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CLALLAM COUNTY
SUPERIOR COURT
Jodi R. Backlund

No. 41157-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jason Bishop,

Appellant.

Clallam County Superior Court Cause No. 09-1-00530-2

The Honorable Judge S. Brooke Taylor

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS.....2

ARGUMENT.....4

I. **Mr. Bishop’s conviction must be reversed because the trial judge erroneously refused to instruct the jury on the inferior degree offense of Assault in the Fourth Degree.4**

A. Standard of Review.....4

B. The refusal to instruct on Assault in the Fourth Degree denied Mr. Bishop his statutory right to have the jury consider an applicable inferior-degree offense.4

C. The refusal to instruct on of Assault in the Fourth Degree denied Mr. Bishop his constitutional right to due process under the Fourteenth Amendment.7

D. The refusal to instruct on Assault in the Fourth Degree violated Mr. Bishop’s state constitutional right (under Wash. Const. Article I, Sections 21 and 22) to have the jury consider applicable lesser included offenses.8

II. The trial court’s improper use of an “aggressor” instruction violated Mr. Bishop’s Fourteenth Amendment right to due process because it stripped him of his ability to argue self defense.....13

A. Standard of Review.....13

B. The trial court should not have given an aggressor instruction, because Mr. Bishop did not engage in an aggressive act (other than the alleged crime itself) consisting of more than mere words.....14

CONCLUSION16

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Beck v. Alabama</i> , 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) ..	7, 8, 10
<i>Tata v. Carver</i> , 917 F.2d 670 (1st Cir. 1990)	7
<i>Vujosevic v. Rafferty</i> , 844 F.2d 1023 (1988)	7, 8

WASHINGTON STATE CASES

<i>City of Pasco v. Mace</i> , 98 Wash.2d 87, 653 P.2d 618 (1982)	8, 10
<i>City of Tacoma v. Belasco</i> , 114 Wash.App. 211, 56 P.3d 618 (2002)	4
<i>Clarke v. Washington Territory</i> , 1 Wash. Terr. 68 (1859)	11
<i>Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake</i> , 150 Wash.2d 791, 83 P.3d 419 (2004)	12
<i>Sofie v. Fibreboard Corp.</i> , 112 Wash.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).....	9
<i>State v. Birnel</i> , 89 Wash. App. 459, 949 P.2d 433 (1998).....	14, 15
<i>State v. Fernandez-Medina</i> , 141 Wash.2d 448, 6 P.3d 1150 (2000).....	5, 7
<i>State v. Hobble</i> , 126 Wash.2d 283, 892 P.2d 85 (1995).....	8, 10
<i>State v. Kidd</i> , 57 Wash. App. 95, 786 P.2d 847, <i>review denied</i> , 115 Wash.2d 1010, 797 P.2d 511 (1990)	14, 15
<i>State v. Parker</i> , 102 Wash.2d 161, 683 P.2d 189 (1984)	5, 7
<i>State v. Riley</i> , 137 Wash.2d 904, 976 P.2d 624 (1999)	14
<i>State v. Schaaf</i> , 109 Wash.2d 1, 743 P.2d 240 (1987).....	10
<i>State v. Schaler</i> , 169 Wash.2d 274, 236 P.3d 858 (2010)	14

<i>State v. Smith</i> , 150 Wash.2d 135, 75 P.3d 934 (2003)	10, 13
<i>State v. Stark</i> , 158 Wash.App. 952, 244 P.3d 433 (2010)	14, 15, 16
<i>State v. Wasson</i> , 54 Wash. App. 156, 772 P.2d 1039, <i>review denied</i> , 113 Wash.2d 1014, 779 P.2d 731 (1989)	14, 15
<i>State v. Young</i> , 22 Wash. 273, 60 P. 650 (1900)	5, 12
<i>Timmerman v. Territory</i> , 3 Wash. Terr. 445 (1888)	12

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I	15
U.S. Const. Amend. XIV	1, 7, 14, 16
Wash. Const. Article I, Section 21	8, 9, 10, 11, 13
Wash. Const. Article I, Section 22	8, 9, 11, 13

