

FILED

Jan 29, 2014

Court of Appeals

Division III

State of Washington

Supreme Ct No.

891676-3

COA No. 30879-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent

v.

FLOYD KOONTZ, Petitioner

---

PETITION FOR REVIEW

---

**FILED**  
FEB - 4 2014  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON CRF

Janet G. Gemberling  
Attorney for Petitioner

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

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A. IDENTITY OF PETITIONER

Floyd Koontz asks this court to accept review of the decision of Division Three of the Court of Appeals terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The opinion filed on November 26, 2013, and the order denying reconsideration, filed on January 14, 2014. Copies of these decisions are in the Appendix at pages A-1 through A-8 and B-1.

C. ISSUE PRESENTED FOR REVIEW

The evidence shows the defendant went to the home of a person with whom he had had a heated dispute some months earlier. The defendant was carrying a pocket knife. No one witnessed the beginning of ensuing confrontation. Is the evidence sufficient to justify the trial court's finding the defendant was the aggressor in the fight and therefore refusing to consider a claim of self-defense?

D. STATEMENT OF THE CASE

Floyd Koontz was convicted of manslaughter following a bench trial. (CP 129) The trial court made the following findings of fact relevant to the issue presented in this petition:

8. At some date prior to May 8, 2011 and after the sale of a pickup by Pedro Flores to Floyd Koontz on June 4, 2010 there was a confrontation between the two over the failure of Floyd Koontz to complete payment for the pickup.

9. This confrontation took place at the home of Pedro Flores. During the argument Pedro told Floyd Koontz loudly and in no uncertain terms not to return without the money that was owed while physically pushing Floyd out of the house.

10. During this confrontation Pedro Flores probably displayed a knife while telling Floyd Koontz not to return.

13. There is no reason to believe that Pedro Flores changed his mind about ordering Floyd Koontz not to return without the money owed.

16. During the time Floyd was at the house with Dezarea and Jeri, Floyd Koontz made statements about Pedro Flores. The statements were as benign as jokingly saying, "I hate him." or as threatening as, "I hate the son of a bitch, and I am going to kill him."

17. Dezarea Chambers and Jeri Anderson were concerned about the statements made by Floyd and called Pedro Flores to warn him about Floyd's statements and tell him that Floyd had a knife.

(CP 122-23)

1. On May 8, 2011 Pedro Flores died as a result of a knife wound inflicted by Floyd Koontz. This took place in Yakima County, Washington State.

2. The stab wound was inflicted by Floyd Koontz during a fight at the home of Pedro Flores where both Pedro Flores and Floyd Koontz were armed and fighting with deadly weapons.

(CP 121)

22. Floyd Koontz was the aggressor in the confrontation with Pedro Flores on May 8, 2011.

(CP 123)

The court concluded:

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

(CP 123)

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted when a decision of the Court of Appeals conflicts with a decision of the Supreme Court or another division of the Court of Appeals, or involves a significant question of constitutional law or an issue of substantial public interest. RAP 13.4(b).

The court is asked to review a decision in which the court's refusal to consider a claim of self-defense was predicated on evidence the defendant went to the home of a person with whom he had had a heated dispute some months earlier ending in the alleged victim ordering him to

leave and not come back without the money allegedly owed by the defendant, and thus the defendant was the aggressor.

1. ABSENT EVIDENCE OF A DIRECT THREAT OR ATTEMPT TO INJURE, REFUSAL TO CONSIDER SELF-DEFENSE CLAIM VIOLATED DUE PROCESS.

A trial court's refusal to consider a defendant's claim of self-defense because the court has found the defendant was the aggressor implicates the due process requirement that the State bears the burden of proving every element of the charged offense:

The State must prove every element of the crime charged beyond a reasonable doubt. Wash. Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When the defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt. *State v. Acosta*, 101 Wash.2d 612, 615-16, 683 P.2d 1069 (1984). It is constitutional error to relieve the State of its burden of proving the absence of self-defense. *State v. Walden*, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997).

*State v. L.B.*, 132 Wn. App. 948, 952, 135 P.3d 508, 510 (2006). A finding that the defendant was the first aggressor relieves the State of its burden of proving that a defendant did not act in self-defense. See *State v. Bea*, 162 Wn. App. 570, 575-76, 254 P.3d 948, 951 review denied, 173 Wn.2d 1003, 271 P.3d 248 (2011) citing *State v. Douglas*, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005).

