95899-8

Supreme Court No. (to be set)
Court of Appeals No. 34157-7-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Joseph Richmond
Appellant/Petitioner

Kittitas County Superior Court Cause No. 14-1-00247-4
The Honorable Judge Scott Sparks

PETITION FOR REVIEW

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DECISION BELOW AND ISSUES PRESENTED

Petitioner Joseph Richmond, the appellant below, asks the Court to review the Court of Appeals published opinion entered on May 1, 2018.[1]

This case presents five issues:

1. Did Mr. Richmond lose his right to act in self-defense when he stood on his own property holding a piece of wood and told Higginbotham not to come any closer?

2. Is an aggressor instruction improper where the alleged provocation is a lawful act?

3. Where the court instructs on provocation, must the jury be told that the aggressor doctrine does not apply to actions reasonably likely to provoke an unreasonable belligerent response?

4. Did the trial court violate Mr. Richmond's right to present a defense?

5. Did the trial court infringe Mr. Richmond's confrontation right?

STATEMENT OF THE CASE

Dennis Higginbotham accompanied two friends to Joseph Richmond's house. RP 267, 433-434. They went to retrieve property belonging to one of them, Veronica Dresp.[2] RP 263-265, 267, 433-434. When Mr. Richmond refused to let them in, they threatened to kick down the door. RP 270-271, 363-364, 556, 981. They broke into a locked shed using a crowbar. RP 271, 364, 556, 981.

Police responded to Mr. Richmond's 911 call and instructed Higginbotham's party to leave. RP 273, 282, 374, 437-438, 465-466, 564, 568, 623. Dresp agreed to return the following day, when an officer could

[1] A copy of the opinion is attached.

[2] The other friend was named Lonnie Zackuse. Dresp had lived with Mr. Richmond until recently; the three friends went to Mr. Richmond's house to retrieve Dresp's property. RP 263-265, 267.

be present for a civil standby. RP 273, 282-283, 374, 437, 558, 623, 624.

After the officer left, Higginbotham's group either remained at or returned to Mr. Richmond's house.[3] RP 273, 282-283, 374, 437-438, 465-466, 564, 568, 623. Higginbotham and Mr. Richmond yelled at each other. RP 287, 289-290, 358, 379, 380, 382, 467, 698, 722.

Higginbotham held a mag-light. RP 358, 380, 694, 698, 989. Mr. Richmond went inside and returned with a length of two-by-four.[4] RP 292-296, 381, 459.

He warned Higginbotham not to come closer. RP 292, 294, 382, 993, 1046. Higginbotham stepped toward him, and Mr. Richmond hit him once with the board. RP 289, 292, 294, 379-380, 382, 467, 993, 995, 1016, 1046. Higginbotham died as a result. RP 845-846.

A toxicology report showed that Higginbotham had enough methamphetamine in his system to kill most people. CP 68-77. At Mr. Richmond's murder trial, he sought to introduce this fact, along with testimony showing that methamphetamine can make people irrational and aggressive. RP 89-91, 160-190. The trial court refused. RP 170-175.

Mr. Richmond also wanted to show that Higginbotham and the two friends used methamphetamine together. RP 163-190. The court refused to allow cross-examination on the subject, unless it related to witness perception and memory. RP 183-190; 221-223.

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[3] According to Dresp, they didn't leave the scene. RP 283-284. Zackuse testified that they drove away and came back. RP 437-438.

[4] Mr. Richmond testified that he picked up the board outside, without going in the house. RP 995, 1016.

Over Mr. Richmond's objection, the court gave an aggressor instruction. RP 1080-1092; CP 106. The State relied on the instruction in closing argument. RP 1125-1126, 1165.

Following Mr. Richmond's murder conviction, he appealed. CP 109, 126-139. The Court of Appeals affirmed, with one judge dissenting. *See* Majority, pp. 1, 17; Dissent, pp. 1-12.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE TRIAL COURT IMPROPERLY STRIPPED MR. RICHMOND OF HIS RIGHT TO CLAIM SELF-DEFENSE.

Mr. Richmond came out of his house with a two-by-four. He stood on his property and told Higginbotham not to come any closer. This happened after Higginbotham's party had threatened to kick down the door, used a crowbar to break into a locked shed, and was told to leave by a police officer. When Mr. Richmond told the other man not to come closer, Higginbotham came toward him. Under the circumstances, Mr. Richmond was not the aggressor. The court should not have instructed jurors on the aggressor doctrine.

A. Mr. Richmond did not lose his right to act in self-defense when he stood on his own property holding a piece of wood and told Higginbotham not to come any closer.

Washington courts disfavor aggressor instructions.[5] *State v. Stark*, 158 Wn.App. 952, 960, 244 P.3d 433 (2010); *State v. Douglas*, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005). Such instructions are rarely

[5] Jury instructions are not warranted unless supported by substantial evidence. *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 767, 389 P.3d 517 (2017).

necessary and have the potential to relieve the State of its burden to disprove self-defense. *Stark*, 158 Wn.App. at 960.

The aggressor doctrine applies only when the accused's aggressive act is "reasonably likely to provoke a belligerent response…" *State v. Sullivan*, 196 Wn. App. 277, 289, 383 P.3d 574 (2016), *review denied*, 187 Wn.2d 1023, 390 P.3d 332 (2017); CP 106. The provoking act cannot be the assault itself. *State v. Brower*, 43 Wn. App. 893, 902, 721 P.2d 12 (1986).[6] Here, Mr. Richmond acted defensively. Even when the evidence is taken in a light most favorable to the State, he was not the aggressor.

Mr. Richmond was on his own property.[7] RP 264, 338, 484. He faced a group that had threatened to kick down his door and had broken into a locked shed using a crowbar. RP 270-271, 363-364, 556, 981.

Higginbotham was there even after police told his party to leave. RP 273, 282, 374, 437-438, 465-466, 564, 568, 623. He had a mag-light in his hand while the two yelled at each other. RP 287, 289-290, 358, 379, 380, 467, 698, 722. He walked toward Mr. Richmond and said he wasn't afraid. RP 289-290, 291, 379-380, 439.

Higginbotham continued to approach after Mr. Richmond warned him not to come any closer. RP 292, 294, 382, 993, 1046. When Higginbotham came closer, Mr. Richmond hit him. RP 292, 294, 379-380, 382, 467. 995, 1016.

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[6] *See also State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989) (Defendant "never initiated any act toward [the victim] until the final assault); *State v. Kidd*, 57 Wn.App. 95, 100, 786 P.2d 847 (1990) (The provoking act "cannot… be the actual assault).

[7] The rental was in his name, and he paid rent. RP 264, 338, 484.

Mr. Richmond was not the aggressor. *See Douglas*, 128 Wn. App. at 563-564. He had a right to be on his property; by contrast, police told Higginbotham to leave. When Mr. Richmond warned Higginbotham not to come closer, Higginbotham ignored the warning and stepped toward him holding the mag light.

Mr. Richmond's actions were not "reasonably likely to provoke a belligerent response…" *Sullivan*, 196 Wn. App. at 289; CP 106. By instructing on provocation, the trial court improperly stripped Mr. Richmond of his right to use self-defense. *See Douglas*, 128 Wn. App. at 563-564.

Mr. Richmond did not lose the right to use self-defense simply because he retrieved a weapon. *Id.* In *Douglas*, for example, the defendant shot an unarmed man. *Id.* This did not warrant an aggressor instruction. *Id.*

> As the dissent here pointed out, Mr. Richmond possessed the right to hold the board to defend himself in the event Higginbotham attacked him first. Even if Richmond bore a gun, the constitution would protect his conduct.
> Dissent, p. 8 (citing U.S. Const. Amend. II, Wash. Const. art. I, §24.)

Even if Mr. Richmond acted improperly by swinging the board, the instruction was unwarranted. Under the aggressor doctrine, the assault itself may not be the provoking act. *Brower*, 43 Wn. App. at 902; *Wasson*, 54 Wn. App. at 159; *Kidd*, 57 Wn.App. at 100.

The jury should have been permitted to evaluate Mr. Richmond's self-defense claim on its merits. *See Douglas*, 128 Wn. App. at 563-564. The provocation instruction and the prosecutor's arguments prevented them from doing so. *Id.*

The Court of Appeals majority decided that Mr. Richmond provoked the fight by going inside and returning with the two-by-four. Majority, p. 12.[8] Under the court's reasoning, no one could ever hold a weapon while telling an intruder to leave. *See* Dissent, p. 8 ("Walking with a two-by-four in one's hand does not reasonably provoke a fight, when one stops short of the victim and warns the victim not to step forward.")

