FILED
February 17, 2016
Court of Appeals
Division III
State of Washington

NO. 33154-7-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ALDO MIGUEL GUTIERREZ, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

1. Did the trial court properly enter finding of fact number 1.10?

2. Did the trial the trial court properly enter finding of fact number 1.11?

3. Did the trial court properly enter finding of fact number 1.12?

4. Did the trial court properly enter finding of fact number 1.13?

5. Did the trial court properly enter finding of fact number 1.14?

6. Did the trial court properly enter finding of fact number 1.15?

7. Did the trial court properly enter conclusion of law number 2.2?

8. Was there sufficient evidence to support the elements of second degree assault?

B. ANSWERS TO THE ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

1. The trial court properly entered finding of fact number 1.10.

2. The trial court properly entered finding of fact number 1.11.

3. The trial court properly entered finding of fact number 1.12.

4. The trial court properly entered finding of fact number 1.13.

5. The trial court properly entered finding of fact number 1.14.

6. The trial court properly entered finding of fact number 1.15.

7. The trial court properly entered conclusion of law number 2.2.

8. Sufficient evidence supports the elements of second degree assault.

II. STATEMENT OF THE CASE

The Appellant, Aldo Miguel Gutierrez, was convicted of second degree assault following a bench trial. The charge stems from the following facts:

On August 27, 2014, during the fabrication technology class taught by Dale Mapes, a fight broke out between students at Stanton Academy in Yakima, Washington. RP at 23; 29; 43-44; CP at 42. The students involved in the fight were Aldo Miguel Gutierrez, Appellant, and J.P.[1] RP at 23-24. Classrooms at Stanton Academy were equipped with video surveillance. *Id.* at 24-25. The incident between Gutierrez and J.P. was captured on video. *Id.* at 26; SE 1. Mapes positively identified Gutierrez in court as the person who started the fight with J.P. *Id.* at 24.

[1] Although J.P. is now 18 years old, Respondent will refer to him by his initials to protect his compelling privacy interests.

Video

The State admitted the classroom video at trial. Mapes testified that at 9:18 in the morning, he took attendance to ensure that all of the students were present. *Id.*at 28-29. While the video played, Mapes identified himself, Gutierrez, J.P. and other students in the classroom. *Id.* at 28; 30-31. J.P. walked across the classroom and grabbed a couple of tissues from Mapes' desk. SE 1 at 9:20:35. A few seconds later, Mapes opened the door and Gutierrez came in and walked to the table in the back of the classroom and put his bag down. RP at 31; SE 1 at 9:20:39.

Once at the table, Gutierrez took his shirt off and Mapes walked back to the area where Gutierrez was. SE 1 at 9:21:10. When Mapes approached Gutierrez and J.P., he testified that he heard the two having a heated conversation with each other in Spanish. RP at 32. Mapes testified that he did not speak Spanish, but based on the tone of the conversation between the two students, he did not think that the students were "exchanging pleasantries." *Id.* at 33. He testified that both students raised their voices and were "a little edgy with each other." *Id.*

At one point, Gutierrez started to put his shirt back on while Mapes walked to the front of the classroom to call school security. SE 1 at 9:21:20. Mapes testified that he was concerned about the situation between the two students escalating. RP at 35. While Mapes tried to call school security,

J.P. sat at a table while Gutierrez stood right across from J.P. RP at 35. Gutierrez then took his shirt off again. SE 1 at 9:21:28.

A couple of seconds later, J.P. stood up and Gutierrez charged at him. *Id.* at 9:21:30. Gutierrez picked up J.P. and slammed him to the floor. RP at 36; SE 1 at 9:21:31. While on the floor, Gutierrez grabbed J.P. around the head and shoulders. RP at 36. J.P. tried to get up while Gutierrez had both of his arms around him. SE 1 at 9:21:41. One of Gutierrez's arms tightly clinched J.P.'s neck while the other arm held the top of J.P.'s head. *Id.* at 9:21:41-9:21:48. Gutierrez then slammed J.P. to the floor and J.P.'s legs flailed. *Id.* at 9:21:49. Gutierrez got on top of J.P. and appeared to punch or strike J.P. *Id.* at 9:21:58.