A determination that the defendant was the first aggressor must be predicated on finding that the defendant committed an aggressive act to which the alleged victim would be entitled to respond with force: “[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force.” *State v. Riley*, 137 Wn.2d 904, 912, 976 P.2d 624, 629 (1999).

An alleged victim is not entitled to respond with force to just any act that might be perceived as aggressive: “[N]o provocative act which does not amount to a threat or an attempt to inflict injury, and no conduct or words, no matter how offensive or exasperating, justify a battery[.]” *State v. Riley*, 137 Wn.2d at 913; *citing People v. Mayes*, 262 Cal.App.2d 195, 197, 68 Cal.Rptr. 476 (1968). “[T]hat defendant may have uttered insults or participated in arguments does not justify [a] first aggressor instruction[.]” 137 Wn.2d at 913; *citing People v. Manzanares*, 942 P.2d 1235, 1241 (Colo.Ct.App.1996).

The trial court unjustifiably relieved the State of its burden of proving the absence of self-defense; this was constitutional error. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). In concluding that the trial court’s findings in this case described aggressive conduct to which the victim was entitled to respond with lawful force, the

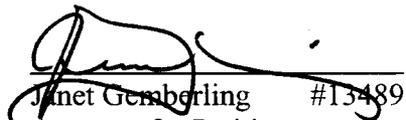
Court of Appeals has extended the factual basis for applying the first-aggressor doctrine beyond the limits of existing case law. *See State v. Riley; State v. Birnel*, 89 Wn. App. 459, 949 P.2d 433 (1998).

F. CONCLUSION

Review should be granted and the Court of Appeals decision should be reversed.

Dated this 29th day of January, 2014.

JANET GEMBERLING, P.S.

  
Janet Gemberling #13489  
Attorney for Petitioner

# APPENDIX A

**FILED**  
**NOV. 26, 2013**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 30879-1-III
	)	
Respondent,	)	
	)	
v.	)	
	)	
FLOYD KOONTZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

BROWN, J. – Floyd Koontz appeals his first degree manslaughter conviction following a bench trial. He contends the court erred in finding he was the first aggressor and argues insufficient evidence supports his conviction. In his statement of additional grounds for review (SAG), Mr. Koontz, pro se, reiterates his appellate counsel’s first aggressor concerns and additionally urges us to reassess witness credibility. We find no error, and affirm.

FACTS

Mr. Koontz purchased a vehicle from Pete Flores for \$500. Mr. Koontz gave him \$250 and agreed to pay the remaining \$250 at a later time. Mr. Koontz was not happy with the car and felt Mr. Flores had sold him a “lemon.” Report of Proceedings (RP) at 291. Mr. Koontz confronted Mr. Flores, who allegedly pulled out a knife and

No. 30879-1-III  
*State v. Koontz*

embarrassed Mr. Koontz. Witnesses heard the two men arguing about the vehicle. And, one witness thought she heard Mr. Koontz threaten that he was "gonna get a knife." RP at 560. Mr. Flores ended up kicking Mr. Koontz out and telling him not to come back unless Mr. Koontz had the money to pay the balance on the vehicle.

About three months later, Mr. Koontz was at a friend's house where a witness saw him using a pocket knife to cut and eat sausage. A friend at the house had recently talked to Mr. Flores, who asked her to remind Mr. Koontz he still owed him money. Mr. Koontz became upset about this and left. According to the witness, Mr. Koontz stated on his way out that "he was gonna go kill Pete." RP at 147.

Mr. Koontz then went to Mr. Flores's house. A friend of Mr. Flores was inside using the bathroom. When he came outside, the friend saw Mr. Koontz pulling a knife out of Mr. Flores's neck. The friend did not hear any loud noises coming from outside. Mr. Flores died a short time later. An investigating officer went to Mr. Koontz's home to investigate the homicide. He saw Mr. Koontz had been stabbed and called for an ambulance. Mr. Koontz had a puncture wound in his chest, along with superficial cuts or stab wounds, and some bleeding.

The State charged Mr. Koontz with first degree murder. During his bench trial, Mr. Koontz testified Mr. Flores threatened him and then attacked him with a file and a butcher knife. Mr. Koontz further testified that as he tried to pull his knife out of his pocket he tripped and fell, and Mr. Flores fell on top of him. He then stabbed Mr. Flores and ran away.