The evidence did not support an aggressor instruction. The instruction improperly prevented the jury from considering Mr. Richmond's self-defense claim and relieved the state of its burden of proof. *Stark*, 158 Wn.App. at 961. Mr. Richmond's conviction must be reversed, and the case remanded for a new trial with proper instructions. *Id.*

B. An aggressor instruction may not be based on the defendant's lawful activity.

The "aggressor doctrine" derives from the common-law rule that a person who provokes a fight may not claim self-defense. *See, e.g., State v. McCann,* 16 Wash. 249, 47 P. 443 (1896). The common law has always required evidence of an unlawful (or "lawless") aggressive act.[9] *See, e.g., State v. Turpin*, 158 Wash. 103, 290 P. 824 (1930).

The history of the doctrine's development shows that an unlawful act is still required. When first published, the pattern aggressor instruction required jurors to determine if the defendant created the need to act in self-

[8] The trial court did not identify any specific action that warranted an aggressor instruction. RP 1080-1092. The prosecutor repeatedly suggested that Mr. Richmond's general attitude precluded him from defending himself. RP 1125-1126, 1165.

[9] *See also State v. Thomas*, 63 Wn.2d 59, 385 P.2d 532 (1963), *overruled on other grounds by State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974); *State v. Upton*, 16 Wn.App. 195, 556 P.2d 239 (1976); *State v. Bailey*, 22 Wn.App. 646, 591 P.2d 1212 (1979).

defense "by any *unlawful* act." Former WPIC 16.04, 11 Wash. Prac., Pattern Jury Instr. Crim. (1st. Ed) (emphasis added).

This language was found to be "too vague and too broad." *State v. Arthur*, 42 Wn. App. 120, 124, 708 P.2d 1230 (1985). In *Arthur*, jurors may have believed that an automobile accident was the unlawful act that made the defendant the aggressor. *Id.*, at 123-124. The *Arthur* court found that this was "not rational, reasonable, or fair." *Id.*

The following year, the Supreme Court acknowledged *Arthur*, but upheld a conviction where the instruction included the word "unlawful." *State v. Hughes*, 106 Wn.2d 176, 192-193, 721 P.2d 902 (1986) . In *Hughes*, the Supreme Court rejected the defendant's argument that the instruction was vague. According to the Supreme Court, the defendant's case did not present the vagueness problem addressed by *Arthur* because "the evidence of unlawful conduct was clear." *Id.*

Citing *Hughes* and *Arthur*, the Court of Appeals clarified that the instruction was "vague and overbroad unless directed to specific *unlawful* intentional conduct." *State v. Thompson*, 47 Wn.App. 1, 8, 733 P.2d 584, 589 (1987) (emphasis added) (citing *Arthur* and *Hughes*). The *Thompson* court upheld a conviction despite the instruction's vague language because the defendant's "*unlawful conduct*, consisting of drawing his weapon [without provocation,] was the only conduct upon which the jury could base a denial of his self-defense theory." *Id.* (emphasis added).[10]

[10] Under one version of the facts, the defendant drew his weapon (without any provocation) during a "conversation" about an earlier insult. *Thompson*, 47 Wn. App. at 4.

Faced with the criticisms outlined in *Arthur* and reiterated in *Thompson*, the pattern committee replaced the word "unlawful" with the word "intentional." *See* WPIC 16.04 (4th Ed.). This was an attempt to address the *Arthur* court's concern—that jurors in that case might have stripped the defendant of his self-defense claim because of an accidental fender bender. *See Arthur*, 42 Wn.App. at 124.

However, this revision created a new problem. If taken literally, the amendment significantly lowers the State's burden to disprove self-defense. The language precludes a self-defense claim based on *lawful* intentional acts that foreseeably provoke a belligerent response, relieving the State of its burden to prove an unlawful or lawless provoking act.

For example, approaching a group of drug dealers to tell them to leave the neighborhood is an intentional act reasonably likely to produce a belligerent response. A person who does so would not be permitted to use force in self-defense if attacked by the drug dealers.

Similarly, starting a business next to a competitor is an intentional act reasonably likely to produce a belligerent response. Under the instruction, doing so would strip the new business owner of the right to use self-defense if attacked by the competitor.

Even after *Arthur* and the instruction's amendment, Washington appellate courts have continued to require clear proof of an unlawful provocation before the instruction can be given. For example, the Supreme Court has held that "words alone do not constitute sufficient provocation" for an aggressor instruction. *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d

624 (1999). The *Riley* court's explanation rested, in part, on the "unlawful" force requirement inherent in the aggressor rule:

> the reason one generally cannot claim self-defense when one is an aggressor 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."

Id. (quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 657–58 (1986) (footnotes omitted by court)).

Numerous other cases confirm the requirement of an unlawful provoking act. *See State v. Hardy*, 44 Wn.App. 477, 484, 722 P.2d 872 (1986) ("the jury, by treating the name-calling as an unlawful act, [may have] improperly denied Hardy her claim of self-dense"); *State v. Brower*, 43 Wn.App. 893, 902, 721 P.2d 12 (1986) ("Here, there is no indication Mr. Brower was involved in any wrongful or unlawful conduct which might have precipitated the incident" *State v. Douglas*, 128 Wn.App. at 563-564 ("The record [did] not show that Douglas was the aggressor or that he was involved in any wrongful or unlawful conduct."); *Stark*, 158 Wn.App. at 960 (lawfully obtaining a restraining order was not provocation that warranted an aggressor instruction).

In this case, the jury may have believed that Mr. Richmond's lawful conduct—telling Higginbotham to leave or picking up the board to defend himself when Higginbotham approached—qualified as a provoking act. Jurors could read the instruction to strip Mr. Richmond of his self-defense claim based on his lawful conduct, if they found it reasonably likely

to provoke Higginbotham.[11]

Because Mr. Richmond did not commit an unlawful act prior to the alleged assault, the court should not have instructed jurors on the aggressor doctrine. *See Turpin*, 158 Wash. at 113. However, according to the Court of Appeals, the aggressor doctrine no longer includes *any* requirement of an unlawful act. Majority, p. 12 (citing *State v. Wingate*, 155 Wn.2d 817, 822, 122 P.3d 908 (2005)).

Wingate does not support this conclusion. The *Wingate* court rejected a vagueness challenge that was based on *Arthur*. The court held that *Arthur* and its progeny do not require reversal where the word "unlawful" is absent from the aggressor instruction. *Id.* Mr. Richmond is not making a vagueness challenge based on *Arthur*.

The instruction here lowered the State's burden of disproving the lawful use of force. The court erroneously told jurors that Mr. Richmond was not entitled to defend himself, even if his allegedly provocative actions were wholly lawful. Mr. Richmond's conviction must be reversed, and his case remanded for a new trial. *See, e.g., State v. McCreven*, 170 Wn. App. 444, 461-467, 284 P.3d 793 (2012).

C. The aggressor doctrine does not apply to actions that are reasonably likely to provoke a foreseeable but unreasonable belligerent response.

The court instructed jurors that Mr. Richmond was not entitled to

[11] Furthermore, the instruction applied even if Mr. Richmond's acts were reasonably likely to provoke an *unreasonable* belligerent response, as argued elsewhere in this brief.

act in self-defense if he had committed "any intentional act reasonably likely to provoke a belligerent response…" CP 106. The instruction did not require proof that the intentional act would provoke a belligerent response *from a reasonable person*. CP 106.

But the common-law aggressor doctrine cannot be premised on unreasonable or illegal belligerence, no matter how foreseeable. *See, e.g., Riley*, 137 Wn.2d at 911 (explaining that aggressor instructions apply when the victim's use of force qualifies as self-defense). Any other rule would grant those who are known to be bellicose, combative, and thin-skinned the right to attack others with impunity.[12]

For example, a letter carrier who approaches the house of a person known to hate postal workers would be guilty of an "intentional act reasonably likely to provoke a belligerent response." CP 106. Similarly, efforts to calm someone who is having an angry public meltdown might be "reasonably likely to provoke a belligerent response." CP 106. In both examples, the aggressor instruction, as given here, would prohibit the actor from warding off an attack from the other person.

The instruction given at Mr. Richmond's trial was flawed. It did not make manifestly clear the aggressor rule's objective standard, because it directed jurors to disregard Mr. Richmond's self-defense claim even if they believed Higginbotham's belligerent response to be unreasonable or even unlawful.

