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NO. 34247-2-II  
Clark County No. 05-8-00938-7

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JOSUA JAMES HOPKINS**

**Appellant.**

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**BRIEF OF APPELLANT**

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PM 7-17-06

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**A. ASSIGNMENTS OF ERROR**

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**C. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY**

On August 30<sup>th</sup>, 2005 the Clark County Prosecuting Attorney charged Joshua James Hopkins with one count of Assault in the Second Degree, alleged to have occurred on July 19<sup>th</sup>, 2005 against Jason Pumphrey. CP 1. Mr. Hopkins was tried before the Clark County Superior Court on December 7<sup>th</sup>, 2005. Report of Proceedings. Mr. Hopkins was convicted as charged. CP 41. He was given a standard range sentence. CP 12. This timely appeal followed. CP 19-20.

**2. FACTUAL HISTORY**

On July 19<sup>th</sup>, 2005 Jason Pumphrey was angry because he'd had an argument with his girlfriend. RP 44, 62. He was driving along Third Street in Camas, Washington at approximately 10:00 p.m. when he saw four young people in the road going in the other direction. RP 86, 114-115. Two of the young people were on bikes and two were on foot, and they were headed towards McDonalds to get something to eat. RP 86. The four young people were Jake Childreth, Chris Molash, Appellant Joshua Hopkins, and Kelly Fich. RP 81-82. Mr. Pumphrey angrily swerved his car toward Jake Childreth, one of the two youths on a bike, yelling at him to get the "F" out of the road. RP 115. Jake then raised his middle finger at Mr. Pumphrey, at which time Mr. Pumphrey made a U-turn and pulled into a Shucks parking lot to confront the youths. RP 87. Mr. Pumphrey was yelling out loud when he arrived in the parking lot, which he claimed was due to his anger at his girlfriend. RP 62. Mr. Pumphrey parked in such a way that he was only about three or four steps from Mr. Childreth. RP 118. What happened next was disputed by the State's two witnesses to the incident.

Mr. Pumphrey testified for the State. The State began its direct examination by asking Mr. Pumphrey if he had pulled his car into the Shucks parking lot on July 19<sup>th</sup>, to which he replied he did. RP 44. The State, in an apparent effort to hide the fact that Mr. Pumphrey was the

initial aggressor, then asked him if, prior to pulling his car into the parking lot, he had any injuries to his face, to which he replied he did not. RP 44. The State asked if, prior to pulling his car into the parking lot, he had any injuries to his back, to which he replied he did not. RP 44. The State avoided any questions regarding Mr. Pumphrey's behavior prior to the fight. RP 43-57. Regarding the fight itself, Mr. Pumphrey testified generally that Mr. Hopkins was "the main aggressor," that he "led the group," that he "got them all to jump me" without "saying a word," and that he was "obviously the leader." RP 51-52. When pressed by the State to give details rather than assumptions, Mr. Pumphrey testified he concluded Mr. Hopkins was the ringleader because "He was the one that was up in the face. He...was throwing blows just like everybody else. And for some reason during the whole fight, I happened to be facing him the whole time." RP 52.

Mr. Pumphrey testified the fight happened so fast that he couldn't recall how many times he was hit but he did recall putting Mr. Hopkins into a headlock. RP 54. He testified that the fighting stopped, at which point he taunted Mr. Hopkins that it took him and "three of his buddies" to fight him. RP 55. He testified that Mr. Hopkins then came at him and that's when he put Mr. Hopkins in a headlock. RP 55. Mr. Pumphrey testified that his intent in making the taunting comment to Mr. Hopkins

was to re-engage Mr. Hopkins in a fight, hoping it would get the others to flee and get Mr. Hopkins to stop hitting him. RP 71. “Mr. Pumphrey admitted he was attempting to hit Mr. Hopkins while he had Mr. Hopkins in a headlock, but did not remember if he made contact. RP 56. He testified the headlock is the last thing he remembered. RP 68. He did not remember ever being on the ground, until he woke up on the ground. RP 54. He did not remember being kicked by anyone. RP 54. Regarding a bottle that was thrown, the State asked: “At any point during the incident, do you recall anything being thrown at or towards you?” Mr. Pumphrey testified that he recalled a Dr. Pepper being thrown at him but not hitting him. RP 56. The State then asked what was going on at the time the bottle was thrown, and Mr. Pumphrey replied “They were all walking towards me in a group.” RP 56.

Mr. Pumphrey drove away from Shucks in his car. RP 57. Despite being very close to the Camas police station from his location at Shucks, Mr. Pumphrey instead drove to a friend’s house in Washougal. RP 58-59. When asked on cross examination why he was in the Shucks parking lot when the business was closed, he replied it was for “religious reasons.” RP 72.