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The trial court concluded Mr. Koontz was the aggressor and rejected his self-defense argument. The court then found him guilty of first degree manslaughter while armed with a deadly weapon. Mr. Koontz appealed.

## ANALYSIS

### A. First Aggressor

The issue is whether the trial court erred in concluding Mr. Koontz was the first aggressor, and rejecting his self-defense claim. Mr. Koontz argues no evidence shows he provoked the fight that resulted in Mr. Flores's death. We review conclusions of law de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873-74, 16 P.3d 601 (2001).

In Washington, a defendant's right to act in self-defense is determined from the defendant's subjective, reasonable belief that he or she is in imminent harm. *State v. Bradley*, 141 Wn.2d 731, 737, 10 P.3d 358 (2000). But, to disavow a defendant's claim of self defense, the State may produce "credible evidence" showing the defendant was the aggressor. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

At the outset we note, because this case was decided in a bench trial, the trial judge had the fact-finding discretion to resolve witness credibility and evidence weight problems without the necessity of giving jury instructions. The judge is presumed to know the law. The judge's oral decision indicates a careful consideration of the case facts as applied to the law of self-defense. The judge carefully explained his reasoning regarding the credibility issues and indicated his views on the persuasiveness of the evidence. These are areas that we must defer to because substantial evidence in the

No. 30879-1-III  
*State v. Koontz*

record supports the trial court's findings of fact and those facts support its conclusions of law. The judge's rejection of self defense because he found Mr. Koontz was the aggressor is wholly supported by this record.

In any event, case law concerning when an aggressor instruction is justified is instructive. "A court properly submits an aggressor instruction where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant'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) (citing *Riley*, 137 Wn.2d at 909-10).

In *Riley*, Mr. Riley referred to a rival gang member as a "wanna-be." 137 Wn.2d at 906. The victim then threatened to shoot Mr. Riley. Mr. Riley pulled a gun on the victim and demanded his gun. As the victim reached for his gun, Mr. Riley shot him. The court instructed on first aggressor. *Id.* at 907. The jury found Mr. Riley guilty of first degree assault. He appealed his conviction, arguing the trial court erred in giving an aggressor instruction. The court rejected Mr. Riley's challenge, holding generally where credible evidence exists from which a jury could reasonably determine that the defendant provoked the need to act in self defense, an aggressor instruction is appropriate. *Id.* at 910.

In other words, a defendant whose aggression provokes the contact eliminates his right of self-defense. *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012

(2005). Here, the trial court acted within its fact-finding discretion in deciding the underlying facts in support of its legal conclusions.

Mr. Koontz and Mr. Flores had a previous encounter where they argued over the vehicle that Mr. Flores sold to Mr. Koontz. Mr. Flores displayed a knife and told Mr. Koontz to leave his home and never come back. Nevertheless, upon learning from mutual friends that Mr. Flores still wanted his money for the vehicle, Mr. Koontz went back. This time he was carrying a knife (previously displayed while he was eating sausage) and visibly upset. Mr. Koontz also stated he was going to "kill Pete." RP at 147. While the witness at Mr. Flores's home did not hear a struggle and Mr. Koontz also had been wounded, Mr. Koontz's actions would still constitute aggression sufficient to eliminate his right to claim self-defense. *Douglas*, 128 Wn. App. at 562. Moreover, a fact-finder could "reasonably determine . . . that the defendant provoked the fight" based on Mr. Koontz's actions. *Anderson*, 144 Wn. App. at 89 (citing *Riley*, 137 Wn.2d at 909-10). The trial court properly concluded likewise in denying Mr. Koontz's self-defense claim.

#### B. Evidence sufficiency

The issue is whether sufficient evidence exists to support Mr. Koontz's first degree manslaughter conviction. He contends the State failed to prove he acted recklessly.

Evidence is sufficient when, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.

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*State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). When considering the sufficiency of the evidence, all reasonable inferences 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).

A person commits first degree manslaughter when he or she "recklessly causes the death of another person." RCW 9A.32.060(1)(a). "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c). Our Supreme Court clarified in *State v. Gamble*, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005) that to convict a defendant of first degree manslaughter the State must prove beyond a reasonable doubt that the defendant knew of, and disregarded, a substantial risk that *death* may occur.

