30879-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FLOYD KOONTZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

INDEX

A. ASSIGNMENTS OF ERROR 1

B. ISSUES 2

C. STATEMENT OF THE CASE 4

D. ARGUMENT 7

1. NO EVIDENCE SUPPORTS THE COURT'S FINDING THAT MR. KOONTZ WAS THE AGGRESSOR 8

2. NO EVIDENCE SUPPORTS THE CONCLUSION THAT MR. KOONTZ WAS GUILTY OF FIRST DEGREE MANSLAUGHTER 11

E. CONCLUSION 14

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BIRNEL, 89 Wn. App. 459,
949 P.2d 433 (1998), *abrogated on other grounds by In re Pers. Restraint of Reed,* 137 Wn. App. 401,
153 P.3d 890 (2007)..... 10

STATE V. BROWER, 43 Wn. App. 893,
721 P.2d 12 (1986)..... 10

STATE V. CORD, 103 Wn.2d 361,
693 P.2d 81 (1985)..... 7

STATE V. FRAZIER, 82 Wn. App. 576,
918 P.2d 964 (1996)..... 7

STATE V. GAMBLE, 154 Wn.2d 457,
114 P.3d 646 (2005)..... 11

STATE V. GATEWOOD, 163 Wn.2d 534,
182 P.3d 426 (2008)..... 7

STATE V. HALSTIEN, 122 Wn.2d 109,
857 P.2d 270 (1993)..... 7

STATE V. HOVIG, 149 Wn. App. 1,
202 P.3d 318 (2009)..... 7

STATE V. RILEY, 137 Wn.2d 904,
976 P.2d 624 (1999)..... 8

STATE V. THOMAS, 150 Wn.2d 821,
83 P.3d 970 (2004)..... 7

STATUTES

RCW 9A.08.010(1)(c) 11

RCW 9A.32.060(1)..... 11

OTHER AUTHORITIES

1 WAYNE R. LaFAVE & AUSTIN W. SCOTT.,
Substantive Criminal Law § 5.7 (1986) 9

OXFORD ENGLISH DICTIONARY (1971) 12

WPIC 16.04..... 8

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the following Findings of fact:

> 10. During this confrontation Pedro Flores probably displayed a knife while telling Floyd Koontz not to return.
>
> 22. Floyd Koontz was the aggressor in the confrontation with Pedro Flores on May 8, 2011.

(CP 123)

2. The trial court erred in concluding:

> 2. Floyd Koontz is guilty beyond a reasonable doubt of the crime of First Degree Manslaughter committed on May 8, 20ll, because he stabbed Pedro Flores by his neck, killing him, during a fight at the home of Pedro Flores where Floyd had gone armed with a knife knowing that he had been told not to return without the money still owed to Pedro Flores. Floyd Koontz knew of the substantial risk of death to Pedro Flores caused by his actions and engaged in the conduct anyway. That disregard of the substantial risk was a gross deviation from conduct that a reasonable person would exercise in the situation

(CP 123)

3. The trial court erred in concluding:

> 3. Floyd Koontz is not entitled to raise the claim of self-defense, because he was the aggressor in the confrontation on May 8, 2011.

(CP 123)

B. ISSUES

1. An eyewitness testified that on the occasion of an earlier confrontation, the alleged victim had told the defendant to leave and not come back without money he was owed. Another witness testified that the defendant had told her that at some point the alleged victim had embarrassed him by pulling a knife. Is the evidence sufficient to support finding that the alleged victim pulled a knife during the confrontation in which he told the defendant to get out and not come back?

2. The defendant testified the alleged victim had attacked him without provocation. No witness saw the beginning of the fight that culminated in the stabbing and death of the alleged victim, but there was evidence that the defendant had sustained several wounds before stabbing the alleged victim. Is the evidence sufficient to support finding that the defendant was the aggressor?

3. Witnesses testified they saw the defendant using a knife to cut sausage shortly before the fatal incident. The defendant admitted that he had the knife in his pocket and pulled it

out to stab the alleged victim. Is this evidence sufficient to support finding that the defendant went to the home of the alleged victim armed with a knife?