WASHINGTON STATUTES

RCW 10.61.003	4, 7
RCW 10.61.006	12
RCW 10.61.010	5, 7

OTHER AUTHORITIES

1 J. Chitty, <i>Criminal Law</i> 250 (5th Am. ed. 1847)	11
2 M. Hale, <i>Pleas of the Crown</i> 301-302 (1736)	11
2 W. Hawkins, <i>Pleas of the Crown</i> 623 (6th ed. 1787)	11
T. Starkie, <i>Treatise on Criminal Pleading</i> 351-352 (2d ed. 1822)	11
Territorial Code of 1881, Section 1098	12

ASSIGNMENTS OF ERROR

1. The trial judge erred by refusing to instruct the jury on the inferior degree offense of Assault in the Fourth Degree.
2. The trial judge violated Mr. Bishop's Fourteenth Amendment right to due process by refusing to instruct on the inferior degree offense of Assault in the Fourth Degree.
3. The trial judge violated Mr. Bishop's state constitutional right to a jury trial by refusing to allow the jury to consider the inferior degree offense of Assault in the Fourth Degree.
4. The trial court erred by giving an aggressor instruction in the absence of evidence that Mr. Bishop provoked the need to act in self-defense.
5. The trial court erred by giving Instruction No. 16.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person is entitled to have the jury instructed on applicable inferior-degree included offenses. Here, the trial judge refused to instruct on the inferior-degree offense of Assault in the Fourth Degree. Did the trial judge's refusal to instruct on Assault in the Fourth Degree violate Mr. Bishop's unqualified right to have the jury consider an inferior degree offense, as well as his Fourteenth Amendment right to due process and his state constitutional right to a jury trial?
2. An aggressor instruction should not be given unless there is evidence of an intentional act (other than the actual crime) that is more than mere words, and which a jury could reasonably assume would provoke a belligerent response. In this case, the state presented evidence that Mr. Bishop verbally confronted and then assaulted another person. Did the trial court violate Mr. Bishop's right to due process by giving an aggressor instruction?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jason Bishop and his sister Melinda Bishop were at the New Peking restaurant in Port Angeles with some of her friends. Melinda Bishop has a child, and the father did not pay his child support. RP (6/21/10) 117; RP (6/22/10) 86, 132. The father, Chris Bair, was at the New Peking that same night. RP (6/21/10) 91.

Mr. Bishop and Bair were both outside of the bar, and they exchanged brief words and fought. When Mr. Bishop walked away, Bair did not seem seriously injured to him. RP (6/22/10) 95, 117. However, Bair's jaw was broken, and the state charged Mr. Bishop with Assault in the Second Degree. RP (6/21/10) 90; CP 17.

At trial, it was hotly contested who started the fight, as well as each person's participation in the physical part of it. Mr. Bishop said that he acted in self-defense. RP (6/22/10) 91-92, 111-112, 119. He told the investigating officer that night that Bair yelled at him inside the restaurant. RP (6/22/10) 58, 88. He said that once outside, Bair called him names, spit on him, and punched him. Mr. Bishop said he punched back. RP (6/22/10) 58-59, 68, 91. At one point, as Bair came at him, Mr. Bishop put out his foot and pushed him away. RP (6/22/10) 59, 93. Mr. Bishop consumed multiple alcoholic beverages that evening, and one of the

investigating officers opined he would have been over the driving limit.

RP (6/22/10) 66-67, 87, 100,103.

Bair testified that even though he had been married to Mr. Bishop's sister for two years and that they were together for five years before that, he would not recognize Mr. Bishop on sight and did not realize who he was until Mr. Bishop said that Bair needed to pay his sister the child support he owed her. RP (6/21/10) 94, 103-104, 115. He said that Mr. Bishop punched him repeatedly. RP (6/21/10) 103-104. Bair claimed that he blacked out and next remembered being on the ground against the wall being picked up by a friend. RP (6/21/10) 104-105, 126. Even though he blacked out, Bair initially asserted that he did not fight back, though he later acknowledged that he might have. RP (6/21/10) 124-125.

The defense proposed a lesser-degree instruction on Assault in the Fourth Degree, which the court declined to give. Defendant's Proposed Instructions, Defense Supplemental Proposed Jury Instructions, Court's Instructions to Jury, Supp. CP; RP (6/22/10) 127-130, 177-187. The defense also objected to the use of the initial aggressor instruction. The court gave the following instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward

another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Instruction No. 16, Court's Instructions to Jury, Supp. CP.

The jury returned a verdict of guilty. After sentencing, Mr. Bishop timely appealed. RP (6/24/10) 2-6; RP (8/31/10) 2-25; CP 4, 5-16.

