

rational trier of fact could find that defendant was the

IN THE COURT OF APPEALS

STATE OF GEORGIA

JASON YARNELL,

Appellant.

v.

STATE OF GEORGIA,

Appellee.

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ACCUSATION: 2008D-3928-1

DOCKET NO.: A09A1343

FILED IN OFFICE

OCT 13 2009

**CLERK, COURT OF
APPEALS OF GEORGIA**

MOTION FOR RECONSIDERATION

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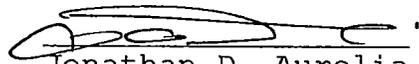
fact is not proved unless it is established." Gillette, supra at 574. The only evidence left, assuming disbelief of defendant's statement, is that appellant is physically larger than the "victim" and that the two appeared to have been engaged in a long struggle - neither of which is any indicator or proof of who may be the primary aggressor.

Second, the court has misapplied or erroneously relied upon the cases Roper v. State, 281 Ga. App. 878, 800 (1) (1997); and Jones v. State, 294 Ga. App. 564, 566 (1) (2008). Those cases deal with the credibility of witnesses. There was no conflict in the evidence here and no question about credibility - neither the "victim" nor the defendant testified. The only witnesses at trial were two police officers who arrived after the altercation concluded, neither of whom testified how the altercation began.

Affirming appellant's conviction is tantamount to saying a person who is physically larger than an attacker has no right to defend them self. This is not hyperbole - there is no evidence offered in this case other than that appellant is larger than the "victim" and speculation as to

who was the primary aggressor. Therefore, appellant asks this court to reconsider its earlier ruling and reverse appellant's conviction.

Respectfully submitted, this, the 12th day of October, 2009.



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CERTIFICATE OF SERVICE

I have served the State of Georgia, by hand delivering a copy of the **MOTION FOR RECONSIDERATION** (Yarnell v. State A09A1343), to:

Karen Seeley
Assistant Solicitor
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Respectfully submitted, this, the 12th day of October,
2009.


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