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STATE OF WASHINGTON
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Supreme Ct. No. 89676-3
COA No. 30879-1-III

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

FLOYD EDWARD KOONTZ,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the Court of Appeals [Division III] decision filed on November 26, 2013 and the order denying reconsideration filed on January 14, 2014.

C. ISSUES PRESENTED FOR REVIEW

1. Does the decision conflict with a decision of the Supreme Court or another decision of the Court of Appeals?
2. Does the decision involve a significant question of constitutional law?
3. Does the decision involve an issue of substantial public interest?

D. STATEMENT OF THE CASE

In June of 2010, Koontz purchased a truck from Pete Flores for \$500. He paid \$250 and agreed to pay the rest later. RP 557. Koontz felt like he had been sold a “lemon.” RP 291. Months later, an argument ensued over the truck at Flores’s home. RP 558. During that argument, Flores kicked out Koontz and told him not to come back unless he had the rest of the money for the truck. RP 121, 561. There was yelling and pushing between the two. RP 122. 558. A friend, Jeri Anderson, was present at the time and asked them to calm down. RP 558. Flores pulled a

knife on Koontz and Koontz became mad. RP 292, 294. Anderson testified that she had seen Koontz with a knife earlier and thought Koontz was “gonna get a knife” when he reached for his pocket. RP 560. Koontz was pushed out the door by Flores. RP 561. Koontz was resisting leaving and continued to argue with Flores as he finally went to his vehicle to leave. RP 561. Anderson testified that Koontz was embarrassed by this incident. RP 293. Koontz told her that if he saw Flores he was going to kill him. RP 295.

About three months later, on May 8, 2011, Anderson and her sister, Dezarae Chambers, were visiting with Koontz. RP 564. Chambers told Koontz that Flores still wanted the money he felt he was owed for the truck. RP 128. When she told Koontz this, he jumped up and blurted out, “I’m gonna go kill that son-of-a-bitch right now.” RP 128. He also made comments such as, “If Pete ends up dead, I’m the one that killed him,” and “I hate that motherfucker.” RP 146-7, 154-5, 569.

Chambers testified that there was “a lot of aggression behind what he was saying.” RP 156. His demeanor changed and “he really got agitated” when Flores was mentioned. RP 129. He was also described as “intense” when the victim’s name came up. RP 145. Anderson told him that she wouldn’t recommend him visiting Flores. RP 568. Anderson testified that Koontz responded by saying “I hate that son of a bitch” and

something like, "I want to kill him." RP 569. As Koontz left the house he said, "you don't think I will, you don't think I'll do it." RP 129, 148.

Chambers was worried so she told Anderson to call Flores and tell him what Koontz had said. Anderson then called the victim and told him that Koontz had a knife and was coming to visit him. RP 569. Flores did not seem concerned and they ended the conversation. RP 571. She called Flores back within a few minutes after that, but he did not answer his phone. RP 573. Chambers and her sister then drove to Flores's house and discovered him lying mortally wounded in his yard. RP 130-31, RP 574-76.

A good friend of Flores's, Majin Saldana, was inside using Flores's restroom at the time of the attack. RP 180. Saldana testified that when he came out the house, he saw Koontz pulling a knife out of the side of the victim's neck. RP 180, 201. He also saw Flores fall to the ground. RP 182. Saldana screamed at the Defendant to stop. RP 183. Saldana went to his truck to get a pick so he could get Koontz off of his friend. RP 183, 186. Koontz then left and Flores died shortly thereafter. Saldana testified that Flores's behavior had not been erratic or aggressive prior to the stabbing. RP 223. He also said that while he was inside he did not hear any loud noises coming from outside.

Koontz' friend, Bob Murray, testified that Koontz showed up at his house shortly after the attack and that the Defendant was screaming and really disturbed. Koontz told him that he got in a fight and "might have killed a man." RP 500. Vickie Murray was also present and testified that Koontz said, "I think I might have just killed somebody." RP 522-3. Testimony indicated that Koontz' injuries appeared to be just superficial cuts. RP 421-22.

Koontz testified at trial that when he got to the victim's house, Flores was outside and had his back to him. RP 680. Koontz said that Flores turned around and said, "what the fuck do you want asshole?" RP 707. The Defendant claims that Flores then pulled a knife on him. RP 696.

Specifically, Koontz claimed he was attacked by Flores with a butcher knife and file. RP 705-06. However, when first contacted by Deputy Gonzalez he stated he had been attacked with a machete. RP 416. Koontz claimed that as he tried to pull his knife out of his pocket he tripped and fell, and Flores fell on top of him. Koontz believes that during this fall, Flores fell on his knife, causing a wound to Flores's back. RP 716. Koontz testified that while Flores was on top of him, he stabbed Flores and then ran away. RP 714-15. Koontz said he then blacked out but remembers going to his friend Bob's place. RP 721.

Koontz claimed that this incident was not over the truck, but admitted that he had been deceived by Flores in the transaction. RP 696. 693. Koontz claimed that he told Flores he didn't want the truck but that Flores never came and retrieved the truck. RP 697.