[12] This is especially true if the "unlawfulness" requirement is eliminated as well, as argued above.

The jury may have concluded that Mr. Richmond's words were reasonably likely to provoke a belligerent response, given Higginbotham's stubbornness and innate aggressiveness. They may have believed that Mr. Richmond provoked an attack simply by picking up the board, even if he did so out of fear, anticipating that Higginbotham might attack.

The majority below did not engage with this argument. Without analysis, the majority concluded that the instruction was "sufficient to stop the jury from reaching an initial aggressor conclusion based on an irrational victim response." Majority, p. 13.

This is incorrect. The reasonableness addressed by the instruction relates to the likelihood of a belligerent response: the act must be "reasonably likely" to provoke such a response. The instruction says nothing about the reasonableness of the victim's belligerence.

The court's aggressor instruction did not properly convey the aggressor rule's objective standard. CP 106. It stripped Mr. Richmond of his right to use self-defense if his lawful acts were likely to provoke an unreasonable belligerent response.

The court's instruction violated due process because it improperly relieved the State of its burden to disprove self-defense. *McCreven,* 170 Wn.App. at 462. The conviction must be reversed. *Id.*

D. The Court of Appeals published decision conflicts with *Douglas.* Furthermore, this case presents significant issues of constitutional law that are of substantial public interest.

According to the majority, Mr. Richmond was barred from

claiming self defense because he "armed himself with a two-by-four and ran outside his home." Majority, p. 12. This conclusion is in direct conflict with another decision of the Court of Appeals.

In *Douglas*, the defendant armed himself with a firearm. *Douglas*, 128 Wn. App. at 558-559, 563-564. He aimed it at an unarmed man. *Id.* The fact that he armed himself did not make him the aggressor. *Id.*

Here, as in *Douglas,* Mr. Richmond armed himself. Doing so should not have stripped him of his right to claim self-defense. *Id.* The Court of Appeals' published decision conflicts with *Douglas.* The Supreme Court should accept review to resolve this conflict. RAP 13.4(b)(2). In addition, this case presents significant constitutional issues that are of substantial public interest. RAP 13.4(b)(3) and (4). Under the majority's reasoning, the State is relieved of its burden to disprove self-defense whenever the accused is the first to display a weapon. Majority, p. 12.

This violates due process. It also implicates the state and federal constitutional right to bear arms. The Supreme Court should accept review to address these issues. RAP 13.4(b)(3) and (4).

II. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE BECAUSE THE TRIAL COURT VIOLATED MR. RICHMOND'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

An autopsy showed that Higginbotham had enough methamphetamine in his system to kill most people. CP 68-77. People can become irrational and aggressive after ingesting methamphetamine. RP 167-169. The defense wished to introduce this evidence to explain why Higginbotham

came toward Mr. Richmond even though he (Richmond) was armed with a two-by-four. The evidence was relevant and admissible. Its exclusion violated Mr. Richmond's right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

A. The Supreme Court should review the trial court's decision *de novo*.

Appellate courts review constitutional issues *de novo. Lenander v. Washington State Dep't of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016); *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016). Even when a trial court makes a discretionary decision, review is *de novo* if the error is alleged to violate a constitutional right. *Jones*, 168 Wn.2d at 719; *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009).

Thus, for example, the *Jones* court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones*, 168 Wn.2d at 719.[13] Similarly, the *Iniguez* court reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. The *Iniguez* court specifically pointed out that review would have been for abuse of discretion had the defendant not argued a constitutional violation. *Id*.

Although evidentiary rulings are ordinarily reviewed for an abuse

[13] Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

of discretion, review is *de novo* where such a ruling violates a constitutional right. *Id.; Jones*, 168 Wn.2d at 719.[14] Here, as in *Jones*, Mr. Richmond alleges a violation of his constitutional right to present a defense. Review is therefore *de novo*. *Jones*, 168 Wn.2d at 719.

B. The trial court's decision denied Mr. Richmond a meaningful opportunity to present his defense.

An accused person has a constitutional right to present a defense. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§3, 22; *Jones*, 168 Wn.2d at 720; *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) and *Holmes v. S. Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). The right to present a defense includes the right to introduce relevant and admissible evidence. *Jones*, 168 Wn.2d at 720. Evidence is relevant "if it has any tendency to make the existence of any consequential fact more probable or less probable." *Washington v. Farnsworth*, 185 Wn.2d 768, 782–83, 374 P.3d 1152 (2016) (citing ER 401). The threshold to admit relevant evidence is low; "even minimally relevant evidence is admissible." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010) (internal quotation marks and citation omitted). Evidence that meets the "minimally relevant" standard can only be excluded if the State proves that it is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Jones*, 168 Wn.2d at 720. No

[14] *See also United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992).

state interest is compelling enough to prevent evidence that is of high probative value to the defense. *Id.*

Here, Mr. Richmond sought to introduce evidence corroborating his self-defense claim. The evidence was at least "minimally relevant," and should not have been excluded. *Id.; Salas*, 168 Wn.2d at 669.

A qualified expert may provide opinion testimony based on scientific, technical, or other specialized knowledge if it would "assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. Expert testimony is admissible if it will be helpful to the trier of fact, with "helpfulness" construed "broadly." *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (citing *Miller v. Likins*, 109 Wn.App. 140, 148, 34 P.3d 835 (2001)). The rule favors admissibility in doubtful cases. *Likins,* 109 Wn.App. at 148.

In addition, the underlying facts supporting an expert opinion are "admissible for the limited purpose of explaining the basis for [that] opinion." *Allen v. Asbestos Corp., Ltd.*, 138 Wn.App. 564, 579, 157 P.3d 406 (2007); ER 703. This is so even if the underlying facts would otherwise be inadmissible. *Id.*, ER 703.

Methamphetamine is "a powerful stimulant" that can produce aggressive behavior, sometimes including "out-of-control violent rages." Christopher Haas, *Owner and Promoter Liability in "Club Drug" Initiatives*, 66 Ohio St. L.J. 511, 522 (2005) (citations omitted). Police officers know that meth users "present special dangers because of their irrationality, paranoia, unpredictability, and tendency to react violently to confron-

tation." Michelle Kommer, *Protecting Children Endangered by Meth: A Statutory Revision to Expedite the Termination of Parental Rights in Aggravated Circumstances*, 82 N.D.L. Rev. 1461, 1470 (2006) (citing Ells et al., American Prosecutors Research Institute, *Behind the Drug: The Child Victims of Meth Labs* (2002)); *see also State v. Hopkins*, 113 Wn.App. 954, 956, 960, 55 P.3d 691 (2002) (quoting officer testimony that people using methamphetamine "can get pretty aggressive and mean.").

Those who repeatedly use high doses to maintain intoxication "are often delusional and extremely violent." Dr. Mary Holley, *How Reversible Is Methamphetamine-Related Brain Damage?*, 82 N.D.L. Rev. 1135, 1139 (2006) (citing Joan E. Zweben et al., *Psychiatric Symptoms in Methamphetamine Users*, 12 Am. J. Addictions 181, 184-85 (2004)). Meth addicts also tend to show "poor decision-making, impulsivity, and lack of insight." Dr. Jane Carlisle Maxwell, *Methamphetamine: Epidemiological and Research Implications for the Legal Field*, 82 N.D.L. Rev. 1121, 1129 (2006) (citing Edythe London et al., *Mood Disturbances and Regional Cerebral Metabolic Abnormalities in Recently Abstinent Methamphetamine Abusers*, 61 Archives of General Psychiatry 73 (2004)).

Here, Mr. Richmond sought to introduce evidence that Higginbotham's postmortem toxicology results showed not just that he'd used methamphetamine, but that he had "a super-high level" in his system, sufficient to kill a non-user. RP 167-168; CP 68-77. He offered expert testimony to explain the results of this level of use: irrationality, poor decision-making, impulsivity, lack of insight, and extreme violence. RP 160-190; CP 68-77.

The evidence was offered to corroborate Mr. Richmond's testimony that Higginbotham was the aggressor. RP 167- 168. The extraordinary level of methamphetamine in Higginbotham's system would have explained to the jury why Higginbotham continued to advance on Mr. Richmond even though the latter was armed and warned him not to come closer.[15] *See* Holley, 82 N.D.L. Rev. at 1139. The proffered testimony was not "marginally relevant evidence;" instead it was "evidence of extremely high probative value." *Jones,* 168 Wn.2d at 721. It went directly to the heart of Mr. Richmond's entire defense.