4. The defendant drove to the home of the alleged victim several months after a confrontation in which the alleged victim ordered him to leave, pushed him out the door and told him not to come back without the money he owed. The defendant had a knife in his pocket. Is the evidence sufficient to support finding that the defendant knew of and disregarded a substantial risk that death would occur?

5. In the absence of any evidence the defendant provoked or commenced the fight, or that he knew that approaching a friend who had previously threatened him would likely result in the friend's death, did the court err in concluding the defendant was guilty of first degree manslaughter, and as the aggressor was not entitled to assert a claim of self-defense?

C. STATEMENT OF THE CASE

Pete Flores sold a truck to Floyd Koontz in June 2010 for $500. (RP 557) Mr. Koontz gave him $250 and agreed to pay the remaining $250 later. (RP 557)

Monica Parrish testified that some time during the summer of 2010, Mr. Koontz complained to her that Mr. Flores had "sold him a lemon." (RP 291, 293) He said he was upset about "an argument that had broken out. Pete broke out in some kind of rage and evidently embarrassed him or pulled a knife on him in front of friends." (RP 292)

Around the same time, Mr. Koontz told another acquaintance, Bob Murray, that Mr. Flores had threatened to beat him to death with a hammer. (RP 492)

Jeri Anderson and Dezarai Chambers were visiting Mr. Flores when they heard Mr. Koontz and Mr. Flores arguing about the truck; Mr. Koontz was asking Mr. Flores to lower the price. (RP 558) The argument became loud and Ms. Anderson went to intervene. (RP 559) At first she thought Mr. Koontz was "gonna get a knife" so she warned Mr. Flores. (RP 560) There is no evidence that Mr. Koontz in fact had a knife on that occasion, and according to Ms. Anderson, Mr. Flores did not have a knife or any other kind of weapon. (RP 561).

> Pete ended up pushing him out the door and shutting it and told him, told him not come back to his place again unless he has the money for his truck. He told him to get off his property and don't come back.

(RP 561)

A few months went by. (RP 120) During the afternoon of May 8, 2012, Mr. Koontz visited Ms. Anderson and her sister Dezarae Chambers. (RP 123) He brought some beer and sausage inside to share. (RP 124) During the visit he used his pocket knife to cut and eat the sausage. (RP 124) Ms. Chambers recalled that she had seen Mr. Flores recently and he had told her to tell Mr. Koontz that he wanted his money. (RP 128) Ms. Chambers did so and Mr. Koontz became upset and left.[1] (RP 128) According to Ms. Chambers, Mr. Koontz said he was going to kill Mr. Flores, so although she didn't believe he meant it she told her sister to call Mr. Flores and warn him. (RP 129-130, 573)

Majin Saldana was visiting Mr. Flores on the afternoon of May 8. (RP 178, 180) When Mr. Koontz arrived, Mr. Saldana was inside using the toilet. (RP 180) He first realized Mr. Koontz was there when he came out and saw Mr. Koontz pulling a knife out of Mr. Flores's neck. (RP

[1] As he was leaving, Mr. Koontz said he was going to kill Mr. Flores, but neither Ms. Chambers nor Ms. Anderson testified that she believed him and the trial court found that the State had failed to prove premeditation or intent. (RP 129, 568, 813, 817)

180) While Mr. Saldana called 911, Mr. Koontz got in his car and left. (RP 182-83) Mr. Flores bled to death in about ten minutes. (RP 253)

Deputy Horacio Gonzales arrested Mr. Koontz at his home a short time later. (RP 415) He saw that Mr. Koontz had been stabbed and called for an ambulance. (RP 417) Mr. Koontz had a puncture wound in his chest, along with superficial cuts or stab wounds, and some bleeding. (RP 421-22, 432, 438) He told one of the arresting officers that he had been attacked with a machete. (RP 438)

The State charged Mr. Koontz with first degree murder. (CP 1) The matter was tried to the court. Mr. Koontz testified that when he arrived at Mr. Flores's home on May 8, Mr. Flores made a somewhat threatening remark and promptly attacked him with a file and a butcher knife. (RP 705-06) As he tried to pull his knife out of his pocket, Mr. Koontz tripped and fell; Mr. Flores fell on top of him. (RP 710-11) Mr. Koontz got his knife out and stabbed Mr. Flores. (RP 714) He managed to get away and fled. (RP 714-15)

Rejecting Mr. Koontz's claim that he had acted in self-defense, the trial court found that he was the aggressor in the affray, found him guilty of first degree manslaughter while armed with a deadly weapon, and imposed a standard range sentence of 119 months. (CP 122-23, 130).