Mr. Koontz and Mr. Flores had a prior confrontation resulting in Mr. Flores kicking Mr. Koontz out of his house and telling him to never come back. Mr. Koontz then heard from a mutual friend that Mr. Flores wanted to be paid for the vehicle. Mr. Koontz appeared agitated and left the house of the mutual friend, claiming he was going to kill Mr. Flores. He was carrying a knife at the time. Based on these facts, and drawing all reasonable inferences in favor of the State, a reasonable person could conclude Mr. Koontz knew of, and disregarded, a substantial risk that death may occur. Mr. Koontz

acted recklessly. Thus, sufficient evidence exists to support his first degree manslaughter conviction.

### C. Statement of Additional Grounds

In his SAG, Mr. Koontz dedicates several pages to citing to the trial transcript and then providing commentary about the testimony. It appears from these comments he is challenging the trial court's finding that he was the first aggressor and disagrees with the trial court's witness credibility determinations.

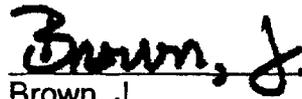
We do not readdress Floyd Koontz's first-aggressor concerns because his appellate counsel's brief adequately addressed that issue, rejected above. See RAP 10.10(a) (providing the purpose of a SAG is to "identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel").

Mr. Koontz is concerned that several of the witnesses committed perjury and disagrees with the trial court's credibility assessments. Mr. Koontz, however, testified at trial (RP 647), rebutting the testimony he now questions. We defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Moreover, both circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Accordingly, Mr. Koontz fails to present any reversible error.

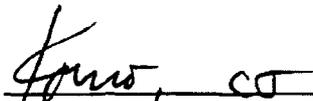
No. 30879-1-III  
State v. Koontz

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Brown, J.

WE CONCUR:

  
Korsmo, C.J.

  
Kulik, J.

## APPENDIX B

**FILED**  
**JAN. 14, 2014**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III**

STATE OF WASHINGTON,	)	No. 30879-1-III
	)	
Respondent,	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
FLOYD KOONTZ,	)	
	)	
Appellant.	)	

THE COURT has considered appellant's motion for reconsideration of this court's decision of November 26, 2013, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, appellant's motion for reconsideration is hereby denied.

DATED: 1-14-14

PANEL: Jj. Brown, Kulik, Korsmo

FOR THE COURT:

  
\_\_\_\_\_  
KEVIN M. KORSMO  
CHIEF JUDGE

SUPREME COURT OF THE STATE OF WASHINGTON

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

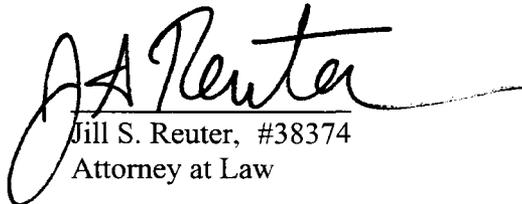
I certify under penalty of perjury under the laws of the State of Washington that on January 29, 2014, I served a copy of the Petition for Review in this matter by email on the attorney for Respondent, receipt confirmed, pursuant to the parties' agreement:

Tamara Hanlon  
tamara.hanlon@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on January 29, 2014, I mailed a copy of the Petition for Review in this matter to:

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

Signed at Spokane, Washington on January 29, 2014.

  
Jill S. Reuter, #38374  
Attorney at Law

**FILED**

**JAN 31, 2014**

**In the Office of the Clerk of Court  
WA State Court of Appeals, Division III**

**COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III**

STATE OF WASHINGTON,	)	No. 30879-1-III
	)	
Respondent,	)	ORDER DENYING MOTION
v.	)	TO PUBLISH
	)	
FLOYD KOONTZ,	)	
	)	
Appellant.	)	

THE COURT has considered appellant's motion to publish the court's opinion of for reconsideration of this court's decision of November 26, 2013, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, appellant's motion to publish is hereby denied.