Because the evidence was "of *high* probative value… 'no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Wash. Const. art. 1, §22.'" *Jones,* 168 Wn.2d at 720 (emphasis in original) (quoting *State v. Hudlow,* 99 Wn.2d 1, 16, 659 P.2d 514 (1983)). Because no state interest "can possibly be compelling enough to preclude [its] introduction…, the trial court violated the Sixth Amendment[16] when it barred [the] evidence." *Id.,* at 721.[17]

C. This case presents a significant question of constitutional law that is of substantial public interest.

Because it presents a significant question of constitutional law that

[15] It also provided at least slight evidence that Mr. Richmond's fear of Higginbotham was reasonable.

[16] And Wash. Const. art. I, §§3 and 22.

[17] Even if the excluded evidence were only minimally relevant, it should not have been excluded absent prejudice so great "as to disrupt the fairness of the fact-finding process." *Jones,* 168 Wn.2d at 720. The State did not show prejudice of that magnitude. Furthermore, any improper prejudicial effect could have been cured with an instruction. *See, e.g., State v. Sublett,* 176 Wn.2d 58, 70 n. 5, 292 P.3d 715 (2012) ("[L]limiting instructions are assumed to cure most risks of prejudice.")

is of substantial public interest, the Supreme Court should review and hold that the trial court violated Mr. Richmond's constitutional right to present a defense. *Jones*, 168 Wn.2d at 720; RAP 13.4(b)(4) and (4).

III. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE BECAUSE MR. RICHMOND SHOULD HAVE BEEN ALLOWED TO IMPEACH ADVERSE WITNESSES WITH BIAS EVIDENCE.

Dresp and Zackuse used methamphetamine with Higginbotham on the day of the incident. RP 184. Mr. Richmond sought to cross-examine them about this. RP 163-190. By excluding this evidence, the trial court violated Mr. Richmond's right to confront the State's witnesses and his right to present a defense. *State v. Darden*, 145 Wn.2d 612, 620-626, 26 P.3d 308 (2002); *Jones*, 168 Wn.2d at 719-720.

D. The Supreme Court should review this constitutional error *de novo*.

As outlined above, courts review constitutional issues *de novo,* even when based on discretionary decisions at the trial level. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. This court should review the ruling excluding the impeachment evidence *de novo. Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281.]

E. The court's ruling excluding impeachment evidence infringed Mr. Richmond's right to confrontation and his right to present a defense.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. U.S. Const. Amend. VI; Wash. Const. art. I, §22; *Darden*, 145 Wn.2d at 620 (citing *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). The court's refusal to allow Mr. Richmond to impeach the State's main

witnesses violated his confrontation right.[18] *Id.*

The confrontation clause protects more than "mere physical confrontation." *Darden*, 145 Wn.2d at 620 (quoting *Davis*, 415 U.S. at 315). The bedrock of the confrontation right is the guarantee of an opportunity to conduct a "meaningful cross-examination of adverse witnesses" to test for memory, perception, and credibility. *Darden*, 145 Wn.2d at 620. The trial judge excluded evidence that went directly to the perception, memory, bias, and credibility of the State's most important witnesses.

Confrontation helps assure the accuracy of the fact-finding process. *Id*. (citing *Chambers* I, 410 U.S. at 295). The right to confront adverse witnesses must be "zealously guarded." *Darden*, 145 Wn.2d at 620. The trial court failed to zealously guard this critical right in Mr. Richmond's case.

Cross-examination that is even "minimally relevant" must be permitted under most circumstances. *Id.*, at 621. To justify exclusion, the State must demonstrate that the evidence is "so prejudicial as to disrupt the fairness of the fact-finding process." *Id.*, at 622. Even disruptively prejudicial evidence must be admitted if the defendant's need for the evidence outweighs the State's interest in exclusion. *Id.* Here, the State advanced no justification strong enough to warrant excluding the proffered evidence, especially given the importance of the two witnesses Mr. Richmond sought to cross examine.

In fact, "the more essential the witness is to the prosecution's case,

[18] It also violated his right to present a defense. *Jones*, 168 Wn.2d at 719-720.

the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." *Darden*, 145 Wn.2d at 619. Dresp and Zackuse were critical to the State's case: they provided the only eyewitness testimony to the altercation besides Mr. Richmond own testimony. Accordingly, Mr. Richmond should have had "more latitude" to explore credibility issues than he would have had with other witnesses. *Darden*, 145 Wn.2d at 619.

Mr. Richmond wanted to introduce evidence that Dresp, Zackuse, and Higginbotham used methamphetamine together on the day of the offense. RP 163-190. The evidence was relevant to show bias stemming from the relationship between the three.

"Bias" describes a relationship (usually between a witness and a party) "which might lead the witness to slant, unconsciously or otherwise, his testimony." *United States v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 469, 83 L. Ed. 2d 450 (1984). Bias evidence is always relevant. *State v. Spencer*, 111 Wn.App. 401, 408, 45 P.3d 209 (2002) (citing *Davis*, 415 U.S. at 316-18). Exposure of witness bias is "a core value of the Sixth Amendment." *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010), *as amended* (Sept. 1, 2010). Bias is a "quintessentially appropriate topic for cross-examination." *Id.*

Even "minimally relevant" evidence showing bias is admissible under the confrontation clause. *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009). And an accused person has "more latitude to expose the bias of a key witness." *Id.*

The fact that the three friends were close enough to engage in criminal activity together is at least "minimally relevant" to the issue of bias. *Fisher,* 165 Wn.2d at 752. Because of this relationship, Dresp and Zackuse may have slanted their testimony against Mr. Richmond, "unconsciously or otherwise." *Abel,* 469 U.S. at 52. They may also have tempered any negative information about Higginbotham or felt some desire to corroborate rather than contradict each other.

The Court of Appeals majority upheld the trial court's decision excluding the evidence. Majority, p. 15. According to the majority, "[t]he jury knew Ms. Dresp and Ms. Zackuse were close friends with Mr. Higginbotham." Majority, p. 15. The majority concluded that the evidence that they'd used drugs together "would not have appreciably enhanced the jury's ability to assess potential bias." Majority, p. 15.

This reasoning does not justify the decision. First, if the evidence "enhanced the jury's ability"[19] to *any* degree, it should have been admitted. *Darden,* 145 Wn.2d at 619-622. The evidence was at least "minimally relevant." *Id.,* at 620. Second, Mr. Richmond should have had "more latitude" to explore bias, because Dresp and Zackuse were the only other eyewitnesses. *Id.,* at 619. The confrontation right requires admission even if the evidence was disruptively prejudicial. *Id.; Fisher,* 165 Wn.2d at 752; *State v. Craven,* 67 Wn.App. 921, 927, 841 P.2d 774 (1992); *see also Abel,* 469 U.S. at 56 (upholding prosecution's introduction of witness's membership in the same murderous prison gang as defendant).

[19] Majority, p. 15.

The decision to exclude the evidence violated Mr. Richmond's confrontation right and his right to present a defense. *Darden,* 145 Wn.2d at 619-622; *Jones*, 168 Wn.2d at 719-720. His conviction must be reversed. *Darden,* 145 Wn.2d at 619-622.

F. The majority's published decision conflicts with *Darden, Fisher,* and *Abel.* Furthermore, this case presents a significant constitutional issue that is of substantial public interest.

Darden, Fisher, and *Abel* all make clear that a person in Mr. Richmond's position must be granted wide latitude to introduce minimally relevant evidence of bias, even if the evidence is prejudicial to the State. The majority's published opinion conflicts with these cases.

The trial court's decision violated Mr. Richmond's confrontation right under the state and federal constitutions. *Darden*, 145 Wn.2d 620-626. It also violated his right to present a defense. *Jones*, 168 Wn.2d at 719-720. The Supreme Court should accept review to resolve the conflict and to address these significant constitutional issues which are of substantial public interest. RAP 13.4(b)(1), (2), (3) and (4).

CONCLUSION

For the foregoing reasons, the Supreme Court should accept review, reverse the conviction, and remand for a new trial.

Respectfully submitted May 24, 2018.

BACKLUND AND MISTRY

Jodi R. Backlund, No. 22917

Manek R. Mistry, No. 22922

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Joseph Richmond, DOC #884586
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

and I sent an electronic copy to

prosecutor@co.kittitas.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

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

Signed at Olympia, Washington on May 24, 2018.

_____

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX:

Court of Appeals Published Opinion, filed on May 1, 2018.

