

FILED
Mar 29, 2013
Court of Appeals
Division III
State of Washington

30879-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FLOYD KOONTZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S REPLY BRIEF

Janet G. Gemberling
Attorney for Appellant

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

INDEX

A.	ARGUMENT	1
B.	CONCLUSION.....	3

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BIRNEL, 89 Wn. App. 459,
949 P.2d 433 (1998)..... 3

STATE V. DOUGLAS, 128 Wn. App. 555,
116 P.3d 1012 (2005)..... 1

STATE V. RILEY 137 Wn.2d 904,
976 P.2d 624 (1999)..... 2

STATE V. WASSON, 54 Wn. App. 156,
772 P.2d 1039 (1989)..... 2

A. ARGUMENT

The State argues, in effect, that if in the course of an argument my neighbor pulls a knife, threatens me, pushes me out the door and tells me to get out and not come back, and thereafter I approach my neighbor on his property and he assaults me, I am necessarily a first aggressor because I have provoked my neighbor. And, the State argues, if I have anything on my person that I use to defend myself, I am guilty of assault or homicide if I injure or kill my neighbor in the course of defending myself.

The trial court did not find that Mr. Koontz threatened Mr. Flores upon arriving at his home. The court did not find that Mr. Koontz pulled a knife as soon as he arrived at the home of Mr. Flores. No evidence would support such findings. The provocative act identified by the court was Mr. Koontz's act of driving to Mr. Flores' home and getting out of his truck. The State has cited no case that holds a person becomes an aggressor by going to the home of someone by whom he has been previously threatened.

Evidence that the defendant pointed a gun at an acquaintance who was drunk, abusive and threatening, was insufficient to justify giving an aggressor instruction in *State v. Douglas*, 128 Wn. App. 555, 562-63, 116 P.3d 1012 (2005).

“Evidence that the defendant drew his gun first and aimed it at the victim” justified giving an aggressor instruction in *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). “The aggressor instruction in this case was proper because it was not based on Riley's words alone, but on his aggressive conduct as well.” *Id.* Driving to the home of a person who has made threats in the past, knowing he was unwelcome, may have been unwise, but the act of driving a car to someone's house cannot be considered aggressive conduct in the same sense as drawing or pointing a gun.

In *Wasson*, the defendant had an altercation with a third party, then shot the victim who had attempted to intervene. *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989). The court held this did not justify giving an aggressor instruction since there was no evidence that the defendant “acted intentionally to provoke an assault from” the alleged victim. Here, however ill advised Mr. Koontz's visit to Mr. Flores, the court never found that he went with the intention of provoking an assault from Mr. Flores. The court merely found Mr. Koontz knew he had been previously assaulted by Mr. Flores and was not welcome at Mr. Flores's home. (CP 123)

Evidence that a man searched his estranged wife's purse, confronted her in her own home, accused her of using drugs and

demanded to know where her money was going was not sufficient to support giving an aggressor instruction. *State v. Birnel*, 89 Wn. App. 459, 949 P.2d 433 (1998). Such conduct was surely more aggressive than Mr. Koontz's visiting his former friend.

B. CONCLUSION

The trial court erred in finding that Mr. Koontz was the aggressor. His conviction should be reversed. No evidence was presented showing beyond reasonable doubt that Mr. Koontz was not acting in self-defense. The evidence is insufficient to support his conviction. The charge should be dismissed.

Dated this 29th day of March, 2013.

JANET GEMBERLING, P.S.


Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

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

I certify under penalty of perjury under the laws of the State of Washington that on March 29, 2013, I served a copy of the Appellant's Reply Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Kevin Eilmes
kevin.eilmes@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on March 29, 2013, I mailed a copy of the Appellant's Reply Brief in this matter to:

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

Signed at Spokane, Washington on March 29, 2013.



Jill S. Reuter
Attorney At Law