Mapes walked to the back of the classroom and tried to separate the two students. *Id.* at 9:22:01. Mapes testified that he told both students to stop fighting. RP at 39. Shortly afterward, Gutierrez let go of J.P. and both he and J.P. got to their feet. SE 1 at 9:22:04. Once on their feet, Gutierrez and J.P. exchanged words while Mapes stood between them. RP at 39. At one point both students chest bumped each other. SE 1 at 9:22:10. Then Gutierrez pushed J.P. and continued pointing at him several times. *Id.* at 9:22:11. Mapes could not understand what the students said to each other because the exchange was in Spanish. RP at 39. Mapes testified that he

heard Gutierrez tell J.P. in English something to the effect that he won and that he would do it again. *Id.* at 40.

As the exchange continued, J.P. reached down and grabbed an electronic device off of the table and slammed it on the floor. SE 1 at 9:23:03. Mapes testified that he thought the device was Gutierrez' phone. RP at 41. Seconds later, Mapes turned around and asked another student to walk down the hall to get school security. SE 1 at 9:22:58. Gutierrez put his shirt on only to take it off not even a full second later. *Id.* at 9:22:58-9:23:17. A student was then observed leaving the classroom to retrieve the school security officers. *Id.* at 9:23:07. In the meantime, J.P. walked back to his table and took off his shirt. *Id.* at 9:23:34. J.P. walked over to Gutierrez and struck Gutierrez in the head or neck. *Id.* at 9:23:35. Gutierrez then wrapped his arms around J.P., picked him up, and slammed him to the floor. *Id.* at 9:23:37. Gutierrez got on top of J.P. on the floor and the two struggled. *Id.* at 9:23:40. At one point, the camera angle became obstructed by the table. *Id.* at 9:23:42. J.P. raised his hand in the air for about a second. *Id.* at 9:23:50. Gutierrez put both hands around J.P.'s neck when J.P. raised up. *Id.* at 9:23:53. As J.P. attempted to get up several times, Gutierrez jumped on his back and clinched his forearm tightly around J.P.'s neck. *Id.* at 9:23:55. Gutierrez then used his other arm to hold J.P.'s head. *Id.* at 9:23:56. While this occurred, Gutierrez backed into Mapes and then threw

J.P. to the floor. *Id.* at 9:23:57. J.P. struggled to get up several times and each time Gutierrez slammed him to the floor. *Id.* at 9:23:53-9:24.04. During this period of time, the camera angle was obstructed by Mapes. *Id.* at 9:23:58.

Seconds later, school security officers Carlos Balli and Kimberly Roberts entered the classroom. RP at 42; SE 1 at 9:24:12. Balli pulled Gutierrez off of J.P. who was motionless on the floor. SE 1 at 9:24:15. J.P. raised his head and then slowly got to his feet. *Id.* at 9:24:28. About a second later, the video ended. RP at 43; SE 1 at 9:25:53.

Other Evidence

After admitting the video, the State presented testimony from school security officer Roberts. Roberts testified that there were 84 cameras at Stanton Academy. RP at 58. A large part of Roberts' job was monitoring the cameras. *Id.* Roberts explained that the reason Mapes was not able to contact school security by phone was because she and Balli were in the commons. *Id.* at 59.

While viewing the video, Roberts identified herself and Balli. RP 60; SE 1 at 9:24:12. Roberts recalled that when she and Balli arrived in the classroom, Balli pulled Gutierrez off of J.P. who was still on the ground. RP at 60. Roberts testified that J.P. was unresponsive when she contacted him: "He wasn't talking, his eyes were closed. He looked like he was

unconscious to me." *Id.* at 61. Roberts said that she talked to J.P., called his name, and rubbed his back, but he did not respond. *Id.* at 62. About 15 seconds later, J.P. opened his eyes and appeared to regain consciousness. *Id.* at 61. J.P. got up appearing confused and disoriented. *Id.* at 61-62.

Roberts testified that when the principals entered the classroom, her biggest concern was to let them know that J.P. had been unconscious. *Id.* at 63. Roberts was worried J.P. would fall down or have other health problems as a result of losing consciousness. *Id.*

After Roberts testified, Officer Jack Curtsinger testified. His testimony primarily focused on his expertise in defensive tactics. *Id.* at 67. Officer Curtsinger testified about his familiarity teaching and employing blood restriction holds such as the carotid restraint or blood restriction restraint. *Id.* at 68. In the carotid restraint, blood flow to the brain is reduced. *Id.* Officer Curtsinger also discussed the naked choke hold. *Id.* at 73. In the naked choke hold, there is nothing between the restraint and the area that is being restrained. *Id.* Whether someone is rendered unconscious by the restraint, depends on a number of factors such as a person's level of conditioning and whether a person is under the influence of any chemicals. *Id.* at 68. According to Officer Curtsinger, when a person loses consciousness, their body relaxes and they "simply go to sleep basically." *Id.* at 69.