Renee S. Townsley
Clerk/Administrator

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May 1, 2018

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CASE # 341577
State of Washington v. Joseph A. Richmond
KITTITAS COUNTY SUPERIOR COURT No. 141002474

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment
c: **E-mail** Honorable David A. Elofson

c: Joseph A Richmond #884586
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JOSEPH ANDREW RICHMOND, Appellant.	)))))))))	No. 34157-7-III PUBLISHED OPINION

PENNELL, A.C.J. — Joseph Richmond appeals his conviction and sentence for second degree murder. We affirm the conviction but remand for resentencing so that the trial court may assess whether an out-of-state conviction should be included in Mr. Richmond's offender score.

BACKGROUND

Offense conduct

Dennis Higginbotham went to Joseph Richmond's property with two other individuals, Veronica Dresp and Lonnie Zackuse. Ms. Dresp was Mr. Richmond's

estranged girlfriend. Ms. Dresp had asked Mr. Higginbotham and Ms. Zackuse to accompany her to Mr. Richmond's property so that she could remove some of her belongings.[1]

When the trio arrived at Mr. Richmond's home, Ms. Dresp knocked on the door. Although there was no answer, Ms. Dresp could see Mr. Richmond inside. Ms. Dresp felt angry. She wanted to retrieve her belongings. Ms. Dresp advised Mr. Richmond that if he did not open the door, she would kick it down. She also told him she would break into the shed. To that end, she retrieved a crow bar from Mr. Higginbotham's van.[2] As Ms. Dresp followed through on her promise to break into the shed, a police officer arrived at the scene in response to a call from Mr. Richmond.

The officer talked to Ms. Dresp and Mr. Richmond. It appears this helped mitigate the situation. With the officer's input, it was agreed Ms. Dresp would return the following day to retrieve her belongings from inside the residence. It was also agreed Ms. Dresp could immediately remove some belongings from a car parked on the property.

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[1] Ms. Dresp had lived at the property with Mr. Richmond as an authorized tenant. The parties dispute whether Ms. Dresp shared Mr. Richmond's authority over the premises on the date of the offense conduct. We need not resolve this issue for purposes of this appeal.

[2] Ms. Dresp testified that she was using Mr. Higginbotham's van because it was the only available vehicle and it could also fit her belongings.

With a plan for the removal of Ms. Dresp's property in place, the officer left, believing she had resolved the situation to the best of her ability.[3]

Once the officer was gone, Ms. Dresp began removing items from the car with the help of Mr. Higginbotham and Ms. Zuckuse. Mr. Higginbotham's presence appeared to upset Mr. Richmond. Mr. Richmond began yelling and an oral argument ensued between the two men. Although he was much smaller than Mr. Richmond, Mr. Higginbotham stated he was not afraid of Mr. Richmond. He said he was at the property only to help Ms. Dresp retrieve her belongings. Mr. Higginbotham was carrying a flashlight in his hand at this point in time. According to Ms. Dresp and Ms. Zackuse, Mr. Higginbotham appeared more frustrated than angry.

Mr. Higginbotham started walking toward Mr. Richmond as the two men argued. However, Ms. Dresp urged Mr. Higginbotham away. Mr. Higginbotham and Mr. Richmond exchanged additional words and then Mr. Richmond went inside his house.

Mr. Richmond's return to the house was a relief. It appeared the hostility had come to an end. Unfortunately, this turned out not to be true. Instead, Mr. Richmond

[3] There was some dispute in the testimony as to when it was agreed that Ms. Dresp could remove items from the car. Ms. Dresp and Mr. Richmond recalled the agreement occurred after the officer left. The officer testified the agreement took place in her presence.

ran out of his house, armed with a two-by-four piece of lumber that was nearly four feet in length. Mr. Richmond and Mr. Higginbotham then started exchanging more words. Mr. Richmond warned Mr. Higginbotham not to come any closer to him. When Mr. Higginbotham took a step forward, Mr. Richmond struck Mr. Higginbotham with the two-by-four. According to Ms. Dresp and Ms. Zackuse, Mr. Richmond held the two-by-four like a baseball bat and swung it at Mr. Higginbotham's head. After he was hit, Mr. Higginbotham spun around and fell face first on the ground.

Ms. Dresp went to Mr. Higginbotham's aide and Ms. Zackuse called 911. Meanwhile, Mr. Richmond ran out of the back of his house and drove away in a truck. As he left, Mr. Richmond threatened to shoot everyone if they did not leave the property.

When emergency personnel arrived at the scene, it was determined Mr. Higginbotham had suffered "severe head trauma." 3 Report of Proceedings (RP) (Feb. 4, 2016) at 513. Mr. Higginbotham was unconscious and eventually transported to Harborview Medical Center in Seattle. He died shortly thereafter. Examiners found no evidence of any weapons on Mr. Higginbotham's body or in his clothing. An autopsy concluded Mr. Higginbotham's death was caused by a blunt force injury to his head.

Legal proceedings

Mr. Richmond lodged a self-defense theory against the State's murder charges. In

support of this theory, Mr. Richmond sought to introduce testimony from several experts. One of the experts was David Predmore. Mr. Predmore was proffered to testify about the general effects of methamphetamine consumption on human behavior. According to the defense, this testimony was relevant because high levels of methamphetamine had been found in Mr. Higginbotham's system at the time of his death. Although Mr. Richmond had not been aware of Mr. Higginbotham's methamphetamine consumption at the time of the assault, the defense theorized that Mr. Predmore's testimony was relevant to corroborate Mr. Richmond's claim that Mr. Higginbotham was behaving aggressively the night of the attack. The trial court excluded Mr. Predmore's testimony as speculative and irrelevant.

Another proposed defense expert was Dr. Robert Stanulis. Defense counsel advised that Dr. Stanulis would testify to the "flight or fight" response as it pertained to Mr. Richmond's behavior the night of the attack. Clerk's Papers (CP) at 168. Although defense counsel furnished a curriculum vitae for Dr. Stanulis, no expert report or summary of opinion was ever produced. None exists in the record on appeal. The trial court excluded Dr. Stanulis's testimony on the basis of an inadequate discovery disclosure.

At trial, Mr. Richmond took the stand and testified in his defense. Mr. Richmond told the jury he was in fear for his life on the night of the attack. He felt ganged up on by Ms. Dresp and her companions. He repeatedly told the trio they needed to leave. Mr. Richmond said that while he was trying to get Ms. Dresp and her companions to leave, Mr. Higginbotham approached him in a "fast manner," armed with a flashlight.[4] 5 RP (Feb. 9, 2016) at 993. Mr. Richmond then saw his dog try to sneak outside the door of his home. Mr. Richmond moved to shut the door and then returned to his position in front of Mr. Higginbotham. Another argument ensued. During this argument, Mr. Richmond claimed Mr. Higginbotham approached him with what appeared to be a knife. Mr. Richmond felt scared. He picked up a two-by-four and used it to strike down Mr. Higginbotham. After Mr. Higginbotham fell, Mr. Richmond stated he panicked. He ran inside his house, grabbed his dog, and left the property in a truck.

Based on the testimony, the trial court provided the jury a full panoply of self-defense pattern instructions. Not only did the court provide WPIC 16.02, 16.07, and 16.08 (regarding justifiable homicide and no duty to retreat) as requested by Mr. Richmond, it also provided WPIC 16.04, as requested by the State, which explains the

[4] The flashlight was a "standard police type Maglite," approximately 15 inches in length. 5 RP (Feb 8, 2016) at 698, 895.

restrictions on lawful use of self-defense by an initial aggressor.[5]

During summation, the prosecutor argued the initial aggressor instruction. The prosecutor asked the jury to focus on what happened when Mr. Richmond returned from his house after the initial verbal confrontation with Mr. Higginbotham. The prosecutor described Mr. Richmond's retreat inside the house as "a moment of peace." 6 RP (Feb. 9, 2016) at 1125. The prosecutor asked the jury to focus on this moment and consider whether Mr. Richmond's subsequent actions were reasonable. The prosecutor argued it was not reasonable for Mr. Richmond to come out of his house with the two-by-four given that the situation appeared to have calmed down. "Who's the aggressor?" the prosecutor asked. *Id*. at 1126. "The defendant is the aggressor. He doesn't get—You don't even get to the question of self-defense." *Id*. In her final statements to the jury, the prosecutor argued Mr. Richmond stirred the "whole thing up" and took "it to a next level by coming out of his house, armed with a board, screaming at them. He doesn't get to claim self-defense." *Id*. at 1165.