Dr. Chris Jackson testified that Mr. Pumphrey had two fractured ribs, a fractured T-11 thoracic vertebrae, and a fractured cheekbone. RP 24-27.

Kelly Fich testified for the State. She testified that when Mr. Pumphrey pulled into the Shucks parking lot he got out of his car and “got into Jake’s face,” yelling at him. RP 87. She said Mr. Pumphrey then got into Mr. Hopkins’ face and pushed Mr. Hopkins. RP 87-88. Mr. Hopkins then hit Mr. Pumphrey back. RP 88. After that, Mr. Pumphrey put Mr. Hopkins into a headlock. RP 91. Kelly testified that Mr. Pumphrey had his arm around Mr. Hopkins’ neck and held it there for thirty seconds. RP 121. She testified that Mr. Pumphrey was hitting Mr. Hopkins while Mr. Hopkins was in the headlock. RP 122. She said it appeared Mr. Hopkins was having trouble breathing. RP 123. Kelly believed that the headlock ended when Mr. Pumphrey fell backward. RP 124. This corroborated Mr. Hopkins’s testimony about how the headlock was broken. RP 140.

At some point, she saw all participants fighting behind Mr. Pumphrey’s car. RP 94. At that time, all parties, including Mr. Pumphrey, were swinging punches. RP 94. At one point, Mr. Pumphrey was on the ground. Kelly did not recall anyone striking Mr. Pumphrey when he was on the ground, other than Mr. Molash. RP 96. She testified Mr. Molash kicked Mr. Pumphrey twice in the face while he was on the

ground. RP 96. At the time of these kicks, Mr. Pumphrey was getting up. RP 97. At the time Mr. Molash kicked Mr. Pumphrey, Kelly said that Mr. Hopkins was standing next to her. RP 98, 128. Mr. Hopkins did nothing to encourage Mr. Molash to kick Mr. Pumphrey, nor did he appear to support that action. RP 128. Kelly believed that Mr. Hopkins hit Mr. Pumphrey only once. RP 103. Kelly testified that at one point Mr. Hopkins threw Mr. Pumphrey to the ground. RP 109. After that, Mr. Molash alone walked over to Mr. Pumphrey and kicked him in the face when he was on the ground. RP 110. At that point, according to Kelly's testimony, the four youths left. RP 110. Prior to leaving, Kelly testified Mr. Hopkins went over to Mr. Pumphrey to see if he was alright and to help him up. RP. Mr. Pumphrey told Mr. Hopkins to "get away." RP 110. Mr. Hopkins had a red mark on his neck after the incident. RP 125. Kelly never saw anyone throw a bottle. RP 113.

Mr. Hopkins testified on own his behalf. His account of how the fight began mirrored Kelly's, although he testified that Mr. Pumphrey grabbed him by the throat as opposed to hitting or pushing him. RP 136-138. His testimony was consistent with Kelly's that Mr. Pumphrey was the first one to make physical contact. Id. After Mr. Pumphrey grabbed his throat, he hit Mr. Pumphrey, causing Mr. Pumphrey to fall backward. RP 138. Mr. Pumphrey then came up behind Mr. Hopkins and put him in

a headlock. RP 138. He testified that when Mr. Pumphrey had him in a headlock he was elbowing Mr. Pumphrey in the stomach and the ribs. RP 139. Jake attempted to help Mr. Hopkins get out of the headlock by hitting Mr. Pumphrey. RP 140. He ultimately got out of the headlock by throwing himself backwards, landing himself and Mr. Pumphrey on the ground. RP 141. Mr. Pumphrey remained on the ground. RP 141.

The State, during cross examination, focused heavily on the actions of Mr. Childreth and Mr. Molash. The State asked whether Mr. Childreth had any injuries, to which Mr. Hopkins replied he received a bloody lip. RP 143. Mr. Hopkins testified he got involved because he wanted to prevent the 27 year-old Mr. Pumphrey from assaulting the 14 year-old Mr. Childreth. RP 144. The State asked how many times Mr. Childreth hit Mr. Pumphrey, to which Mr. Hopkins replied he didn't know because he was in a headlock. RP 145. The State then asked Mr. Hopkins whether he knew that Mr. Childreth had executed a written statement indicating that he (Childreth) hit Mr. Pumphrey a few times before the headlock. RP 145. Defense counsel objected to the violation of Mr. Hopkins' right of confrontation because Mr. Childreth was not available for cross examination. RP 146. Confusing the difference between hearsay and confrontation, the State responded that the question went to Mr.

