

The State asserts that this Court should disregard these facts under the requisite standard of review. (Rsp. Brf. 29). However, seeing as though each of these facts came from the testimony of T.S., no “reasonable juror would be able to disregard them.” *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). The State’s only two witnesses at trial were T.S. and Officer Jim Wilson, who merely testified about the physical evidence he found regarding the gunshots. (TR 124-134). The State failed to prove through this testimony that Mr. Stewart lacked the license and privilege to enter and remain in the house at the time of the alleged burglary.

The State argues that this Court should look outside of Missouri law in determining whether or not an owner of a property can be guilty of burglary absent a restraining order or an order of protection. (Rsp. Sub. Brf. 25-27). However, it is important to keep in mind Section 556.026, Cum Supp. 2015, which states that “[n]o conduct constitutes an offense or infraction unless made so by this code or by other applicable statute.” The State points to no provision of Missouri law making it illegal for the owner of a property to enter or remain in a home.¹

Because of the ample evidence that Mr. Stewart retained a license and privilege to enter and remain in the house in question, this Court should reverse his conviction for burglary in the first degree. Additionally, because this burglary

¹ Amending Missouri law in the way advocated by the State should be left to the General Assembly rather than this Court.

conviction served as the predicate offense for the armed criminal action conviction, that conviction must also be reversed.

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,

/s/ Samuel Buffaloe

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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). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance, the brief contains 1,022 words, which does not exceed the words allowed for an appellant's reply brief.

/s/ Samuel Buffaloe

Samuel Buffaloe