DATED: 1/31/14

PANEL: Jj. Brown, Kulik, Korsmo

FOR THE COURT:

  
\_\_\_\_\_  
**KEVIN M. KORSMO**  
**CHIEF JUDGE**

Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
TDD #1-800-833-6388

*The Court of Appeals  
of the  
State of Washington  
Division III*



500 N Cedar ST  
Spokane, WA 99201-1905

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<http://www.courts.wa.gov/courts>

January 31, 2014

**E-mail**

James Patrick Hagarty  
Tamara Ann Hanlon  
Yakima County Prosecuting Attorney's Off  
128 N. 2nd St. Rm 329  
Yakima, WA 98901-2621

**E-mail**

Janet G. Gemberling  
Janet Gemberling PS  
P.O. Box 9166  
Spokane, WA 99209-9166

CASE # 308791  
State of Washington v. Floyd Edward Koontz  
YAKIMA COUNTY SUPERIOR COURT No. 111006471

Dear Counsel:

Enclosed is your copy of this Court's Order Denying Motion to Publish Court's Opinion of November 26, 2013, which was filed today and which is self-explanatory.

A petition for review, if any, is due 30 days after an order determining a timely motion to publish is filed, RAP 13.4(a). A petition for review should be filed in the Court of Appeals.

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST: mk  
Attach.  
c: Floyd Edward Koontz  
#730322  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326

**FILED**  
**JAN 31, 2014**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON,	)	No. 30879-1-III
	)	
Respondent,	)	ORDER DENYING MOTION
v.	)	TO PUBLISH
	)	
FLOYD KOONTZ,	)	
	)	
Appellant.	)	

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IT IS ORDERED, appellant's motion to publish is hereby denied.

DATED: 1/31/14

PANEL: Jj. Brown, Kulik, Korsmo

FOR THE COURT:

  
\_\_\_\_\_  
KEVIN M. KORSMO  
CHIEF JUDGE

**FILED**  
**JAN. 14, 2014**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON,	)	No. 30879-1-III
	)	
Respondent,	)	ORDER DENYING MOTION
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DATED: 1-14-14

PANEL: Jj. Brown, Kulik, Korsmo

FOR THE COURT:

  
\_\_\_\_\_  
KEVIN M. KORSMO  
CHIEF JUDGE

## Karademos, Michelle

---

**To:** Zorich, Carolyn  
**Subject:** FW: Koontz (308791) - Motion to Publish

---

**From:** Shahan, June  
**Sent:** Wednesday, January 22, 2014 10:56 AM  
**To:** Karademos, Michelle  
**Subject:** FW: Koontz (308791) - Motion to Publish

Hi Michelle,

I was advised to forward this e-mail to you. Jan did not file a separate motion to publish but on Page 6 of the Motion for Reconsideration, C. The Decision Should be Published Because It Modifies Established Legal Principles, she does bring it up. I don't know if it was addressed in the memo or if it was overlooked or if the panel choose not to address it so am sending it back to you. Let me know if you need me to do anything. Thanks.

June

---

**From:** Robert Canwell [<mailto:admin@gemberlaw.com>]  
**Sent:** Wednesday, January 22, 2014 9:58 AM  
**To:** Shahan, June  
**Subject:** Koontz (308791) - Motion to Publish

Hi June,

Jan wanted me to check with you on the status of the Motion to Publish in this matter, filed about a month back. Will this be ruled on anytime soon?

Thanks,

Robert Canwell  
Legal Assistant

Janet Gemberling, PS  
Attorney At Law  
PO Box 9166  
Spokane, WA 99209-9166

## Karademos, Michelle

---

**From:** Karademos, Michelle  
**Sent:** Thursday, January 23, 2014 8:08 AM  
**To:** Shahan, June  
**Subject:** FW: Koontz (308791) - Motion to Publish

This Order Denying Recon was filed on January 14, 2014.

So, we are denying the motion to publish – does the Clerk of the Court want us to do another order denying motion to publish?

Please let me know.

Michelle

---

**From:** Zorich, Carolyn  
**Sent:** Wednesday, January 22, 2014 4:09 PM  
**To:** Karademos, Michelle  
**Subject:** RE: Koontz (308791) - Motion to Publish

Yes – I caught the motion to publish within the motion for reconsideration and recommended NOT granting the motion in my January 7<sup>th</sup> memo to the panel. I'm not sure what the judges decided.  
C.