Hopkins' state of mind. RP 146. The court overruled the objection, stating "You've got access to the statement." RP 146.

The State also questioned Mr. Hopkins about the actions of Mr. Molash. RP 147. Mr. Hopkins stated he didn't see Mr. Molash strike Mr. Pumphrey because he was in a headlock. RP 147. Mr. Hopkins testified that he did see Mr. Molash throw a bottle at Mr. Pumphrey as Mr. Pumphrey was coming up behind him to place him in a headlock. RP 148-49. Mr. Hopkins did not see Mr. Molash kick Mr. Pumphrey. RP 155. The State again questioned Mr. Hopkins on the actions of Mr. Childreth, asking if he saw Mr. Childreth kick Mr. Pumphrey. RP 153. When Mr. Hopkins replied "no," the State asked whether he would be surprised to find out Mr. Childreth had executed a written statement indicating he also kicked Mr. Pumphrey. RP 153. Defense counsel did not renew what would have been a fruitless objection. RP 153.

Mr. Hopkins' grandmother testified that when he came home that night, he had a red mark on his face, a bloody lip and redness all over his neck. RP 158. The red mark on his face turned blue but disappeared after a few days, as did the redness on his neck and the swelling of his lip. RP 158.

The court found Mr. Hopkins guilty of Assault in the Second Degree. CP 41. In its oral ruling, the court found that Mr. Pumphrey had

precipitated this incident by swerving at the four youths with his car, by yelling at them, and “maybe taking the first shove at Jake.” RP 169. The court nevertheless found that Mr. Hopkins was not entitled to raise self-defense because neither he, nor anyone he was with, retreated. RP 169, 171. The court further found that Mr. Hopkins had both a duty to retreat and a duty to effectuate the retreat of everyone with him, rather than respond to Mr. Pumphrey’s aggression by hitting him. RP 171. The court also found that Mr. Hopkins did not act in self-defense because he and Mr. Pumphrey did not have equal injuries. RP 170.

The court entered the following findings of fact, to which Mr. Hopkins assigns error:

1. On July 19<sup>th</sup>, 2005, victim Jason Pumphrey entered the Shucks parking lot in Camas, Washington.
3. A minor confrontation occurred involving Mr. Pumphrey, Mr. Hopkins, Mr. Molash and Mr. Childreth, which ended without injury to any of the participants.
4. Mr. Molash re-ignited the altercation by throwing a bottle at Mr. Pumphrey. After Mr. Molash threw the bottle, fighting began with Mr. Hopkins, Mr. Molash and Mr. Childreth surrounding Mr. Pumphrey. At this point, the altercation became three-on-one with Mr. Hopkins, Mr.

Molash and Mr. Childreth acting in concert and as accomplices to each other in their assault against the victim.

5. When the fighting resumed and with Mr. Hopkins, Mr. Childreth and Mr. Molash surrounding Mr. Pumphrey, Mr. Hopkins and Mr. Childreth intentionally struck Mr. Pumphrey. Mr. Pumphrey was kicked in the ribs. In addition, Mr. Hopkins was able to pick up and throw Mr. Pumphrey to the ground and while he lay there immobile, Christopher Molash walked up to him and kicked him two times in the head and face.

7. Neither Mr. Childreth nor Mr. Molash sustained any injuries. Mr. Hopkins may have received minor redness to his face or neck. Mr. Molash, Mr. Childreth, and Mr. Hopkins were able to walk away from the incident and did not seek medical attention.

9. This Court finds Mr. Childreth, Mr. Molash, and Mr. Hopkins intentionally assaulted Mr. Pumphrey, and beyond a reasonable doubt that the force they used was excessive and not done for the purpose of self defense and/or the defense of others.

CP 40-41.

The court entered the following Conclusions of Law, to which Appellant assigns error:

2. All of the above facts have been proven by the State beyond a reasonable doubt.

3. On July 19<sup>th</sup>, 2005, in Clark County, Washington, Joshua James Hopkins with the assistance of Jacob Tyler Childreth and Christopher Molash did intentionally assault and thereby recklessly inflict substantial bodily harm upon Jason Pumphrey and are guilty of the crime of Assault in the Second Degree, as charged in Count 1.

4. Mr. Childreth, Mr. Molash, and Mr. Hopkins did not act in self-defense or defense of others. The force used by Mr. Childreth, Mr. Molash, and Mr. Hopkins was excessive force.

5. Mr. Childreth, Mr. Molash, and Mr. Hopkins acted as accomplices in their assault upon Mr. Pumphrey.

CP 41.

