IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EDWARD JAMES HARRIS, Appellant.	No. 39728-5-II UNPUBLISHED OPINION

Armstrong, J. — A jury convicted Edward Harris of first degree assault and unlawful possession of a firearm. The trial court found that he had been convicted previously of two "most serious" offenses and imposed a sentence of life imprisonment without possibility of parole. On appeal, he argues that the trial court erred in giving an "initial aggressor" instruction and erred in imposing the life sentence. Concluding that the trial court did not err, we affirm.[1]

On May 17, 2008, Harris and Anthony Millan were at the house of a mutual acquaintance. Two or three weeks previously, Harris and Millan had gotten into an argument in which "words were exchanged." Verbatim Report of Proceedings (VRP) at 227-30. They renewed their argument and Harris challenged Millan to fight. But before the fight could occur, Harris's family and friends arrived and drove him away. Before Harris left, Millan called him a "coward". RP at

[1] A commissioner of this court initially considered Harris's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

437.

About 9:00 p.m. that evening, Harris was riding with family and friends when he saw Millan walking toward a market. Harris yelled to Millan then got out of the car and started walking toward Millan. Millan was armed with a knife but testified that he did not display it to Harris. Harris pulled out a gun that he had tucked into his pants. Millan turned to run. Harris shot him in the buttock and hip. Harris later admitted to a detective that he had shot Millan but said he did so because he believed Millan had a gun.

The State charged Harris with first degree assault and unlawful possession of a firearm. The trial court gave self defense instructions at Harris's request. At the State's request and over the objection of Harris, the court also gave the following "initial aggressor" 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 force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Clerk's Papers (CP) at 38; VRP at 530-34.

The jury convicted Harris as charged. At sentencing, the trial court found by a preponderance of the evidence that Harris had been convicted twice previously of second degree assault, which are "most serious" offenses. CP at 57; VRP at 647-48. Based on that finding, the trial court concluded that Harris was a persistent offender and sentenced him to life imprisonment without the possibility of parole.

First, Harris argues that the trial court erred in giving the initial aggressor instruction

because there was no evidence that his conduct precipitated the need to later use self defense. *State v. Wasson*, 54 Wn. App. 156, 158-59, 772 P.2d 1039 (1989). The giving of an initial aggressor instruction is disfavored. *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). But the trial court has the discretion to give an initial aggressor instruction if "there was credible evidence from which the jury could reasonably have concluded that it was the defendant who provoked the need to act in self-defense." *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990). *See also Riley*, 137 Wn.2d at 909-10.

Harris contends that the only evidence of provocation was his statement to Millan while he was still in the car and that under *Riley*, "words alone do not constitute sufficient provocation" to warrant the giving of an initial aggressor instruction. But there was also evidence that Harris got out of the car and walked toward Millan after arming himself. There was sufficient evidence from which a jury could reasonably have concluded that Harris provoked the need for him to later act in self defense. The trial court did not abuse its discretion in giving the initial aggressor instruction.

Second, Harris argues that the trial court erred in finding by a preponderance of the evidence that he had committed two prior "most serious" offenses and therefore must be sentenced to life imprisonment without the possibility of parole. He contends that such prior convictions are elements of the crime, which a jury must find beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 304-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). However, the Washington State Supreme Court has rejected his arguments. *State v. Sibert*, 168 Wn.2d 306, 314, 230 P.3d 142 (2010);

State v. Thiefault, 160 Wn.2d 409, 418-19, 158 P.3d 580 (2007).

We affirm.

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

Armstrong, J.

We concur:

Van Deren, J.

Worswick, A.C.J.