

SUPREME COURT NO. 94716-3
C.O.A. No. 48408-1-II
Cowlitz Co. Cause NO. 15-1-00754-5

**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DARYL GLENN HARDING,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

RYAN JURVAKAINEN
Prosecuting Attorney
ERIC BENTSON/WSBA#38471
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney for Ryan P. Jurvakainen, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS' DECISION

The Court of Appeals correctly decided this matter, holding there was sufficient evidence to instruct the jury on first aggressor when affirming Harding's assault in the second degree convictions. The Respondent respectfully requests this Court deny review of the June 6, 2017, Court of Appeals' opinion in *State of Washington vs. Daryl Harding*, No. 48408-1-II.

III. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' decision finding that the trial court did not err in instructing the jury on first aggressor involve a significant question of constitutional law under RAP 13.4(b)(3)?

IV. STATEMENT OF THE CASE

Greg Stark lived in an upstairs apartment number three (“#3”) at 1013 North Third Avenue in Kelso. 2RP at 65-67. Stark had two chairs outside his apartment, and neighboring apartment number four (“#4”) had one chair outside. 2RP at 67. About three days before July 8, 2015, while headed to a medical appointment, Stark observed Daryl Harding sitting in

front of apartment #4. 2RP at 68. When Stark returned to his apartment, Harding was sitting in one of Stark's chairs in front of his apartment. 2RP at 68. Harding asked Stark for a cigarette, and Stark gave him one. 2RP at 68. Over the next two days, Harding remained outside of Stark's apartment. 2RP at 68. Whenever Stark left his apartment, Harding asked for a cigarette, and Stark would give him one. 2RP at 69.

After about three days, Stark and his girlfriend became nervous about Harding sitting in front of his apartment. 2RP at 70. On July 8, 2015, Stark was leaving his apartment to take his girlfriend to an appointment, when he again observed Harding sitting in one of his chairs in front of his apartment. 2RP at 70. As he had before, Harding requested a cigarette. 2RP at 71. This time Stark told him that he could not afford to keep giving Harding cigarettes. 2RP at 71. Harding then pulled a \$10 bill out of his sock and showed it to Stark. 2RP at 71. Stark told Harding that he needed to go buy himself a pack of cigarettes and also asked, "[W]ould you please not sit in front of my apartment – you are making my girlfriend nervous[?]" 2RP at 71.

Later that night, Stark's friend Norm Jensen came to Stark's apartment. 2RP at 72. Stark and Jensen left Stark's apartment to go to the store where they purchased a six-pack of beer. 2RP at 72-73. When they returned to Stark's apartment, Harding was sitting in the single chair in

front of apartment #4. 2RP at 73. Harding called Stark, who was Native American, a profane racial slur. 2RP at 66, 73. Stark's downstairs neighbor, who was also Native American, heard Harding and also came outside of his apartment. 2RP at 73-74. Stark told Harding to get off his porch and said, "[Y]ou've been camping out for three days now; you don't belong here." 2RP at 74. Stark called Harding a profane racial slur. 2RP at 74. Both Stark and Jensen went inside Stark's apartment. 2RP at 74. Harding remained outside of Stark's apartment and continued to use profanity and call Stark racial slurs. 2RP at 75. Stark then closed his door—which was sliding glass—and called the police to ask them to remove Harding. 2RP at 75-76, 80, 96. From outside the sliding glass door, Harding threatened Stark saying was going to get him. 2RP at 96.

Officers John Johnston and Tim Gower of the Kelso Police Department responded to Stark's call. 2RP at 108-09, 112. They went upstairs and observed Harding sitting outside of apartment #4. 2RP at 113. Initially, Officer Johnston contacted Stark inside apartment #3 and Officer Gower contacted Harding. 2RP at 113-14. After speaking with Stark, Officer Johnston contacted Harding. 2RP at 114. Harding told Officer Johnston he was transient, had been staying in front of apartment #4, did not know anyone in the apartments, and that he was willing to leave. 2RP at 114-15.

The officers walked down the stairs with Harding, toward the street. 2RP at 115. Harding told Officer Johnston that “tweakers” in the apartment had stolen his guitar and amplifier. 2RP at 115. Officer Johnston attempted to investigate the theft of Harding’s property. 2RP at 116. Officer Johnston requested a description of the stolen amplifier. 2RP at 116. However, Harding would only provide minimal information. 2RP at 116. Harding became angry, told Officer Johnston he was not going to do anything about it, then said, “Forget it. I’m leaving,” and left. 2RP at 116.

Harding eventually returned to the apartments. 2RP at 98. After being in Stark’s apartment for a while, it was time for Jensen to return home. 2RP at 98. Because Harding was outside, Stark suggested that Jensen let him walk him home. 2RP at 98. Jensen opened the door and exited Stark’s apartment. 2RP at 99.