#### **D. ARGUMENT**

##### **1. THE TRIAL COURT DENIED MR. HOPKINS DUE PROCESS OF LAW WHEN IT FAILED TO ENTER FINDINGS OF FACT WHICH WERE SUPPORTED BY THE EVIDENCE ADDUCED AT MR. HOPKINS TRIAL, AND INSTEAD ADOPTED FINDINGS PRESENTED BY THE STATE WHICH WERE BASED ON EVIDENCE ADDUCED AT THE JOINT TRIAL OF MR. CHILDRETH AND MR. MOLASH, AND WERE IN FACT SIMPLY COPIED FROM THOSE FINDINGS.**

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997).

Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In this case, the findings of fact and conclusions of law are essentially identical to the findings of fact and conclusions of law entered for co-defendants Childreth and Molash, who were tried separately from Mr. Hopkins. Attached as Appendix A is a copy of the findings of fact and conclusions of law for Mr. Molash, which appellate counsel obtained from appellate counsel for Mr. Molash.

Turning to finding of fact number one, it omits the material fact, reluctantly conceded by the State and found by the trial court, that Mr. Pumphrey was the person who provoked this fight. RP 169. Specifically, the court found that Mr. Pumphrey had provoked this confrontation by swerving his car at Mr. Childreth, Mr. Molash, Mr. Hopkins, and Ms. Fich, by yelling at them, and by possibly pushing Mr. Childreth. RP 169.

However, finding of fact number one simply states that Jason Pumphrey “entered the Shucks parking lot,” omitting all of Mr. Pumphrey’s conduct preceding and concurring with that act. This not only fails to accurately reflect the testimony adduced at trial and found to be true by the trial court, but it appears calculated to limit Mr. Hopkins’ ability to argue on appeal that Mr. Pumphrey, not he, was the primary aggressor. Further, this finding of fact is identical to finding of fact number one in Mr. Molash’s case, who was tried separately.

Concerning finding of fact number three, which states “A minor confrontation occurred involving Mr. Pumphrey, Mr. Hopkins, Mr. Molash and Mr. Childreth, which ended without injury to any of the participants,” this finding is clearly the product of a different trial and body of testimony. Not a single witness in Mr. Hopkins’ trial testified that there were two separate and distinct confrontations, as this finding of fact implies. Mr. Pumphrey, whose testimony was vague and replete with generalizations, never testified that there were two distinct confrontations. RP 43-73. The closest Mr. Pumphrey came to describing two distinct confrontations was when he testified that the fighting stopped at which point he intentionally provoked Mr. Hopkins back into the fray in the hope it would cause Mr. Childreth and Mr. Molash to leave. RP 71. While Appellant certainly does not concede this to be a true account of what

happened, and submits this explanation by Mr. Pumphrey of his actions is absurd, it nevertheless supports Appellant's contention that not even Mr. Pumphrey agrees with finding of fact number three, which is that there was an initial "minor" confrontation that was separate and distinct from the actual fight.

Further, Kelly Fich, the third witness for the State, never testified there were two distinct confrontations. Her testimony consistently established that Mr. Pumphrey was the primary aggressor and was the person who struck the first blow. RP 81-129. According to her testimony, Mr. Pumphrey initiated the fight, which very quickly resulted in Mr. Pumphrey placing Mr. Hopkins in a headlock which appeared to cause him trouble breathing, and that at one point after the headlock all three young men were hitting Mr. Pumphrey as Mr. Pumphrey attempted to hit them. RP 94. Mr. Hopkins' testimony corroborated Kelly Fich's with regard to how the fight started.

Although appellate counsel for Mr. Hopkins has never reviewed the trial transcript of the Childreth/Molash trial, it is obvious, based on the fact that the findings entered in Mr. Hopkins' case are identical to the findings in Mr. Molash's case and that *no witness* in Mr. Hopkins' trial gave testimony that would support this finding, that this finding is derived from evidence obtained in the Childreth/Molash trial, not Mr. Hopkins'

trial. It was clear error for the trial court to enter this totally unsupported finding.

Finding of fact number four suffers from the same infirmity as finding of fact number three: No witness in Mr. Hopkins' trial testified that the altercation, having concluded, was "re-ignited" by Mr. Molash throwing a bottle at Mr. Pumphrey. With regard to the bottle, Mr. Pumphrey testified that the bottle was thrown as the group was walking toward him, and never testified that it "re-ignited" an otherwise concluded altercation. RP 56. Kelly Fich could not recall seeing anyone throw a bottle. RP 113. And Mr. Hopkins testified that Mr. Molash threw the bottle at Mr. Pumphrey as Mr. Pumphrey was coming up behind him to place him in the headlock, presumably to ward off Mr. Pumphrey. RP 148-149. If there was any doubt that the findings entered in Mr. Hopkins' case were nothing but a carbon copy of the findings entered in the case of his two alleged accomplices, the inclusion of this "fact" eliminates that doubt. This "fact" is blatantly unsupported by the record in Mr. Hopkins' trial.