A jury convicted Mr. Richmond of second degree murder.

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[5] The jury was provided instructions based on: (1) WPIC 16.02, Justifiable Homicide—Defense of Self and Others, (2) WPIC 16.04, Aggressor—Defense of Self, (3) WPIC 16.07, Justifiable Homicide—Actual Danger Not Necessary, and (4) WPIC 16.08, No Duty to Retreat. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.02, 16.04, 16.07, 16.08 (3d ed. 2008) (WPIC).

At sentencing, the State introduced a proposed judgment and sentence that contemplated an offender score of five based, in part, on a 2004 Idaho conviction. The court engaged counsel in a brief colloquy regarding the nature of the Idaho conviction. The discussion focused on whether the conviction qualified as a violent offense. Defense counsel said the offense was a nonviolent felony and likely would not even qualify as a crime in Washington. The prosecutor and defense counsel agreed the Idaho offense should be included in Mr. Richmond's offender score as a nonviolent offense. Mr. Richmond concurred with this assessment.

At the conclusion of the sentencing hearing, the court imposed a standard range sentence. Mr. Richmond appeals.

ANALYSIS

Constitutional right to present a defense—exclusion of expert testimony

Mr. Richmond argues the trial court violated his constitutional right to present a defense by excluding expert testimony. We disagree. The trial court never prevented Mr. Richmond from testifying or proffering a self-defense case to the jury. Instead, the court excluded expert testimony proffered by Mr. Richmond because it failed to meet the criteria for admissibility under the rules of evidence. This determination was well within

the trial court's discretion. *See State v. Asaeli*, 150 Wn. App. 543, 573, 208 P.3d 1136 (2009) (evidentiary rulings reviewed for abuse of discretion).

Evidence Rule 702 governs the admissibility of expert testimony. Under this rule, a witness may provide expert opinion testimony to the jury if (1) the witness is qualified as an expert, and (2) the witness's testimony would help the trier of fact. *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004). "Expert testimony is helpful if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury." *Id.* A proposed expert's testimony is not helpful or relevant if it is based on speculation. *State v. Lewis*, 141 Wn. App. 367, 388-89, 166 P.3d 786 (2007); *State v. Mee Hui Kim*, 134 Wn. App. 27, 41-43, 139 P.3d 354 (2006).

The trial court properly excluded Mr. Predmore's proposed testimony regarding the effects of methamphetamine because it was not shown to be potentially helpful to the jury. Mr. Predmore had never met or examined Mr. Higginbotham. He had no basis to assess how Mr. Higginbotham's body may have processed methamphetamine. According to Mr. Predmore's proposed testimony, methamphetamine can have a wide range of effects. Increased aggression is only one possibility. It is therefore nothing but speculation to connect Mr. Higginbotham's methamphetamine use with Mr. Richmond's claim of victim aggression. The evidence was properly excluded, consistent with long-

standing case law. *Lewis*, 141 Wn. App. at 389 (expert testimony regarding potential effects of methamphetamine too speculative to help jury decide whether the defendant acted in self-defense).[6]

A somewhat similar analysis holds true for Dr. Stanulis. The defense failed to proffer the substance of Dr. Stanulis's testimony to opposing counsel and the court in a timely manner, despite numerous continuances. Although some sort of proffer was eventually made to the trial court on the morning of jury selection, the substance of this proffer is not in the appellate record. Without the ability to review the substance of the proffer and how it might have related to Mr. Richmond's conduct the night of the attack, we are in no position to analyze whether Dr. Stanulis's testimony was admissible or whether Mr. Richmond was prejudiced by the trial court's decision to exclude the testimony as a discovery violation.

First aggressor jury instruction

Mr. Richmond argues the trial court improperly issued a first aggressor instruction, thereby vitiating his ability to argue self-defense. We disagree.

[6] Because Mr. Richmond was not aware of Mr. Higginbotham's drug use at the time of the altercation, the trial court also acted within its discretion in ruling that evidence of Mr. Higginbotham's drug use was irrelevant and inadmissible, irregardless of expert testimony.

A first aggressor instruction may be issued in circumstances 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's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon." *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008). The State is invariably the party to propose a first aggressor instruction. As such, the State has the burden of establishing the instruction's applicability. To meet this obligation, the State must point to some evidence, beyond the defendant's mere words, indicating the defendant intentionally provoked the confrontation between himself and the victim. *State v. Riley*, 137 Wn.2d 904, 910-11, 976 P.2d 624 (1999); *State v. Stark*, 158 Wn. App. 952, 960, 244 P.3d 433 (2010); *Anderson*, 144 Wn. App. at 89.[7]

As emphasized in the prosecutor's summation, the analysis of whether Mr. Richmond qualified as a first aggressor must focus on what happened after the "moment of peace," when Mr. Richmond returned from inside his home. 6 RP (Feb. 9, 2016) at 1125; *see State v. Wingate*, 155 Wn.2d 817, 823, 122 P.3d 908 (2005). There is a conflict in the parties' proffered evidence as to what happened at this point. According to the

[7] We review the evidence supporting a first aggressor instruction in the light most favorable to the State. *State v. Wingate*, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005).

State's witnesses, Mr. Richmond armed himself with a two-by-four and ran outside his home. But according to Mr. Richmond, he merely stood on his porch and reached for the two-by-four after Mr. Higginbotham came at him with what appeared to be a knife. The conflicting evidence justified a first aggressor instruction under the second qualifying circumstance (a conflict in the evidence as to whether the defendant provoked the fight) as well as the third (defendant made the first move by drawing a weapon). *Anderson*, 144 Wn. App. at 89.

Mr. Richmond argues the first aggressor instruction was improper because there was no evidence he engaged in unlawful activity prior to responding to Mr. Higginbotham's fateful final step. This legal argument is inapposite. The Washington cases requiring an unlawful act for a first aggressor instruction are no longer good law. *Wingate*, 155 Wn.2d at 822. As the law currently stands, the requirement is only that the defendant's provoking conduct be intentional. *Id*. That standard has been met.

Mr. Richmond complains the trial court's first aggressor instruction was flawed. He claims the instruction permitted the jury to find unlawful aggression based on mere words. Mr. Richmond also complains the instruction permitted the jury to find he was a first aggressor even if Mr. Higginbotham's response to Mr. Richmond was unreasonable. We disagree with both these contentions.

The first aggressor instruction provided by the trial court was based on WPIC 16.04. It stated:

> No person may, by any intentional *act* reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill, 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.

CP at 106 (emphasis added).

As written, the trial court's instruction only permitted the jury to find Mr. Richmond an initial aggressor based on an "act." *Riley*, 137 Wn.2d at 913-14. Mere words were insufficient. *Id.* In addition, the requirement that Mr. Richmond's act be "reasonably likely to provoke a belligerent response," CP at 106, was sufficient to stop the jury from reaching an initial aggressor conclusion based on an irrational victim response.

In the end, the trial court's jury instructions did not strip Mr. Richmond of the ability to claim self-defense. The court's instructions were not limited to the first aggressor instruction. They also contained Mr. Richmond's proposed self-defense instructions, including an instruction advising the jury that Mr. Richmond had the right to stand his ground and defend himself from attack. As written, the court's instructions empowered the jury to make an appropriate legal determination regarding self-defense,

based on the testimony the jurors found most persuasive. Had the jury believed the facts proffered by Mr. Richmond in support of self-defense, the first aggressor instruction would not have relieved the State of its burden of proof or negated the self-defense claim. *See Stark*, 158 Wn. App. at 960-61; *State v. Douglas*, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005). Even under the applicable de novo standard of review, *Stark*, 158 Wn. App. at 959, the instruction was proper.

Confrontation right and constitutional right to present a defense

Mr. Richmond claims the trial court improperly restricted his ability to question Ms. Dresp and Ms. Zackuse about their drug use on the day of the attack. This claim is unsupported by the record. The trial court stated it had "no problem" with the defense asking witnesses about their methamphetamine use on the day of the offense. 1 RP (Jan. 27, 2016) at 174. Such questioning was relevant to the witnesses' credibility. The lack of questions regarding drug use was the result of defense counsel's choice not to engage in this line of inquiry, not any ruling by the trial court. We will not review this strategic decision on appeal.

