No. 308791

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

FLOYD EDWARD KOONTZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE F. JAMES GAVIN, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. COUNTERSTATEMENT OF ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether court erred in finding that in a prior confrontation the victim, Pedro Flores, probably displayed a knife while telling the Appellant, Floyd Koontz, not to return to Flores' residence unless he had money owed to Flores?

2. Whether, in light of the prior confrontation, Floyd Koontz was the aggressor in a confrontation which occurred on May 8, 2011, when he returned to Flores' residence?

3. Whether sufficient evidence supported the court's conclusion that Koontz committed the crime of first degree manslaughter on May 8, 2011, by going to Flores' residence, armed with a knife, knowing that he had been told not to return without the money, such that he knew of a substantial risk of death to Pedro Flores caused by his actions, and disregarded that substantial risk?

4. Whether Koontz was entitled to raise, and have the court consider, his claim of self-defense?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court did not err in its findings that in the prior confrontation Mr. Flores probably displayed a knife, as there was testimony of prior threats. Additionally, the court also found that Flores told Koontz loudly and in no uncertain terms that he was not to return to Flores' residence, and pushed him out of the house. Sufficient evidence supported this finding.

2. By returning to the residence on May 8, 2011, Koontz provoked the confrontation in which he caused Flores' death by stabbing. He was the aggressor.

3. Sufficient evidence supported the court's conclusion that Koontz was guilty of the crime of first degree manslaughter, as he knew of the substantial risk to Flores' life by provoking the confrontation, and introducing a knife into that confrontation. He recklessly disregarded that substantial risk by his actions, and his conduct was a gross deviation from conduct that a reasonable person would exercise in such a situation.

4. Because Koontz was the aggressor, the court did not err in refusing to consider Koontz' claim of self defense.

II. STATEMENT OF FACTS

The State is satisfied with Mr. Koontz' Statement of the Case but supplements that narrative here. RAP 10.3(b)

Prior to the ultimate confrontation at Flores' residence on May 8, 2011, Dezarae Chambers was with Floyd Koontz. When told that Pete Flores still wanted the money he felt he was owed for the truck sold to Koontz, Koontz "jumped up and just blurted out that I'm gonna go kill that son-of-a-bitch right now and, and then that's basically when he left our house and it didn't' take him long to get there." **(RP 128)**

Prior to the outburst, Koontz appeared calm, but appeared to Chambers as if he had been drinking. His demeanor changed and "he really got agitated" when Flores was mentioned. **(RP 129)**

Further, while Chambers did not believe that Koontz would kill Flores, he stated, as he left, "you don't think I will, you don't think I'll do it?" **(RP 129)**

Chambers was concerned enough that she instructed her sister to call Flores and relate what Koontz had said. Within a few minutes after that, Flores no longer answered his phone. Chambers and her sister drove

to Flores and discovered him lying mortally wounded in his yard. **(RP 130-31)**

Chambers observed a machete lying nearby, but it had not blood on it, and Chambers had seen Flores using it previously to cut weeds. **(RP 133)**

Koontz testified at trial that he was attacked by Flores with a butcher knife and file. **(RP 705-06)** However, when first contacted by Deputy Gonzalez he stated he had been attacked with a machete. **(RP 416)** Koontz's injuries appeared to be superficial. **(RP 421-22)**

III. ARGUMENT

1. The court did not err in finding that Koontz was the aggressor, or in rejecting his claim of self defense. Sufficient evidence supported the conviction for first degree manslaughter.

In order to raise a self defense claim in any homicide prosecution, a defendant must produce some evidence to establish that the killing occurred in circumstances amounting to defense of life and produce some evidence that he or she had a reasonable apprehension of great bodily harm and imminent danger. RCW 9A.16.050; State v. Read, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). *See, also,* State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). In determining whether a defendant is entitled to a jury

instruction on self defense, or whether to consider it in a bench trial, a trial court must view the evidence from the standpoint of a reasonably prudent person who knows all that the defendant knows and sees all the defendant sees, applying both a subjective and objective assessment. Read, 147 Wn.2d at 242 , *citing* State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

In its subjective assessment, the trial court places itself in the defendant's shoes, and views the defendant's acts in light of all the facts and circumstances known to the defendant at the time of the acts in question. Id.

The objective assessment consists of determining what a reasonable person would have done if placed in the defendant's situation. Id. Considering both the subjective and objective determinations together, the court must determine whether the defendant produced any evidence to support his or her claim that he was in imminent danger. Walker, 136 Wn.2d at 773; Read, 147 Wn.2d at 243.

The subjective assessment is a matter of fact, and the standard of review is abuse of discretion. The objective is a matter of law, and review is *de novo*. Walker, 136 Wn.2d at 773.

However, a defendant whose aggression provokes the contact eliminates his right of self-defense. A first-aggressor jury instruction is

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

Though at times disfavored, first-aggressor instructions are warranted by "credible evidence from which the jury can conclude that it was the defendant who provoked the need to act in self-defense." State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998).

Generally:

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

State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

A provoking act must be intentional and one that a "jury could reasonably assume would provoke a belligerent response by the victim."

State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039, *review denied*, 113 Wn.2d 1014 (1989), *quoting* State v. Arthur, 42 Wn. App. 120, 124, 708 P.2d 1230 (1985), *cited in* State v. Bea, 162 Wn. App. 570, 254 P.3d 948 (2011).

Here, in Mr. Koontz' bench trial, the evidence supports the trial court's finding that he was the aggressor, and that he had not put forth evidence sufficient for the court to consider his claim of self-defense.

As stated in the opening brief, Koontz had told others that Flores had previously pulled a knife on him, and that he had threatened to beat him to death with a hammer. **(RP 292; 492)** Further, there was no evidence that Koontz withdrew from the altercation. Instead, it ended with the fatal wound to Mr. Flores.

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

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

> The evidence established beyond a reasonable doubt that you went to Mr. Flores's house knowing that your presence would likely provoke a belligerent response, which it did. You created the necessitary (sp) for you, the necessity for you acting in your own defense. This makes you the aggressor. So self-defense is not available to you Mr. Koontz.
>
> **(RP 816)**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must

determine only whether substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

An appellate court reviews a trial court's decision following a bench trial for whether substantial evidence supports any challenged findings of fact and whether the findings of fact support the conclusions of law. State v. Hovig, 149 Wn. App. 1, 8, 202 P.3d 318, *review denied*, 166 Wn.2d 1020 (2009), *cited* in State v. Gower, ___ Wn. App. ___, 288 P.3d 665, 670 (2012).

Here, Mr. Koontz was indeed reckless in going to Mr. Flores' residence on May 8, 2011. He was agitated, and uttered threats against Flores. There was credible evidence that there was animosity between the two men over the sale of the truck, and Koontz had mentioned to other witnesses that Flores had threatened *him*. After being forcibly removed from that residence, and told not to come back some months prior, Koontz' actions were done with "knowledge of and disregard for a substantial risk that a death may occur", since he had possession of a knife which could cause death. RCW 9A.08.010(1)(c); State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005). His actions were much more than unwise; his recklessness caused the very altercation which ended in Mr. Flores' death. He may have used the knife earlier to cut sausage, but

he chose to go to Mr. Flores' house with it in his possession, and it was his decision to retrieve the knife and introduce it into the confrontation. That the knife could be used in such a manner was very much part of the substantial risk.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction.

Respectfully submitted this 20th day of February, 2013.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the appellant via U.S. Mail.

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Dated at Yakima, WA this 20th day of February, 2013.

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