Going to finding of fact number five, it states, among other things, that Mr. Pumphrey was kicked in the ribs. Again, no testimony at Mr. Hopkins' trial supports this finding. No witness testified to this. Mr. Pumphrey could not recall being kicked at all. RP 54. And Kelly Fich

only testified to seeing Mr. Molash kick Mr. Pumphrey in the face. Mr. Hopkins never testified about anyone kicking Mr. Pumphrey in the ribs. Again, this “fact” was obviously based on evidence that was adduced at a trial at which Mr. Hopkins was not even a party.

Finding of fact number seven, which purports to find that neither Mr. Molash nor Mr. Childreth sustained any injury, is similarly unsupported in the record. Mr. Pumphrey did not offer testimony about the injuries of Mr. Hopkins, Mr. Childreth, or Mr. Molash. Kelly Fich testified that she believed Mr. Childreth had a split lip, and that she had “no clue” if Mr. Molash was injured. RP 111. She did not testify they were uninjured. And Mr. Hopkins testified he believed Mr. Childreth had a split lip, and that he didn’t *see* any injury to Mr. Molash. RP 151-153. He also never testified that Mr. Childreth and Mr. Hopkins were uninjured. This finding of fact is not supported by substantial evidence in the record of Mr. Hopkins’ trial.

Because the trial court failed to enter findings of fact based on the evidence adduced at Mr. Hopkins’ trial, and instead signed off on the State’s proposed findings which were based on the evidence adduced at the joint trial of Mr. Childreth and Mr. Molash, finding of fact number nine, which purports to find that Mr. Hopkins did not act in self-defense or in the defense of another, cannot be said to be supported by substantial

evidence. These findings of fact were based on evidence which was never confronted by Mr. Hopkins nor tested by cross examination on his behalf. They are factually inaccurate. As such, any determination in finding of fact number nine that Mr. Hopkins did not use lawful force is inherently suspect and unreliable.

Likewise, the conclusions of law cannot be said to be supported by the findings of fact where the findings of fact were derived from a different trial. Why the State believed it was adequate to simply enter findings of fact that were supported (presumably) by the testimony in only one of the two trials they were intended to cover is unclear. Perhaps the State was busy and didn't want to take the time to craft findings that actually reflected the testimony adduced at Mr. Hopkins' trial, opting instead to take the easy route and craft one document with minor variations and different names in the heading.

Whatever the reason, entering findings of fact that were based on evidence adduced at a trial at which Mr. Hopkins was not a party violated his right to due process of law under Washington Constitution Article I, Section 3 and United States Constitution, Fourteenth Amendment. Mr. Hopkins was never afforded the opportunity to confront the witnesses who testified at the Childreth/Molash trial on the evidence they gave at that

trial. It would have been preferable for the court not to enter findings at all, rather than findings which were adduced from a *different trial*.

Mr. Hopkins is entitled to remand so that the court can enter findings of fact and conclusions of law that actually reflect the evidence given at his trial. Mr. Hopkins' defense to this charge is that the force he used was lawful, and he is entitled to appellate consideration of his claim that the trial court misapplied the applicable law on the lawful use of force. To the extent these bogus findings of fact prevent appellate consideration of his claim, his case must be remanded. Alternatively, this court can disregard the written findings of fact and conclusions of law and look to the court's oral ruling in deciding whether the court denied Mr. Hopkins a fair trial by failing to properly consider the defense of lawful use of force.

**II. THE TRIAL COURT DENIED MR. HOPKINS A FAIR TRIAL WHEN IT MISAPPLIED THE LAW PERTAINING TO THE DEFENSE OF LAWFUL USE OF FORCE.**

Under Washington Constitution, Article 1, Section 3 and the United States Constitution, Fourteenth Amendment a defendant is entitled to raise any defense supported by the law and facts. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). In order to properly raise the

issue of self-defense in the State of Washington, a defendant need only produce “any evidence” supporting the claim that the defendant’s conduct was done in self-defense. *State v. Adams*, 31 Wn.App. 393, 641 P.2d 1207 (1982). In considering whether to instruct a jury on self-defense, a court must apply a subjective standard in determining whether “any” evidence exists to justify giving the instruction. *Adams* at 396. In other words, “the court must consider the evidence from the point of view of the defendant as conditions appeared to him at the time of the act, with his background and knowledge, and ‘not by the condition as it might appear to the jury in the light of testimony before it.’” *Adams* at 396; quoting *State v. Tyree*, 143 Wash. 313, 317, 255 P. 382 (1927).