D. ARGUMENT

An appellate court reviews a trial court's decision following a bench trial to determine whether substantial evidence supports the challenged findings and whether the findings support the conclusions of law. *State v. Hovig,* 149 Wn. App. 1, 8, 202 P.3d 318 (2009). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Halstien,* 122 Wn.2d 109, 129, 857 P.2d 270 (1993). This court "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (*citing State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

Challenges to a trial court's conclusions of law are reviewed *de novo*. *State v. Gatewood,* 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A factual finding that is incorporated in the court's conclusions of law is reviewed as a finding. *State v. Frazier*, 82 Wn. App. 576, 589 n13, 918 P.2d 964 (1996).

1. NO EVIDENCE SUPPORTS THE COURT'S FINDING THAT MR. KOONTZ WAS THE AGGRESSOR.

The court concluded Mr. Koontz was not entitled to claim he acted in self-defense because it found he was the aggressor. Generally, "the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation . . . ." *State v. Riley*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999).

The pattern jury instruction WPIC 16.04 explains the concept of an aggressor:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

State v. Riley, 137 Wn.2d at 908.

The State did not present any evidence that Mr. Koontz took any action that created a necessity for Mr. Flores to act in self-defense. By going to the home of a former friend, after having been told to leave and not come back, Mr. Koontz may have acted unwisely, but this would not create a necessity for the friend to act in self-defense. The evidence would support the inference that Mr. Koontz's conduct was likely to provoke an

argument, or more threats from Mr. Flores, but there is no evidence that this conduct, without more, provoked the fight.[2]

"[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force. For the victim's use of force to be lawful, the victim must reasonably believe he or she was in danger of imminent harm." *State v. Riley*, 137 Wn.2d at 912.

The reason for barring an aggressor from asserting a claim of self defense "is because 'the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense.'" 137 Wn.2d at 911, *quoting* 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 657-58 (1986).

---

[2] In its oral ruling, the court stated:

> 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 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.
>
> (RP 816)

In *State v. Birnel*, the defendant suspected that the alleged victim, his wife, was taking drugs and confirmed his suspicion by searching her purse. S*tate v. Birnel*, 89 Wn. App. 459, 949 P.2d 433 (1998), *abrogated on other grounds by In re Pers. Restraint of Reed*, 137 Wn. App. 401, 408, 153 P.3d 890 (2007) and *State v. Brower*, 43 Wn. App. 893, 721 P.2d 12 (1986). After he confronted her and asked if she was on drugs and if that was where the money was going, she attacked him with a knife. 89 Wn. App. 463. She was killed in the ensuing struggle and Mr. Birnel was convicted of second-degree murder. *Id*.

This court held the evidence was insufficient to support giving an aggressor instruction: "Even if he knew that his wife did not like him to search her purse, a juror could not reasonably assume this act and these questions would provoke even a methamphetamine abuser to attack with a knife." 89 Wn. App. at 473.

No reasonable person could infer from the mere fact that Mr. Flores had ordered Mr. Koontz to leave his home some months earlier, and had told him not to come back without the money, that Mr. Flores would believe he was in imminent danger if Mr. Koontz did come back with or without the money.

The State did not present any evidence that upon arriving at Mr. Flores's home Mr. Koontz made any provocative remarks or displayed

any weapon or offered to strike any blows, or engaged in any sort of threatening behavior that would cause Mr. Flores to reasonably believe he was in danger of imminent harm.

The court erred in finding that Mr. Koontz was the aggressor on May 8, 2011, because no evidence supports that finding. Thus the court further erred in concluding that Mr. Koontz was not entitled to claim self-defense because he was the aggressor.