Harding swung a board with nails sticking out of it at Jensen’s head. 2RP at 99. Jensen was able to put his hand up to protect his head. 2RP at 99. Harding struck Jensen in the hand, driving a nail through his finger. 2RP at 100, 102-03. Due to having a nail driven into his finger, Jensen was unable to make a fist for about a month’s time afterward. 2RP at 102. Harding again swung the board at Jensen, this time striking him on the shoulder. 2RP at 100. Stark exited and spun Jensen around. 2RP at

100. Harding then hit Jensen for a third time with the board, in the stomach. 2RP at 100. Stark pushed Jensen into the house. 2RP at 100.

Stark grabbed the board to prevent Harding from continuing to assault them. 2RP at 79. Harding was too strong for Stark and pulled the board from Stark's hand, cutting him in the hand. 2RP at 79, 81. Harding then swung the board at Stark's head. 2RP at 79. Stark raised his arm to block the blows, and Harding struck Stark multiple times in the forearm with the spiked board. 2RP at 79. One of the nails protruding from the board punctured Stark's arm, leaving a scar. 2RP at 79, 81. While Stark bled some, the majority of the bleeding came from Jensen's bleeding hand. 2RP at 82-83.

After pushing Jensen into the apartment, Stark closed his sliding glass door. 2RP at 80. Harding then began to strike Stark's sliding glass door with the board, attempting to break it. 2RP at 80. Stark called the police. 2RP at 81. Officers Johnston and Gower responded to Stark's call. 2RP at 117, 139. The police went back up the stairs, where they observed Harding sitting in the chair outside of apartment #4. 2RP at 139. Upon seeing the police Harding stood up, placed his hands behind his back, and said, "I'm putting my hands behind my back; arrest me; I got my point across." 2RP at 118. Harding was arrested. 2RP at 118.

Propped up against the chair he was sitting in, was the board with nails sticking out that he had used to strike Stark and Jensen. 2RP at 121.

Harding was charged with two counts of assault in the second degree for intentionally assaulting Jensen and Stark with a deadly weapon, both with deadly weapon enhancements, and the case proceeded to trial. 2RP at 5. During the trial, Jensen, Stark, Officer Johnston, and Officer Gower testified. 2RP at 65-141, 179-180. The spiked board was admitted into evidence. 2RP at 126-27. Officer Johnston testified that not only did the board present the potential for breaking things, but due to the nails it could also puncture. 2RP at 127-28. Officer Johnston explained that this posed a real danger to the eyes of those struck with the board, and if a nail caught a person in the wrong location it could kill that person. 2RP at 128.

Harding also testified. 2RP at 147-168. Harding said he was sitting outside apartment #4, when Stark and Jensen came out drunk. 2RP at 157. Harding testified that Jensen said to him, “What the f*** are you looking at?” 2RP at 158. Harding said that Jensen called him a racial slur and asked how much money he had. 2RP at 159. Harding claimed that Stark and Jensen were “deliberately trying to pick a fight with me.” 2RP at 160. Harding said Stark then called the police and accused him of trespassing. 2RP at 160. Harding related that the police discussed the

stolen guitar with him and that he became frustrated and walked off. 2RP at 161. Harding said that after the police left he returned to the chair upstairs. 2RP at 162.

Harding said that Stark and Jensen argued with him, calling him racial slurs and that he responded with racial slurs. 2RP at 162. Harding testified that the “Indian that lives downstairs, he comes upstairs and hears us arguin’.” 2RP at 162. Harding said the third man from downstairs was staring at him and told him he would kill him if he disrespected his people. 2RP at 163. Harding said he told the three men: “You’re all a bunch of bitches. You want to take my money, you come and take my money.” 2RP at 164. Because he was outnumbered, Harding said he put his hand behind his back pocket to make the men think he had a knife. 2RP at 164. Harding then challenged the men to come and take his money. 2RP at 165.

Harding testified that the third man said he had something for him and went downstairs to his apartment. 2RP at 165. Harding said that he then looked for “any kind of weapon” he could find. 2RP at 165. After Harding found the board with the nails sticking out, he returned to the top of the stairs. 2RP at 165. Harding said the third man came halfway up the stairs. 2RP at 165. Harding said the third man observed him with the weapon, and Harding challenged him to come take his money. 2RP at

V. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

Because Harding's petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Harding maintains that Court of Appeals' decision raises a significant question of constitutional law under RAP 13.4(b)(3). His petition does not argue for any of the other grounds under RAP 13.4(b). In arguing that the Court of Appeals erred, Harding fails to consider all of the evidence presented. Once such evidence is considered, his argument does not hold. Consequently, Harding's petition fails to demonstrate that the Court of Appeals' decision presents a significant question of constitutional law. For these reasons, his petition does not meet the criteria required for review under RAP 13.4(b).

A. THE COURT OF APPEALS' DECISION DOES NOT INVOLVE A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AS REQUIRED FOR REVIEW UNDER RAP 13.4(B)(3).

The trial court did not err in giving the aggressor instruction because conflicting evidence was presented as to whether Harding's conduct precipitated the fight. "An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight." *State v. Wingate*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999). At trial Harding's testimony as to what occurred differed from Stark's and Jensen's. The jury was permitted to consider all the evidence presented and draw whatever reasonable inferences could be drawn. Accordingly, when all evidence and reasonable inferences are considered, there was sufficient evidence for the court to give the aggressor instruction.