The trial was a bench trial. Koontz was charged with first degree murder. The trial court concluded that Koontz was the aggressor and rejected his self-defense argument. RP 816. The court found him guilty of the lesser crime of first degree manslaughter while armed with a deadly weapon. RP 818.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. The decision does not conflict with a decision of the Supreme Court or another division of the Court of Appeals.

A defendant whose aggression provokes the contact eliminates his right of self-defense. A first-aggressor jury instruction is proper when a defendant is involved in wrongful or unlawful conduct before the charged assault occurred. Therefore, a first-aggressor instruction is appropriate when there is credible evidence that the defendant provoked the use of force, thus necessitating the defendant's use of force in self-defense. State v. Douglas, 128 Wn. App. 555, 562-63, 116 P.3d 1012 (2005).

Generally:

[T]he right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action. Where there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction. An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight.

State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). A provoking act must be intentional and one that a "jury could reasonably assume would provoke a belligerent response by the victim." State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039, *review denied*, 113 Wn.2d 1014 (1989).

Petitioner argues that the "Court of Appeals has extended the factual basis for applying the first-aggressor doctrine beyond the limits of existing case law." However, the Court of Appeals decision does not conflict with any existing case law. It is well within the holding of State v. Riley, 137 Wn.2d 904, 967 P.2d 624 (1999) and consistent with Division Three's prior case of State v. Birnel, 89 Wn. App. 459, 949 P.2d 433 (1998).

State v. Riley held that "words alone do not constitute sufficient provocation." 137 Wn.2d at 911. In that case, the defendant asked the

victim about the victim's gang affiliation and suggested that the victim was a "wanna be." Shortly thereafter, the defendant drew a gun on the victim. The aggressor instruction was deemed proper because it was based on words *and* aggressive conduct. Id. at 909.

Similarly, the case at bar did not involve words alone as provocation. There was ample evidence of aggressive conduct in addition to the many threats -- the Defendant actually went to the victim's home, armed with a weapon, a knife, and knowing that a fight would ensue. He then walked up to the victim while the victim had his back to him.

In State v. Birnel, Division Three of the Court of Appeals found that the evidence did not support an aggressor instruction where a jury could not reasonably assume that the act would provoke a belligerent response from the victim. 89 Wn. App. at 473. In Birnel, the defendant said he confronted his wife about spending money on drugs and that she attacked him with a knife. Id. The court held that a jury could not reasonably assume that his actions would provoke a drug abuser to attack him with a knife. Id.

The facts of the case at hand are much different from those in Birnel. Koontz' actions were much different than the case of a husband merely confronting his wife about spending money on drugs. Here, Koontz made many threats to kill Flores, drove to his house with a knife,

and found Flores with his back to him outside. They had a history in which Flores had threatened him previously and in which Koontz had been kicked out of his house. It would be quite reasonable for any trier of fact to assume that the Defendant's actions would provoke an attack in this situation. As such, the court's decision was entirely consistent with existing case law regarding the doctrine of first aggressor.

In Koontz' bench trial, the evidence overwhelming supported the trial court's finding that he was the aggressor. Koontz had told others that Flores had previously pulled a knife on him, and that he had threatened to beat him to death with a hammer. RP 292, 492. Yet Koontz threatened to kill Flores and knowingly went to his house armed with a knife. Further, there was no evidence that Koontz withdrew from the altercation. Instead, it ended with the fatal wound to Mr. Flores.

The trial court's findings at the conclusion of the trial were cogent, well-founded, and well within the court's discretion:

You knew Mr. Flores had pulled a knife on you. Mr. Flores in a loud, physical manner ejected you from his home. You knew you were not welcome there. Nevertheless you went there with a knife. Mr. Koontz should reasonable (sp) have realized, you should have reasonably realized that Mr. Flores could still be angry with you and did not want you on his property and that your presence could result in a serious confrontation between the two of you.

...

The evidence established beyond a reasonable doubt that you went to Mr. Flores's house knowing that your presence would likely provoke a belligerent response, which it did. You created the necessary (sp) for you, the necessity for you acting in your own defense. This makes you the aggressor. So self-defense is not available to you Mr. Koontz.

RP 816.

2. The decision does not involve a significant question of constitutional law.

The Court of Appeal decision does not involve a significant question of constitutional law. Petitioner has not indicated in his Petition how this case involves any significant question of constitutional law.

3. The decision does not involve an issue of substantial public interest.

The Court of Appeal decision does not involve an issue of substantial public interest. Petitioner has not indicated in his Petition how this case involves any issue of substantial public interest.

F. CONCLUSION

The Court should deny the Defendant's Petition for Review for the reasons outlined above.

Respectfully submitted this 28th day of February, 2014,

/s/ Tamara A. Hanlon
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Attached is an Answer to Petition for Review for filing.

Case name: State of Washington v. Edward Floyd Koontz
Supreme Court Case number: 89676-3

Filed by:

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