Mr. Richmond also complains he was not allowed to introduce testimony that Ms. Dresp and Ms. Zackuse had used methamphetamine with Mr. Higginbotham on the day of the offense. According to Mr. Richmond, this evidence was relevant to show the

witnesses' relationship to Mr. Higginbotham and their bias toward him. We find no abuse of discretion in the trial court's ruling. Evidence of Mr. Higginbotham's methamphetamine use had the potential of being improperly analyzed as bad character evidence. This potential for prejudice was not offset by any significant probative value. The jury knew Ms. Dresp and Ms. Zackuse were close friends with Mr. Higginbotham.[8] Evidence of the trio's shared drug use would not have appreciably enhanced the jury's ability to assess potential bias. The trial court acted within its discretion under ER 404(b) and ER 403 in excluding the evidence. *State v. Darden*, 145 Wn.2d 612, 621-22, 41 P.3d 1189 (2002) (citing *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)).

Out-of-state conviction and offender score

Mr. Richmond argues his Idaho conviction should not have been included in his offender score. According to Mr. Richmond, inclusion of the Idaho conviction was improper because the Idaho statute underlying his conviction is not comparable to any Washington felony offense, as required by RCW 9.94A.525(3). The State suggests we should decline review of this issue because Mr. Richmond affirmatively acknowledged

[8] Ms. Dresp described Mr. Higginbotham as "a good friend of mine." 2 RP (Feb. 3, 2016) at 261. Ms. Zackuse described Mr. Higginbotham as a friend she hung out with "almost every day." 3 RP (Feb. 3, 2016) at 429.

the comparability of his Idaho conviction during the sentencing hearing.[9]

The State bears the burden of proving the existence of prior convictions used to enhance a defendant's sentencing range. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). This burden must be met, regardless of whether a defendant lodges an objection during the sentencing process. *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). It is only when a defendant affirmatively acknowledges the facts and information necessary to justify use of a prior conviction in his or her offender score that the State is relieved of presenting evidence documenting the existence of prior convictions. *State v. Hunley*, 175 Wn.2d 901, 912, 287 P.3d 584 (2012).

The record before us does not warrant finding an affirmative acknowledgement. Although defense counsel recognized Mr. Richmond had an Idaho felony conviction and ultimately accepted the State's offender score calculation, neither defense counsel nor Mr. Richmond ever affirmatively acknowledged that the Idaho conviction was legally comparable to a Washington offense. To the contrary, defense counsel specifically disputed the legal comparability of the Idaho conviction. It is unclear why, given defense counsel's position, the defense ultimately concurred with the State's offender score

[9] The State acknowledges that if this court has some concern about the legality of Mr. Richmond's offender score calculation, then remand may be an appropriate remedy. Resp't's Br. at 51.

calculation. But we need not resolve this conundrum. A defendant's mere agreement with the State's offender score calculation and admission of the existence of an out-of-state conviction is insufficient to constitute an affirmative acknowledgment that an out-of-state conviction meets the terms of the comparability analysis. *State v. Lucero*, 168 Wn.2d 785, 789, 230 P.3d 165 (2010). Under the circumstances here, the State was not relieved of its burden to prove the facts justifying inclusion of the Idaho conviction in Mr. Richmond's offender score.

The appellate record lacks sufficient information to resolve the question of whether Mr. Richmond's Idaho conviction should have been included in the offender score. We therefore remand for resentencing on this issue. *Ford*, 137 Wn.2d at 485-86.

CONCLUSION

We affirm Mr. Richmond's conviction but remand to the trial court with instructions to conduct a comparability analysis and assessment of Mr. Richmond's offender score. Mr. Richmond's request to deny costs is granted.

Pennell, A.C.J.

I CONCUR:

Siddoway, J.

No. 34157-7-III

FEARING, J. (dissenting) — I disagree with the majority that sufficient facts supported a first aggressor jury instruction. Therefore, I dissent.

The majority writes, on page four, that Joseph Richmond "ran out of his house, armed with a two-by-four piece of lumber that was nearly four feet in length." The opinion contains other references to Richmond running from inside the residence to the outdoors with the two-by-four. From these principal facts, the majority concludes the evidence justified a first aggressor instruction. I disagree.

Joseph Richmond, Dennis Higginbotham, whose mouth Richmond silenced, and Veronica Dresp, Richmond's former girlfriend, witnessed the immediate events leading to Dennis Higginbotham's death. Dresp testified to Richmond's return outside his house with a board in his hand as follows:

> [T]he next thing I see Joe [Richmond] running—you know, he came back outside, and—they start—they were exchanging more words, and—Joe said, "If you come any closer," you know,—or, he said, "Don't come any closer. I'm warning you." And then—then—I mean, Dennis [Higginbotham] took one more step closer and that's when—when he hit him.

Report of Proceedings (RP) at 292. Dresp later averred:

> Q And you said Joe came running back out of the house. Did he have anything in his hands at that point.
>
> A He had something behind his hands—or, behind his back—kind of—I mean, I couldn't see it at first. But—by the time I realized what was going on it was too late.
>
> Q Okay. What did Joe do?
>
> A He—hit him.

RP at 293.

On cross-examination, Veronica Dresp testified:

> A He [Joseph Richmond] came out and—stepped off the porch, and—I mean, I couldn't see the board at first, because it was more behind his back, but then, you know,—then they started walking towards each other,—and—'cause, I mean—
>
> Q So Dennis and Joe—
>
> A He wasn't—
>
> Q —were both walking towards each other. Is that—
>
> A Just like—they took like a foot or two—

RP at 381. Veronica Dresp declared further:

> Q And did you—and you—This morning you said you heard Joe say something to Dennis at this point. —tell him—something about getting closer, "Don't come closer,"—
>
> A He said, "Don't"—Yeah. He said, "Don't—don't come any closer. I'm warning you."
>
> Q Okay. And then what did Dennis do after Joe said that?
>
> A I mean, he took a step closer.
>
> Q And that's when—Dennis got struck with the board.
>
> A Right.

RP at 381-82.

Jury instruction 20, the first aggressor instruction to which Higginbotham objected, read:

> No person may, by any intentional act *reasonably likely to provoke a belligerent response*, create a necessity for acting in self-defense and thereupon kill, 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.

Clerk's Papers (CP) at 106 (emphasis added). Nevertheless, we should consider the evidence not only in light of the aggressor instruction, but a second instruction that recognized Joseph Richmond's right to stand his ground. Jury instruction 19 informed the jury that Joseph Richmond need not have retreated from Dennis Higginbotham. The instruction declared:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP at 105.

Washington decisions recognize that the first aggressor instruction may deprive an accused of the ability to claim self-defense. *State v. Wasson*, 54 Wn. App. 156, 160, 772 P.2d 1039 (1989). Therefore, few situations warrant an aggressor instruction. *State v. Arthur*, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985); *State v. Wasson*, 54 Wn. App.

at 161. The theories of the case can usually be sufficiently argued and understood by the jury without the instruction. *State v. Arthur*, 42 Wn. App. 125 n.1.

The majority writes that the State need no longer show that the defendant engaged in an unlawful act in order to garner the first aggressor instruction. I do not consider this principle important to our decision. The State still must show a provoking act by the defendant other than the assault or murder itself. The provoking act that justifies a first aggressor instruction must be one that a jury could reasonably assume would provoke a belligerent response by the victim. *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011); *State v. Wasson*, 54 Wn. App. at 159. Also, the trial court errs when it submits an aggressor instruction and the evidence shows that the defendant used words alone to provoke the fight. *State v. Riley*, 137 Wn.2d 904, 910-11, 976 P.2d 624 (1999); *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008).

The rule controlling our appeal is that the provoking act cannot be the actual assault in order to warrant the giving of the first aggressor instruction. *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990); *State v. Wasson*, 54 Wn. App. at 159; *State v. Brower*, 43 Wn. App. 893, 902, 721 P.2d 12 (1986). Joseph Richmond performed no provoking act until the deadly assault.

As noted by the majority, a court properly submits an aggressor instruction when (1) the jury can reasonably determine from the evidence that the defendant provoked the

fight, (2) the evidence conflicts as to whether the defendant's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon. *State v. Riley*, 137 Wn.2d at 909-10; *State v. Anderson*, 144 Wn. App. at 89. I discern no difference between the first and second circumstances under which to render the instruction. The trial court commits error when delivering the first aggressor instruction when not supported by the evidence. *State v. Wasson*, 54 Wn. App. at 158-59 (1989).