"A court properly submits an aggressor instruction where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant provoked the fight; or (3) the evidence shows the defendant made the first move by drawing a weapon." *State v. Anderson*, 144 Wn.App. 85, 89, 180 P.3d 885 (2008). Although "words alone" do not constitute sufficient provocation for giving an aggressor instruction, "[w]here there is credible

evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate.” *State v. Riley*, 137 Wn.2d 904, 909-910, 976 P.2d 624 (1999). The provocative act need not be the striking of the first blow. *State v. Hawkins*, 89 Wn. 449, 455 (1916). Further, a trespass has been found sufficient provocation to allow an aggressor instruction, when the owner of a property uses force to expel a malicious trespasser. *State v. Bea*, 162 Wn.App. 570, 578, 254 P.3d 948 (2011); *See also*, RCW 9A.16.020(3), (4).

Here, the aggressor instruction was appropriate. First, there was sufficient evidence for the jury to reasonably determine Harding provoked the fight. While Harding recognizes that evidence he provoked the fight would make the aggressor instruction appropriate, he ignores entirely the testimony of Stark and Jensen and only considers his own testimony when addressing this issue. However, the jury was permitted to consider all of the evidence, including the testimony Harding disagrees with. According to Stark and Jensen, when Jensen exited the apartment to leave, Harding struck him with the spiked board multiple times. 2RP at 99-100. Stark then attempted grab the board from Harding in an effort to defend Jensen. 2RP at 79, 101. Harding then struck Stark multiple times. 2RP at 79, 101. Because Harding provoked the fight by assaulting Jensen, he was not

permitted to assault Stark when Stark used force against Harding to protect Jensen. Further, Harding provided additional evidence that he provoked the fight when he testified to holding the spiked board and challenging the men to fight, while trespassing outside Stark's home. 2RP at 165-66. Thus, there was sufficient evidence for the jury to reasonably determine that by his conduct Harding provoked the fight.

Second, there was conflicting testimony as to who precipitated the fight. Harding's argument to the contrary fails. Jensen and Stark testified that as Jensen exited the apartment to go home Harding immediately struck him with the spiked board, then when Stark attempted to assist Jensen, Harding attacked him with the spiked board also. 2RP at 78-79, 99-101. Conversely, Harding testified that prior to striking Stark and Jensen he held up the spiked board and challenged them to come take his money. 2RP at 165-66. According to Harding, Jensen and Stark then came at him like defensive linemen rushing a quarterback, so he struck both of them with multiple times with the spiked board. 2RP at 166-67. These two versions of what occurred were in obvious conflict—Stark and Jensen described Harding as precipitating the fight, while Harding described Stark and Jensen as precipitating fight. Thus, there was conflicting evidence as to whether Harding provoked the fight.

Finally, there was also evidence presented that Harding made the first move by drawing a weapon—an issue Harding’s petition does not even address. Harding testified that after obtaining the spiked board, he stood and challenged Jensen and Stark, telling them to come take his money. 2RP at 166. Harding had already stated he was going to get Stark. 2RP at 96. His prior threat and challenge, just outside the front door of Stark’s apartment, combined with his presentation of the weapon was sufficient evidence for the jury to find he made the first move by drawing a weapon.

Further, Harding, who had already been asked to leave by the police, had returned just outside the front door of Stark’s apartment and was now threatening him with a weapon. Stark would have been justified in using force to expel Harding, who at this point presented as a malicious trespasser. Accordingly, even if the jury believed Harding’s claim that Stark and Jensen rushed him, there was evidence from which it could have found by threatening the men with a weapon first, Harding was the aggressor and was not then justified in using that weapon in self-defense. For these reasons, the aggressor instruction was properly given.

VI. CONCLUSION

Because the aggressor instruction was appropriate, Harding's claim that the Court of Appeals' decision raises a significant question of constitutional law fails.² Because the petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

Respectfully submitted this 28th day of July, 2017.



Eric H. Bentson, WSBA #38471
Deputy Prosecuting Attorney

² By giving the jury the aggressor instruction the court instructed the jury that if it found beyond a reasonable doubt Harding was the aggressor, then he was not entitled to self-defense. 3RP at 41-42. The jury was also instructed that it was the State's burden to prove beyond a reasonable doubt the use of force by Harding was not lawful. 3RP at 42. Thus, if the jury found Harding was not the aggressor, it was properly instructed that the State had the burden of proving beyond a reasonable doubt that Harding's use of force was not lawful.

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via the Supreme Court Portal to the following:

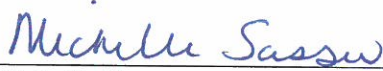
Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504

and,

Mr. Peter Tiller
The Tiller Law Firm
P.O. Box 58
Centralia, WA 98531-0058
ptiller@tillerlaw.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July 28th, 2017.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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