ARGUMENT

I. MR. BISHOP'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL JUDGE ERRONEOUSLY REFUSED TO INSTRUCT THE JURY ON THE INFERIOR DEGREE OFFENSE OF ASSAULT IN THE FOURTH DEGREE.

A. Standard of Review

A trial court's refusal to instruct on an inferior-degree offense is reviewed *de novo*, if the refusal is based on an issue of law. *City of Tacoma v. Belasco*, 114 Wash.App. 211, 214, 56 P.3d 618 (2002). An abuse of discretion standard applies if the refusal was based on a factual dispute. *Id.*, at 214.

B. The refusal to instruct on Assault in the Fourth Degree denied Mr. Bishop his statutory right to have the jury consider an applicable inferior-degree offense.

An accused person has a statutory right to have the jury instructed on applicable inferior-degree offenses. RCW 10.61.003 provides as follows:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.010 provides as follows:

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

These statutes guarantee the “unqualified right” to have the jury pass on the inferior degree offense if there is “even the slightest evidence” that the accused person may have committed only that offense. *State v. Parker*, 102 Wash.2d 161, 163-164, 683 P.2d 189 (1984), quoting *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900). The appellate court views the evidence in a light most favorable to the accused person. *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000). The instruction should be given even if there is contradictory evidence, or if the accused person presents other defenses. *Fernandez-Medina, supra*. The right to an appropriate inferior degree offense instruction is “absolute,” and failure to give such an instruction requires reversal. *Parker, at 164*.

In this case, there was at least “slight[] evidence” that Mr. Bishop was only guilty of Assault in the Fourth Degree. *Id.* Conviction of second-degree assault—under the alternative charged in this case—required proof of an intentional assault and the reckless infliction of substantial bodily harm. Instruction No. 8, Court’s Instructions to the Jury, Supp. CP; CP 17. Mr. Bishop testified that he did not think he had hit Bair hard enough to break his jaw or cause serious harm. RP (6/22/10) 95, 117. Furthermore, a reasonable juror could have believed that Mr. Bishop’s alcohol consumption interfered with his assessment of the likelihood of harm,¹ or that Bair’s intoxication made him unusually (and unforeseeably) susceptible to injury.

Mr. Bishop’s recklessness should therefore have been a jury question. If even one juror believed that Mr. Bishop intentionally assaulted Bair and negligently inflicted substantial bodily harm (without acting recklessly), he would have been convicted of simple assault, rather than a felony.

Instead of viewing the evidence in a light most favorable to Mr. Bishop, the trial judge weighed the evidence, concluded that Mr. Bishop

¹ Defense counsel did not propose an instruction on voluntary intoxication; however, nothing prohibited the jury from considering evidence of intoxication when assessing Mr. Bishop’s mental state.

was acting recklessly, and refused to give the instructions. RP (6/23/10) 127-130, 177-187. This violated Mr. Bishop's unqualified right to have the jury consider the inferior degree offense. RCW 10.61.003; RCW 10.61.010; *Parker*, at 163-164; *Fernandez-Medina*, at 456. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

C. The refusal to instruct on of Assault in the Fourth Degree denied Mr. Bishop his constitutional right to due process under the Fourteenth Amendment.

Refusal to instruct on an inferior-degree offense can violate the right to due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988). The constitutional right to such an instruction stems from "the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free." *Vujosevic*, at 1027. *See also Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In capital cases, "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard...").²

² The court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck*, at 638, n.14. Some federal courts only review a state court's failure to give a lesser-included instruction in noncapital cases when the failure "threatens a fundamental miscarriage of justice..." *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990).

In the absence of instructions on a lesser offense, the jury was forced to either acquit or convict Mr. Bishop; they did not have “the ‘third option’ of convicting on a lesser included offense...” *Beck*, at 634.

Because the trial judge refused to instruct the jury on the inferior-degree offense, Mr. Bishop was denied his constitutional right to a fair trial under the due process clause. U.S. Const. Amend. XIV; *Vujosevic*. The conviction must be reversed and the case remanded to the superior court.

Id.

D. The refusal to instruct on Assault in the Fourth Degree violated Mr. Bishop’s state constitutional right (under Wash. Const. Article I, Sections 21 and 22) to have the jury consider applicable lesser included offenses.