Here, the trial court made several errors in its consideration of the lawful use of force: The court failed to appreciate that prior to determining whether the force used was excessive, the court was first required to determine whether Mr. Hopkins was entitled to act in defense of himself or others. Here, the trial court focused heavily on the amount of force used and the lack of equality between Mr. Hopkins’ and Mr. Pumphrey’s injuries in deciding that Mr. Hopkins was not entitled to rely on self-defense. This puts the cart before the horse. First, the court was required to decide whether Mr. Hopkins, in light of the conditions as they appeared to him at the time, was entitled to defend his fourteen year-old

companion from the aggression of a twenty-seven year-old enraged man who had just swerved his car right at them (and, according to Kelly Fich and the equivocal oral finding of the court, pushed the fourteen year-old Mr. Childreth), and whether he was entitled to defend himself when he was placed in a headlock which injured his neck.

In focusing on the quantum of Mr. Pumphrey's injuries, the court denied Mr. Hopkins' his right to consideration of the defense of lawful use of force because those injuries were just as likely (and, based on the testimony of Kelly Fich, more likely) caused by the other two youths. In other words, if either Mr. Childreth or Mr. Molash was not entitled to act in self-defense or defense of others (or, assuming they were so entitled, merely exceeding the *level* of force they could lawfully apply), that does not automatically preclude a finding that Mr. Hopkins employed lawful force in his actions that night. The trial court appeared to believe that if one of the three did not employ lawful force (such as Mr. Molash, who kicked Mr. Pumphrey in the face while he was on the ground), then *none* of the three could be deemed to have acted in self-defense or defense of others. This is not a correct application of the law.

Second, the trial court concluded that neither Mr. Hopkins nor his companions was entitled to act in self-defense despite the fact that Mr. Pumphrey was the initial aggressor. A person may not, by any intentional

act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of others and then use force or aggression upon another. *State v. Heath*, 95 Wn.App. 269, 271, 666 P.2d 922 (1983); *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986). An aggressor is one whose words or actions precipitated the fight. *Heath* at 271. In *State v. Hawkins*, 89 Wn.App. 449, 455, 154 P.2d 827 (1916), the court upheld the giving of the aggressor instruction where the defendant did not strike the first blow, but was “manifestly the aggressor in the sense that his actions brought on the affray.” Here, the evidence overwhelmingly established, and the court found, that Mr. Pumphrey was the provoker of this confrontation. Despite the State’s best effort at hiding this evidence by avoiding any questions to Mr. Pumphrey which would force him to tell the truth about what he did that night in seeking out this confrontation, the State had to reluctantly concede in its closing argument that Mr. Pumphrey precipitated this confrontation. The trial court simply ignored this fact when it ruled that Mr. Hopkins was not entitled to defend himself or another, again focusing on the quantum of Mr. Pumphrey’s injuries and the actions of Childreth and Molash.

Last, the trial court held that Mr. Hopkins was not entitled to defend himself or another because he had a duty to retreat. Further, the court found that Mr. Hopkins had a duty to *effectuate the retreat of the*

*others*, in addition to himself. RP 171. This is a clear misapplication of the law. A person who is in a place where he or she has a right to be and who has reasonable grounds to believe that he or she will be assaulted is entitled to stand his or her ground and defend against the attack. *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984), *State v. Redmond*, 150 Wn.2d 489, 78 P.3d 1001 (2003). Here, Mr. Hopkins had just as much a right to be in the Shucks parking lot as Mr. Pumphrey. There was no suggestion at the trial level that any of these parties was trespassing.

The testimony of State's witness Kelly Fich established that Mr. Pumphrey engaged these young men from the moment he stepped out of his car, getting "in the face" of both Mr. Childreth and Mr. Hopkins and assaulting both Mr. Childreth and Mr. Hopkins. Had these young men attempted to "retreat" to McDonalds or anywhere else, Mr. Pumphrey likely would have followed them. Additionally, Mr. Pumphrey had a deadly weapon (his car) and had already threatened to use it against these youths by swerving at them. Nevertheless, whether retreat was feasible or not, the law imposes no duty on Mr. Hopkins to retreat and the court erred by finding that he had such a duty, and that his failure to exercise it precluded his employment of lawful force.

Further, it is axiomatic that the law imposes no duty on Mr. Hopkins to effectuate the retreat of *others*, as the court held. There simply

is no such requirement in the law and appellate counsel, after a diligent search, found no case which imposes such a duty.