---

**From:** Karademos, Michelle  
**Sent:** Wednesday, January 22, 2014 11:19 AM  
**To:** Zorich, Carolyn  
**Subject:** FW: Koontz (308791) - Motion to Publish  
**Importance:** High

---

**From:** Shahan, June  
**Sent:** Wednesday, January 22, 2014 10:56 AM  
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Legal Assistant

Janet Gemberling, PS  
Attorney At Law  
PO Box 9166  
Spokane, WA 99209-9166



**FILED**

**JAN. 14, 2014**

**In the Office of the Clerk of Court  
WA State Court of Appeals, Division III**

**COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III**

STATE OF WASHINGTON,	)	No. 30879-1-III
	)	
Respondent,	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
FLOYD KOONTZ,	)	
	)	
Appellant.	)	

THE COURT has considered appellant's motion for reconsideration of this court's decision of November 26, 2013, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, appellant's motion for reconsideration is hereby denied.

DATED: 1-14-14

PANEL: Jj. Brown, Kulik, Korsmo

FOR THE COURT:

**KEVIN M. KORSMO  
CHIEF JUDGE**

Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
TDD #1-800-833-6388

*The Court of Appeals  
of the  
State of Washington  
Division III*



January 14, 2014

500 N Cedar ST  
Spokane, WA 99201-1905

Fax (509) 456-4288  
<http://www.courts.wa.gov/courts>

**E-mail**

Tamara Ann Hanlon  
James Patrick Hagarty  
Yakima County Prosecuting Attorney's Office  
128 N. 2nd St. Rm 329  
Yakima, WA 98901-2621

**E-mail**

Janet G. Gemberling  
Janet Gemberling PS  
P.O. Box 9166  
Spokane, WA 99209-9166

CASE # 308791  
State of Washington v. Floyd Edward Koontz  
YAKIMA COUNTY SUPERIOR COURT No. 111006471

Dear Counsel:

Attached is a copy of the Order Denying Motion to for Reconsideration of this Court's opinion under date of November 26, 2013.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST:mlk

Attach. (1)

c: Floyd Edward Koontz  
#730322  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326



Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
TDD #1-800-833-6388

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500 N Cedar ST  
Spokane, WA 99201-1905

Fax (509) 456-4288  
<http://www.courts.wa.gov/courts>



December 31, 2013

**E-Mail**

Janet G. Gemberling  
Janet Gemberling PS  
PO Box 9166  
Spokane, WA 99209-9166

CASE # 308791  
State of Washington v. Floyd Edward Koontz  
YAKIMA COUNTY SUPERIOR COURT No. 111006471

Counsel:

Pursuant to your "Motion to Extend Time for Filing Motion for Reconsideration," the following notation ruling is entered:

**Motion granted. The Motion for Reconsideration is now due  
December 20, 2013 (date of receipt).**

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST:jcs

c: Floyd Edward Koontz  
#730322  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326

**E-Mail**

c: James Patrick Hagarty  
Tamara Ann Hanlon  
Yakima County Prosecutor's Office  
128 N 2nd St Rm 329  
Yakima, WA 98901-2621



FILED

**Dec 20, 2013**  
Court of Appeals  
Division III

IN THE COURT OF APPEALS OF THE STATE OF WA. **State of Washington**  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 308791
	)	
v.	)	MOTION TO
	)	EXTEND TIME FOR
FLOYD KOONTZ,	)	FILING MOTION FOR
	)	RECONSIDERATION
Appellant.	)	

---

I. IDENTITY OF MOVING PARTY

Appellant Floyd Koontz asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 18.8, so that the ends of justice might be served, Appellant moves the Court for the entry of an order continuing the time for filing his motion for reconsideration until the date of filing: December 20, 2013.

III. GROUNDS FOR RELIEF

Appellant's motion for reconsideration was due on December 16, 2013. I, Janet Gemberling,

am counsel for Appellant. Because of other briefs and a very heavy workload, I have been unable to complete the motion in a timely fashion.

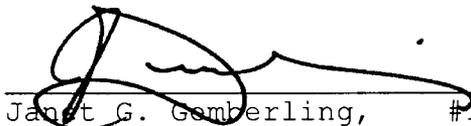
Appellant asks this court to grant the requested extension in order to have sufficient time to complete the motion for reconsideration and not for any tactical reasons.

#### IV. CONCLUSION

Appellant asks the court to extend the deadline for his motion for reconsideration until the date of filing: December 20, 2013.

Respectfully submitted on Friday, December 20, 2013.