Under the Washington constitution, “The right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21. Furthermore, “[i]n criminal prosecutions the accused shall have the right to ... a speedy public trial by an impartial jury...” Wash. Const. Article I, Section 22. As with many other constitutional provisions, the right to a jury trial under the Washington state constitution is broader than the federal right. *State v. Hobble*, 126 Wash.2d 283, 298-99, 892 P.2d 85 (1995); *City of Pasco v. Mace*, 98 Wash.2d 87, 97, 653 P.2d 618 (1982).

Washington state constitutional provisions are analyzed with reference to the six nonexclusive factors set forth in *State v. Gunwall*, 106

Wash.2d 54, 720 P.2d 808 (1986). In this case, analysis under *Gunwall* supports an independent application of the state constitution. These two provisions establish an accused person's state constitutional right to have the jury instructed on applicable inferior-degree offenses.

1. The language of Wash. Const. Article I, Sections 21 and 22 supports the existence of a state constitutional right to applicable jury instructions on inferior-degree offenses.

The first *Gunwall* factor requires examination of the text of the state constitutional provisions at issue. Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury *shall remain inviolate...*” *emphasis added*. “The term ‘inviolate’ connotes deserving of the highest protection... For [the right to a jury trial] to remain inviolate, it must not diminish over time.” *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to ... a speedy public trial by an impartial jury...” The direct and mandatory language (“shall have the right”) implies a high level of protection.

Thus an accused person's right to have the jury consider a inferior-degree offense remains the same as it existed in 1889, and “must not diminish over time,” *Sofie v. Fibreboard Corp.*, at 656. *Gunwall* factor one favors an independent application of these provisions.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions supports the existence of a state constitutional right to applicable jury instructions on inferior-degree offenses.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Wash. Const. Article I, Section 21, which declares “[t]he right of trial by jury shall remain inviolate...,” has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace*, *supra*, found the difference between the two constitutions significant, and determined that the state constitution provides broader protection. This difference in language also favors an independent application of the state constitution.

3. State constitutional and common law history supports the existence of a state constitutional right to applicable jury instructions on inferior-degree offenses.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Article I, Section 21, Washington “preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, at 96. *See also State v. Schaaf*, 109 Wash.2d 1, 743 P.2d 240 (1987); *Hobble, supra*; *State v. Smith*, 150 Wash.2d 135, 151, 75 P.3d 934 (2003). In 1889, when our state constitution was adopted, the lesser-included offense doctrine was well-established under the common law. *Beck v. Alabama*, at 635 n. 9 (citing 2

M. Hale, *Pleas of the Crown* 301-302 (1736); 2 W. Hawkins, *Pleas of the Crown* 623 (6th ed. 1787); 1 J. Chitty, *Criminal Law* 250 (5th Am. ed. 1847); T. Starkie, *Treatise on Criminal Pleading* 351-352 (2d ed. 1822)).

Thirty years prior to the adoption of the state constitution in 1889, the Court for Washington Territory addressed a parallel doctrine (relating to inferior degree offenses), and declared that “There is no better settled principle of criminal jurisprudence than that under an indictment for a crime of a high degree, a crime of the same character, of an inferior degree, necessarily involved in the commission of the higher offense charged, may be found.” *Clarke v. Washington Territory*, 1 Wash. Terr. 68, 69 (1859).

It was against this backdrop that the framers decided that “[i]n criminal prosecutions the accused shall have the right” to a jury trial, and that the jury trial right “shall remain inviolate.” Wash. Const. Article I, Sections 21 and 22. Accordingly, *Gunwall* factor 3 supports an independent application of Article I, Sections 21 and 22 in this case, and establishes a state constitutional right to instructions on applicable inferior-degree offenses.

4. Pre-existing state law supports the existence of a state constitutional right to applicable jury instructions on inferior-degree offenses.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wash.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, at 62). Just one year prior to adoption of the state constitution, the court noted that a jury had the power to convict an accused person “‘of any offense, the commission of which is necessarily included within that with which he is charged in the indictment.’” *Timmerman v. Territory*, 3 Wash. Terr. 445, 449 (1888) (quoting Territorial Code of 1881, Section 1098.) This language endures in the current provision. See RCW 10.61.006. Accordingly, *Gunwall* factor four supports a state constitutional right to applicable instructions on an inferior-degree offense.

5. Differences in structure between the federal and state constitutions support the existence of a state constitutional right to applicable jury instructions on inferior-degree offenses.