The trial court's failure to properly apply the law pertaining to the use of lawful force denied Mr. Hopkins his right to a fair trial under Washington Constitution, Article 1, Section 3 and United States Constitution, Fourteenth Amendment and Mr. Hopkins is entitled to a new trial.

**E. CONCLUSION**

Mr. Hopkins' conviction should be reversed and the case remanded for a new trial with instructions to the court to correctly consider the defense of lawful use of force. Alternatively, Mr. Hopkins' case should be remanded for entry of findings of fact and conclusions of law which are based on the evidence adduced at his trial.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of July, 2006.

  
ANNE M. CRUSER, WSBA #27944  
Attorney for Mr. Hopkins

C.H.

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CLARK COUNTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK  
JUVENILE

STATE OF WASHINGTON,

Petitioner,  
v.

CHRISTOPHER EARL MOLASH,

Respondent.

DOB: 1-22-1989

~~(PROPOSED)~~ FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

SCOMIS No. 05-8-00933-6  
JUV No. 638533 05-R-015608

THIS MATTER having come before the above entitled Court for trial on October 12, 2005, and concluding October 17, 2005, the Respondent, Christopher Molash, being personally present and represented by his trial attorney of record, Darcy Scholts, and the State being represented by Julie C. Carmena, Deputy Prosecuting Attorney for Clark County, State of Washington, and the Court having heard and considered testimony, pleadings and argument of counsel in this case, now enters the following:

FINDINGS OF FACT

1. On July 19, 2005, victim Jason Pumphries<sup>\*</sup> entered the Schuck's parking lot in Camas, Washington.

*\* spelling "Pumphries" or "Pumphrey" have appeared in these proceedings*

INFORMATION - 1  
CC

CLARK COUNTY PROSECUTING ATTORNEY  
JUVENILE DIVISION  
500 WEST 11<sup>TH</sup> STREET • PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2201

*HY MS*

- 1 2. Jacob Tyler Childreth, dob: 09-16-88, Christopher Earl Molash, dob: 01-22-89,  
2 Joshua Hopkins and Kelley Fich were at or near the Schuck's parking lot.  
3  
4 3. A minor confrontation occurred involving Mr. Pumphries, Mr. Hopkins, Mr. Molash  
5 and Mr. Childreth, which ended without injury to any of the participants.  
6  
7 4. Mr. Molash re-ignited the altercation by throwing a bottle at Mr. Pumphries. After Mr.  
8 Molash threw the bottle, fighting began with Mr. Hopkins, Mr. Molash and Mr.  
9 Childreth surrounding Mr. Pumphries. At this point, the altercation became three-on-  
10 one with Mr. Hopkins, Mr. Molash and Mr. Childreth acting in concert and as  
11 accomplices to each other in their assault against the victim.  
12  
13 5. When the fighting resumed and with Mr. Hopkins, Mr. Childreth, and Mr. Molash  
14 surrounding Mr. Pumphries, Mr. Hopkins and Mr. Childreth intentionally struck Mr.  
15 Pumphries. Mr. Childreth also kicked Mr. Pumphries in the ribs. In addition, one of  
16 the youths involved was able to pick up and throw Mr. Pumphries to the ground and  
17 while he lay there immobile, Christopher Molash walked up to him and kicked him  
18 two times in the head and face.  
19  
20 6. Mr. Pumphries sustained injuries which indicate that substantial force was used upon  
21 him and that force resulted in substantial bodily injury including a fractured  
22 cheekbone (a fracture of the left <sup>zygomatic</sup> ~~zygomatic~~ arch), a fracture of the T-11 vertebrae in  
23 his back and fractures to two of his ribs. Mr. Pumphries also suffered contusions and  
24 abrasions to his elbows and knees, a concussion, and an injury to the back of his  
25 head. Mr. Pumphries was required to spend several days in the hospital.  
26  
27 7. Neither Mr. Childreth nor Mr. Molash sustained any injuries. Mr. Hopkins may have  
28 received minor redness to his face or neck. Mr. Molash, Mr. Childreth, and Mr.  
29 Hopkins were able to walk away <sup>from</sup> ~~from~~ the incident and did not seek medical attention.  
30  
31 8. At no point during or after the incident did Mr. Childreth, Mr. Molash or Mr. Hopkins  
32 contact Law Enforcement.