This court must decide if sufficient evidence supported the first aggressor instruction. I agree with the majority that we must view the evidence in the light most favorable to the State. When reviewing a claim for the sufficiency of the evidence, we consider whether, after viewing the evidence in the 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. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). When the defendant challenges the sufficiency of the evidence in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Nevertheless, when an inference is part of the prosecution's proof supporting an element of the crime, due process requires the presumed fact to flow more likely than not from proof of the basic fact. *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). Whether an inference meets the appropriate standard must be

determined on a case-by-case basis in light of the particular evidence presented to the jury in each case. *State v. Hanna*, 123 Wn.2d at 712. A mere scintilla of evidence does not rise to the level of sufficiency in order to support a conviction. *State v. Kirkpatrick*, 14 Wn. App. 212, 216, 540 P.2d 450 (1975). Instead, the State must present substantial evidence. *State v. Randecker*, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971).

The testimony of Veronica Dresp, the sole independent witness, fails to support a conclusion or inference that Joseph Richmond provoked a reaction in Dennis Higginbotham that required Richmond to act in self-defense. None of the testimony states that Richmond ran toward Higginbotham in a threatening manner. If one reads the entirety of Dresp's trial testimony, one questions whether Richmond ran at all. The testimony suggests he walked out of the house. Dresp spoke figuratively when using the word "running" and then the State's attorney later employed the same verb when questioning. Dresp also testified that Richmond "came out and—stepped off the porch," language that does not connote "running." RP at 381. Dresp states Richmond and Higginbotham later stepped toward one another, testimony that confirms that at least Richmond did not run at Higginbotham. Even if we assume that Richmond ran out of the house, which we should do based on principles of review, the trial still lacked testimony that Richmond ran toward Higginbotham in a threatening manner.

We should consider additional evidence. Although Joseph Richmond owned the residence, I assume that Veronica Dresp held the right to enter the premises to retrieve her personal belongings. Still, Dresp used a crowbar to break and enter Richmond's shed. A police officer calmed the situation, but Richmond thereafter exchanged taunts with Dennis Higginbotham, who assisted Dresp in retrieving belongings from a vehicle. Richmond did not desire Higginbotham on his property. Higginbotham walked toward Richmond and the two volleyed further affronts. Richmond entered his house and returned with the two-by-four.

Richmond stepped from the back steps and then walked toward Higginbotham. The two exchanged more verbal assaults and Richmond told Higginbotham not to step further. The trial lacked evidence that Richmond raised the board in a threatening manner before Richmond stepped toward Higginbotham and slammed him with the board. According to Veronica Dresp, Richmond held the board behind his person until he attacked Higginbotham.

Assuming we believe Joseph Richmond's story he never threatened Dennis Higginbotham before Higginbotham approached him with a knife. Under this version of the facts, Richmond did not engage in provocation before he acted in self-defense. Assuming we believe the State's facts, Joseph Richmond attacked Higginbotham without any advance provocation, other than words and by walking toward Higginbotham before

Higginbotham walked toward Richmond. The duo exchanged hostile words, but did not fight. Richmond committed a unilateral assault.

The majority emphasizes that Joseph Richmond carried a board in his hand. Nevertheless, under the State's evidence, Dennis Higginbotham did not move to strike Richmond because of the board. The parties faced each other and stood still while Richmond held the board. Walking with a two-by-four in one's hand does not reasonably provoke a fight, when one stops short of the victim and warns the victim not to step forward. Higginbotham stood on Richmond's property and Richmond held the right to stand his ground and order Higginbotham to leave. The majority's holding conflicts with the right to stand one's ground as instructed by the trial court in jury instruction 19.

Assuming the majority considers the two-by-four to constitute a weapon, Richmond possessed the right to hold the board to defend himself in the event Higginbotham attacked him first. Even if Richmond bore a gun, the constitution would protect his conduct. U.S. CONST. amend. II; WASH. CONST. art. 1, § 24.

Because we determine the inferences we can draw from the evidence on a case-by-case basis and because of the esoteric nature of determining the sufficiency of the evidence, reviewing the facts of reported decisions assists in the resolution of this appeal. In *State v. Anderson*, 144 Wn. App. 85 (2008), this court affirmed the rendering of a first aggressor jury instruction. Testimony established that the defendant leaned over a victim

with his hands on the arms of the victim's chair and yelled in her face. Joseph Richmond did not get in Dennis Higginbotham's face, but rather stood back and told Higginbotham not to come closer.

In *State v. Riley*, 137 Wn.2d 904 (1999), the Supreme Court affirmed the delivery of a first aggressor instruction. The jury heard evidence that Riley drew his gun first and aimed it at a victim. The testimony showed that Joseph Richmond kept the board behind his back and did not raise the lumber until he fatally battered Dennis Higginbotham.

In *State v. Wingate*, 155 Wn.2d 817, 823, 122 P.3d 908 (2005), the Supreme Court again affirmed the rendering of a first aggressor jury instruction. Wingate drew a gun after a confrontation between his friend and another had ended. The drawing of the gun constituted the act of first aggression.

Washington courts, in other cases similar to the facts in Joseph Richmond's appeal, reversed convictions because the evidence failed to support a first aggressor instruction. In *State v. Wasson*, 54 Wn. App. 156 (1989), this court reversed Rodger Wasson's conviction of second degree assault. Wasson and his cousin Billy Bartlett quarreled in an alley outside Bartlett's apartment. Wasson entered his car and repeatedly revved the engine of the vehicle. Bartlett broke the driver's side window of the car. Wasson exited his car with a gun in hand, but Wasson did not assault Bartlett. The commotion attracted neighbor Thomas Reed, who exited the apartment complex and told

the other two men to quiet. Reed and Bartlett exchanged blows, and one blow from Reed knocked Bartlett to the ground. Reed then walked toward Wasson. According to Wasson, he concluded Reed had stabbed Bartlett. Also, Reed approached him and informed him that Reed would attack him next. Wasson told Reed to stop and fired after Reed continued to approach him. According to Reed, Reed uttered no threats to Wasson after Reed fought Bartlett. Also, Reed did not strike Wasson.

In *State v. Wasson*, this court reversed Rodger Wasson's conviction because the trial court rendered a first aggressor instruction without evidence to support the instruction. This court emphasized the right of Wasson to stand his ground when Thomas Reed walked toward him.

In *State v. Arthur*, 42 Wn. App. 120 (1985), this court reversed another conviction for second degree assault because of the rendering of the first aggressor instruction. The instruction indicated that the State must prove that the defendant performed an unlawful act that created the necessity for self-defense, and this court held such an instruction void for vagueness. Still the decision notes the absence of evidence to support the instruction and announces the proposition that trial courts should rarely grant the instruction.

In *State v. Arthur*, William Arthur stabbed Terry Waterhouse. Waterhouse testified he and friends visited in a parking lot, when a drunken and abusive Arthur approached the group. When Arthur got "in his face," Waterhouse pushed Arthur to the

ground. *State v. Arthur*, 42 Wn. App. at 121. Waterhouse and his friends then went to a tavern. Waterhouse later returned to the same parking lot. Arthur also returned and pulled his vehicle into a space in the lot. Arthur abruptly pulled his automobile from the parking spot at high speed, hit a car in an adjoining space, and his car ended in a ditch. Waterhouse ambled to Arthur's vehicle to prevent Arthur from leaving the scene of an accident. When Waterhouse reached into Arthur's car, Arthur stabbed him. Arthur testified that he acted in self-defense because he feared Waterhouse would attack him. This reviewing court noted that the only possible provoking act committed by Arthur was the collision with the other vehicle, but that Arthur had withdrawn from the parking lot. Arthur performed no immediate act that provoked Waterhouse to respond with violence.

In *State v. Brower*, 43 Wn. App. 893 (1986), a jury convicted Ted Brower of second degree assault. Brower journeyed to Claudia Hoyt's apartment to retrieve his car. Brower feared Hoyt or her friends would be armed, so he brought his firearm to use as a last resort. Frederick Martin occupied Hoyt's residence when Brower arrived. Martin grew agitated with Brower. When Brower left the apartment and walked down stairs, Martin trailed Brower. Brower turned and stuck his revolver in Martin's stomach and told him to return to the apartment. This court reversed the conviction because of the lack of evidence to support the giving of a first aggressor instruction. Assuming Brower to be the first aggressor, the first aggression occurred when Brower assaulted Martin.

Although Brower armed himself before traveling to Hoyt's apartment, Brower possessed the right to carry the firearm. A broad reading of *Brower* champions the proposition that arming oneself does not constitute an act that reasonably provokes a belligerent response.

I would remand for a new trial because of the rendering of the first aggressor jury instruction. The jury may still reject Joseph Richmond's self-defense defense and find him guilty of second degree murder.

Fearing, J.

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