2. NO EVIDENCE SUPPORTS THE CONCLUSION THAT MR. KOONTZ WAS GUILTY OF FIRST DEGREE MANSLAUGHTER.

"A person is guilty of manslaughter in the first degree when: (a) He or she recklessly causes the death of another person; . . . ." RCW 9A.32.060(1). "Reckless" is defined as acting with knowledge of and disregard for a "substantial risk that a wrongful act may occur," and that the "disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation." RCW 9A.08.010(1)(c). In the context of manslaughter, recklessness is more narrowly defined as acting with knowledge of and disregard for a substantial risk that a death may occur. *State v. Gamble*, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005).

The court found that "[d]uring this confrontation Pedro Flores probably displayed a knife while telling Floyd Koontz not to return." (CP 122) This finding is not supported by substantial evidence.

Ms. Anderson was the only witness to the confrontation and she testified that Mr. Flores had not displayed a knife or any other weapon. Ms. Parrish, who reported that Mr. Koontz had said Mr. Flores embarrassed him by pulling a knife, had conflicting recollections about the date on which the embarrassing event had taken place and was unable to provide any additional information about the alleged event.

This is not substantial evidence that Mr. Flores pulled a knife on the occasion when Ms. Anderson heard him tell Mr. Koontz to leave and not come back.

In support of its conclusion that Mr. Koontz was guilty of manslaughter, the court found that the death occurred "during a fight at the home of Pedro Flores where Floyd had gone armed with a knife knowing that he had been told not to return without the money still owed to Pedro Flores."

The finding that Mr. Koontz was "armed" is not supported by substantial evidence.

The word "armed" may mean being in possession of a weapon for offensive or defensive purposes. *See* Oxford English Dictionary,

450 (1971). But there is no evidence that Mr. Koontz possessed the knife for the purpose of assaulting Mr. Flores or defending against an anticipated assault. The record demonstrates that Mr. Flores had possessed the knife for the purpose of cutting sausage.

If the words "armed with a knife" are read to mean merely that Mr. Koontz was in possession of a knife, then this finding is supported by the evidence, but then the finding is wholly insufficient to support the conclusion that Mr. Koontz went to the home of Mr. Flores knowing there was a substantial risk that death my occur. Knowledge that Mr. Flores had told him to get out and not come back, coupled with the fact that he, himself, was carrying a pocket knife that he had been using to cut sausages, is not substantial evidence that Mr. Koontz knew that going to the home of Mr. Flores created a substantial risk that death might occur.

There is no evidence Mr. Koontz knew that, by going to the home of Mr. Flores while in possession of a knife after Mr. Flores had told him not to return without the money, he was causing a substantial risk of death to Mr. Flores. Indeed, even if the evidence established that Mr. Koontz went to the home of Mr. Flores, knowingly possessing a knife for use in the event Mr. Flores should attack him, knowing that Mr. Flores had once embarrassed him by pulling a knife, knowing that Mr. Flores had pushed him out of his house telling him not to come back without the money, this

court should hold that such knowledge does not amount to knowledge of a substantial risk that death might occur.

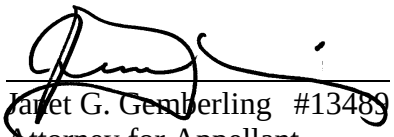
Mr. Koontz's first degree manslaughter conviction is not supported by substantial evidence.

E. CONCLUSION

Because the evidence is insufficient to support the manslaughter conviction, this court should reverse the judgment and dismiss the charge. Alternatively, this court should find the evidence was insufficient to support the court's conclusion that Mr. Koontz was the aggressor, reverse the conviction and remand the case for a new trial.

Dated this 25th day of October, 2012.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 30879-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
FLOYD KOONTZ,	)	
	)	
Appellant.	)	

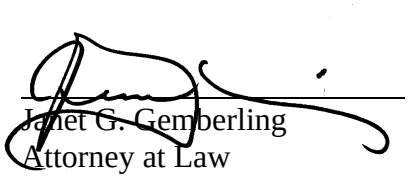
I certify under penalty of perjury under the laws of the State of Washington that on October 25, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Kevin Eilmes
kevin.eilmes@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on October 25, 2012, I mailed a copy of the Appellant's Brief in this matter to:

Floyd Koontz
#730322
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

Signed at Spokane, Washington on October 25, 2012.



Janet G. Gemberling
Attorney at Law