Janet Gemberling, P.S.

  
\_\_\_\_\_  
Janet G. Gemberling, #13489  
Attorney for Appellant

CERTIFICATION

I certify under penalty of perjury under the laws of the State of Washington that the facts set out in part III above are true.

Signed on December 20, 2013.

  
\_\_\_\_\_  
Janet G. Gemberling  
PO Box 9166  
Spokane, WA 99209

I certify under penalty of perjury under the laws of the State of Washington that on this day I served a copy of this document by email on the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

Tamara Hanlon  
Tamara.hanlon@co.yakima.wa.us

Signed at Patnem Beach, India on Friday,  
December 20, 2013.

  
\_\_\_\_\_  
Robert Canwell  
Legal Assistant



**JANET GEMBERLING, PS**

**December 20, 2013 - 11:41 AM**

**Transmittal Letter**

Document Uploaded: 308791-koontz - mot ext mot recon.pdf

Case Name: Floyd Koontz

Court of Appeals Case Number: 30879-1

Party Represented: Floyd Koontz

Is This a Personal Restraint Petition?  Yes  No

Trial Court County: Yakima - Superior Court # 11-1-00647-1

**Type of Document being Filed:**

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion: Motion for Extension of Time
- Response/Reply to Motion: \_\_\_\_\_
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to tamara.hanlon@co.yakima.wa.us.

Sender Name: Robert S Canwell - Email: [admin@gemberlaw.com](mailto:admin@gemberlaw.com)

FILED



**Dec 20, 2013**

Court of Appeals

Division III

State of Washington

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 308791
	)	
v.	)	MOTION FOR
	)	RECONSIDERATION
FLOYD KOONTZ,	)	
	)	
Appellant.)	)	

---

I. IDENTITY OF MOVING PARTY

Appellant Floyd Koontz asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Mr. Koontz asks the court to reconsider and publish the opinion filed on November 26, 2013.

III. FACTS RELEVANT TO MOTION

The trial court cited a history of threats and ill-will between the parties, and evidence that Mr. Koontz must have known that in confronting Mr. Flores he could likely provoke a hostile response. This court similarly cites the history of confrontation and the fact that Mr.

Koontz committed the physical act of going to the home of Mr. Flores while in possession of a knife as "aggression sufficient to eliminate his right to claim self-defense." Slip Op. at 5. The State presented no evidence, and the trial court made no finding, that Mr. Koontz displayed his pocket knife to Mr. Flores or committed any other threatening act on the day of the alleged homicide.

#### IV. GROUNDS FOR RELIEF

##### A. THE OPINION INCLUDES A MINOR FACTUAL MISSTATEMENT

In summarizing evidence of a prior confrontation between Mr. Koontz and Mr. Flores, the opinion states: "And, one witness thought she heard Mr. Koontz threaten that he was 'gonna get a knife.' RP at 560." Slip Op. at 2. The cited portion of the record shows that the witness saw Mr. Koontz reach for something, that she thought Mr. Koontz was going to get a knife and that she warned Mr.

Flores.<sup>1</sup> The record does not support the suggestion that anyone heard Mr. Koontz threaten to get a knife.

B. THE DECISION BROADENS THE REACH OF THE FIRST-AGGRESSOR DOCTRINE

An appellate court reviews a trial court's decision following a bench trial to determine whether substantial evidence supports the challenged findings and whether the findings support the conclusions of law. *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). This court quite properly defers to the trial court's findings of fact. Whether those fact are sufficient to support the conclusion that Mr. Koontz committed an aggressive act to which the

---

A They were over by the, the front door and I seen Floyd reaching for something in his pocket and...

Q And why, why did that concern you?

A Well cause I seen that he had a knife in his pocket earlier and so I thought he was gonna get a knife and I, I warned Pete that he, he reached for his pocket and I thought he was gonna get a knife.

Mr. Flores was entitled to respond with lawful force present a legal issue which this court should reconsider.

The legal conclusion that the defendant was the first aggressor in this confrontation implicates the due process requirement that the State bears the burden of proving every element of the charged offense:

The State must prove every element of the crime charged beyond a reasonable doubt. Wash. Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When the defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt. *State v. Acosta*, 101 Wash.2d 612, 615-16, 683 P.2d 1069 (1984). It is constitutional error to relieve the State of its burden of proving the absence of self-defense. *State v. Walden*, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997).