The fifth *Gunwall* factor always points toward pursuing an independent state constitutional analysis. *Young*, at 180. Thus factor five favors Mr. Bishop’s position.

6. The right to a jury trial is a matter of particular state interest or local concern, and supports the existence of a state constitutional right to applicable jury instructions on inferior-degree offenses.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The right to a jury trial is a matter of state concern; there is no need for national uniformity on the issue. *Smith*, at 152. *Gunwall* factor number six thus also points to an independent application of the state constitution, and supports the existence of a state constitutional right to applicable jury instructions on inferior-degree offenses.

All six *Gunwall* factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution. Our state constitution protects an accused person's right to have the jury consider inferior-degree offenses. The trial judge's failure to instruct on the inferior-degree offense violated Wash. Const. Article I, Sections 21 and 22. Accordingly, Mr. Bishop's conviction must be reversed and the case remanded to the trial court for a new trial.

II. THE TRIAL COURT'S IMPROPER USE OF AN "AGGRESSOR" INSTRUCTION VIOLATED MR. BISHOP'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT STRIPPED HIM OF HIS ABILITY TO ARGUE SELF DEFENSE.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Whether sufficient evidence

justifies an aggressor instruction is also reviewed *de novo*. *State v. Stark*, 158 Wash.App. 952, 959, 244 P.3d 433 (2010).

- B. The trial court should not have given an aggressor instruction, because Mr. Bishop did not engage in an aggressive act (other than the alleged crime itself) consisting of more than mere words.

Aggressor instructions are not favored, and courts must use care in providing the jury with such instructions. *State v. Birnel*, 89 Wash. App. 459, 473, 949 P.2d 433 (1998) (citing *State v. Kidd*, 57 Wash. App. 95, 100, 786 P.2d 847, *review denied*, 115 Wash.2d 1010, 797 P.2d 511 (1990)); *State v. Riley*, 137 Wash.2d 904, 910 n. 1, 976 P.2d 624 (1999). It is error to give an aggressor instruction unless the instruction is supported by credible evidence that the defendant provoked the need to act in self-defense. *Birnel*, at 473; *see also State v. Wasson*, 54 Wash. App. 156, 158-59, 772 P.2d 1039, *review denied*, 113 Wash.2d 1014, 779 P.2d 731 (1989). The aggressive behavior must be (1) an intentional act (other than the charged crime), (2) that is more than mere words, (3) that a jury could reasonably assume would provoke a belligerent response.³ *Kidd*, at 100; *Wasson*, at 159; *Birnel*, at 473; *see also Stark*, *supra*.

³ A typical example of an appropriate case for an aggressor instruction is where a pickpocket takes someone's wallet and then seeks to use force to defend against the victim's response.

In this case, the state did not present evidence of an intentional act (other than the assault itself) that was more than mere words, and which was reasonably calculated to provoke Bair. The state's primary theory was that Mr. Bishop assaulted Bair without provocation. RP (6/23/10) 14-22, 35-39. Under this theory, the aggressive act was the assault itself, and no aggressor instruction was warranted. *Kidd, at* 100. The state's secondary theory was that Mr. Bishop used unreasonable force in defending himself after Bair assaulted him. RP (6/23/10) 14-22, 35-39. Under this theory, Bair was the aggressor, and no aggressor instruction was warranted.

The unspoken theme running through both theories was that Mr. Bishop provoked the fight by confronting Bair about his failure to pay child support. But a verbal confrontation—involving mere words—cannot be the basis for an aggressor instruction.⁴ *Stark, at* 960.

The instruction stripped Mr. Bishop of his self-defense claim, and thus denied him his due process right to a fair trial. U.S. Const. Amend. XIV. Accordingly, his conviction must be reversed and remanded for a new trial. On remand, the trial court should not give an aggressor instruction. *Stark, supra*.

⁴ Otherwise, the doctrine would likely run afoul of the First Amendment's free speech clause. U.S. Const. Amend. I.

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on April 4, 2011.

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CERTIFICATE OF MAILING

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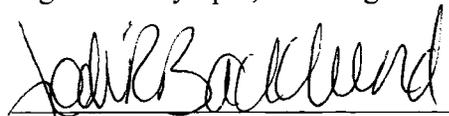
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on April 4, 2011.

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

Signed at Olympia, Washington on April 4, 2011.



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