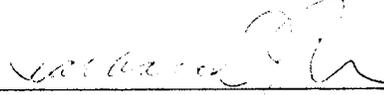
- 1 9. When contacted by Camas Police Officer Tim McNall on August 9, 2005, Mr.  
2 Childreth admitted he hit Mr. Pumphries in the head a couple of times and kicked him  
3 in the ribs, but he claimed that Mr. Molash had left prior to the fight and he stated that  
4 Mr. Molash did not throw a bottle at Mr. Pumphries.  
5  
6 10. When Mr. Molash was contacted by Camas Law Enforcement, he admitted to being  
7 present initially but said he walked away because he could tell that Mr. Hopkins  
8 wanted to fight. He also denied throwing the bottle at Mr. Pumphries.  
9  
10 11. The evidence presented at trial made it clear that Mr. Molash was present for the  
11 entire altercation. The evidence established that Mr. Molash actively participated in  
12 the assault by, among other things: he helped to surround Mr. Pumphries, threw a  
13 bottle at him and kicked him in the head or face at least two times.  
14  
15 12. This Court finds Mr. Childreth, Mr. Molash, and Mr. Hopkins intentionally assaulted  
16 Mr. Pumphries, and beyond a reasonable doubt that the force they used was  
17 excessive and not done for the purpose of self defense and/or the defense of others.

#### 18 **CONCLUSIONS OF LAW**

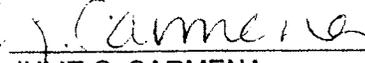
- 19 1. That the court has jurisdiction over the parties hereto and the subject matter of the  
20 action.  
21  
22 2. All of the above facts have been proven by the State beyond a reasonable doubt.  
23  
24 3. On July 19, 2005, in Clark County, Washington, Jacob Tyler Childreth and  
25 Christopher Molash did intentionally assault and thereby recklessly inflict substantial  
26 bodily harm upon Jason Pumphries and are guilty of the crime of Assault in the  
27 Second Degree, as charged in Count 1.  
28  
29 4. Mr. Childreth, Mr. Molash, and Mr. Hopkins did not act in self-defense or defense of  
others. The force used by Mr. Childreth, Mr. Molash, and Mr. Hopkins was  
excessive force.

1 5. Mr. Childreth, Mr. Molash, and Mr. Hopkins acted as accomplices in their assault  
2 upon Mr. Pumphries.

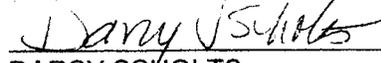
3 DONE IN OPEN COURT at Vancouver, Washington this 2 day of December,  
4 2005.

5   
6 THE HONORABLE BARBARA JOHNSON  
7 JUDGE OF THE SUPERIOR COURT

8 PRESENTED BY:

9  
10   
11 JULIE C. CARMENA  
12 WSBA 25796  
13 Deputy Prosecuting Attorney

14 *Approved as to form (w/ objections filed separately)*

15   
16 DARCY SCHOLTS  
17 WSBA #12911  
18 Attorney for Respondent

CLERK OF COURT  
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COURT OF APPEALS  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
 ) Court of Appeals No. 34247-2-II  
 ) Clark County No. 05-8-00938-7  
 Respondent, )  
 ) AFFIDAVIT OF MAILING  
 vs. )  
 )  
 JOSHUA JAMES HOPKINS, )  
 )  
 Appellant. )

ANNE M. CRUSER, being sworn on oath, states that on the 17<sup>th</sup> day of July 2006,  
affiant placed a properly stamped envelope in the mails of the United States addressed to:

Arthur Curtis  
Clark County Prosecuting Attorney  
P.O. Box 5000  
Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

Mr. Joshua Hopkins

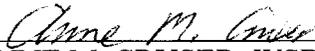
Anne M. Cruser  
*Attorney at Law*  
P.O. Box 1670  
Kalama, WA 98625  
Telephone (360) 673-4941  
Facsimile (360) 673-4942  
anne-cruser@kalama.com

1  
2  
3 2328 NE 249<sup>th</sup> Ave.  
4 Camas, WA 98607

5 and that said envelope contained the following:

- 6 (1) BRIEF OF APPELLANT (2 COPIES TO MR. PONZOHA)  
7 (2) SUPPLEMENTAL DESIGNATION OF CLERKS PAPERS (TO MR.  
8 PONZOHA AND MR. CURTIS)  
9 (3) VERBATIM REPORT OF PROCEEDINGS (TO MR. CURTIS)  
10 (4) R.A.P. 10.10 (TO MR. HOPKINS)  
11 (5) AFFIDAVIT OF MAILING

12 Dated this 17<sup>th</sup> day of July 2006,

13  
14   
15 ANNE M. CRUSER, WSBA #27944  
16 Attorney for Appellant

17  
18 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of  
19 Washington that the foregoing is true and correct.

20  
21 Date and Place: July 17<sup>th</sup>, 2006, Kalama, Washington

22 Signature: Anne M. Cruser  
23