*State v. L.B.*, 132 Wn. App. 948, 952, 135 P.3d 508, 510 (2006). A finding that the defendant was the first aggressor relieves the State of its burden of proving that a defendant did not act in self-defense. See *State v. Bea*, 162 Wn. App. 570, 575-76, 254 P.3d 948, 951 *review denied*, 173

Wn.2d 1003, 271 P.3d 248 (2011) citing *State v. Douglas*, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005).

"[N]o provocative act which does not amount to a threat or an attempt to inflict injury, and no conduct or words, no matter how offensive or exasperating, justify a battery[.]" *State v. Riley*, 137 Wn.2d at 913 citing *People v. Mayes*, 262 Cal.App.2d 195, 197, 68 Cal.Rptr. 476 (1968). "[T]hat defendant may have uttered insults or participated in arguments does not justify [a] first aggressor instruction[.]" 137 Wn.2d at 913 citing *People v. Manzanares*, 942 P.2d 1235, 1241 (Colo.Ct.App.1996).

"[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force." *State v. Riley*, 137 Wn.2d 904, 912, 976 P.2d 624, 629 (1999).

In concluding that the trial court's findings in this case described aggressive conduct to which the victim was entitled to respond with lawful force, this court has extended the factual basis for applying the first-aggressor doctrine beyond the limits of existing case law.

C. THE DECISION SHOULD BE PUBLISHED BECAUSE IT MODIFIES ESTABLISHED LEGAL PRINCIPLES

In determining whether a case has sufficient precedential value to justify publication, the courts consider the following criteria:

- (1) Where the decision determines an unsettled or new question of law or constitutional principle.
- (2) Where the decision modifies, clarifies or reverses an established principle of law.
- (3) Where the decision is of general public interest or importance.
- (4) Where the case is in conflict with a prior opinion of the Court of Appeals.
- (5) Where the decision is not unanimous.

*State v. Fitzpatrick*, 5 Wn. App. 661, 668-69, 491 P.2d 262 (1971), review denied, 80 Wn.2d 1003, (1972).

In extending the first aggressor doctrine this decision implicates the important constitutional principle of due process and modifies the established legal principles of self-defense.

V. CONCLUSION

First, the opinion should be modified to correct the factual misstatement.

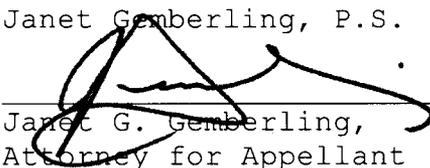
Second, this court should disavow its determination that the trial court's findings were sufficient to justify reliance on the doctrine of first aggressor, and conclude that the failure to determine whether the State carried its burden of proving the absence of self-defense represents an unconstitutional violation of due process.

Alternatively, this court's decision broadens the doctrine of the first aggressor to include anyone who approaches another person with whom he or she has a history of threatening

confrontations, and thereby affords the person approached the right to lawfully use force in response to such an approach. The decision thus has precedential significance and should be published.

Respectfully submitted on Friday, December 20, 2013.

Janet Gemberling, P.S.



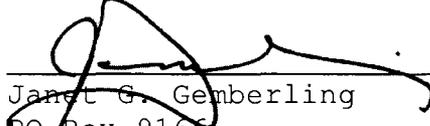
---

Janet G. Gemberling, #13489  
Attorney for Appellant

CERTIFICATION

I certify under penalty of perjury under the laws of the State of Washington that the facts set out in part III above are true.

Signed on December 20, 2013.

  
\_\_\_\_\_  
Janet G. Gemberling  
PO Box 9166  
Spokane, WA 99209

I certify under penalty of perjury under the laws of the State of Washington that on this day I served a copy of this document by email to the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

Tamara Hanlon  
tamara.hanlon@co.yakima.wa.us

Signed at Patnem Beach, India, on Friday, December 20, 2013.

  
\_\_\_\_\_  
Robert Canwell  
Legal Assistant



**JANET GEMBERLING, PS**

**December 20, 2013 - 11:32 AM**

**Transmittal Letter**

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Party Represented: Floyd Koontz

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**Comments:**

No Comments were entered.

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Sender Name: Robert S Canwell - Email: [admin@gemberlaw.com](mailto:admin@gemberlaw.com)