Officer Curtsinger also testified that he reviewed the classroom video. *Id.* at 70. He thought the male not wearing a shirt (Gutierrez) might have tried to put the male in a black shirt (J.P.) in a blood restriction hold. RP at 71; SE 1 at 9:21:39. He testified that it was possible to put someone in a blood restriction hold even from the side. RP at 71. Officer Curtsinger testified "without a doubt" that Gutierrez tried to apply a blood restriction hold on J.P., specifically a naked choke hold. *Id.* at 73; 77; SE 1 at 9:23:55. When asked why he believed this, Officer Curtsinger explained that Gutierrez held onto J.P.'s head, forced him to the ground, and then maintained restriction on the carotid arteries. RP at 77. He believed J.P. lost consciousness when his legs relaxed and straightened out. *Id.* From that time and up until when J.P. lifted his head, he testified that J.P. was unconscious. RP at 78-80; SE 1 at 9:24:15-9:24:28. During cross examination, Officer Curtsinger testified that from the top mount position, Gutierrez was in the most dominant position for ground fighting. RP at 84. Without training or experience, it would be extremely difficult for the person on the bottom to escape from a person who was in the top mount position. *Id.*

The defense presented one witness, Earl Richard Guerin. *Id.* at 96. Guerin testified that he was a mixed martial arts instructor and that he held a black belt in Brazilian Jiu-Jitsu. *Id.* at 97. After reviewing the video,

Guerin testified that he observed two fights between the students. *Id.* at 100. In the first fight, Guerin testified that Gutierrez's actions were not consistent with someone trying to employ a choke or blood restriction restraint. *Id.* at 101. Instead, he believed it was more akin to a headlock. *Id.* at 101; 106. Guerin testified that it was not until the second fight that Gutierrez employed a choke hold. *Id.* at 107. Guerin further testified that Gutierrez used his bicep and forearm to put J.P. in a blood restriction hold. *Id.* at 114; SE 1 at 9:23:47. Guerin concurred that J.P. might have lost consciousness, but he was not sure. RP at 118; 123.

At the conclusion of the evidence, the trial court found Gutierrez guilty of second degree assault. *Id.* at 165. Gutierrez was sentenced on February 19, 2015. The State requested a standard range sentence of 15 to 36 weeks at the juvenile correctional facility. *Id.* at 184. The defense asked for a manifest justice sentence downward of 12 weeks or 84 days. *Id.* at 186. The court imposed a manifest justice sentence of 14 weeks or 98 days. *Id.* at 216-18. This timely appeal then followed.

III. ARGUMENT

A. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S CHALLENGED FINDINGS OF FACT.

Gutierrez disagrees with the trial court's findings of fact and challenges them here. His challenge, however, is without merit because

substantial evidence supports the trial court's findings. In reviewing a sufficiency of the evidence challenge for a conviction following a bench trial, courts determine "whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court's conclusions of law." *State v. Smith*, 185 Wn. App. 945, 956-57, 344 P.3d 1244 (2015) (quoting *State v. Alvarez*, 105 Wn. App. 215, 220, 19 P.3d 485 (2001)). "Substantial evidence" exists when there is sufficient evidence to convince a "fair-minded, rational person that the findings are true." *Smith*, 185 Wn. App at 956 (quoting *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)).

The party challenging the trial court's findings must prove that the findings are not supported by substantial evidence. *Smith*, 185 Wn. App. at 956; *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Aguilar*, 153 Wn. App. 265, 275, 223 P.3d 1158 (2009). Circumstantial evidence is also afforded the same weight as direct evidence in reviewing the sufficiency of the evidence. *Smith*, 185 Wn. App at 956.

Additionally, unchallenged findings of fact become verities on appeal. *State v. Manion*, 172 Wn. App. 610, 633, 205 P.3d 270 (2013).

Gutierrez did not challenge the court's findings of fact that he started the first fight or that he rendered J.P. unconscious by strangling him. CP at 43.

Each challenged finding of fact below was supported by substantial evidence.

1. Substantial evidence supports finding of fact number 1.10.

The video and the testimony of Mapes present unmistakable evidence that Gutierrez started the first fight when he grabbed J.P. and slammed him to the floor. SE 1 at 9:21:30-9:21:34. Gutierrez also concedes that he started the first fight. Brief of Appellant at 3. Gutierrez argues that "review of the video cannot substantiate the facts as the court perceived them." *Id.* at 9. This is incorrect. In the challenged finding, the court found:

> Under the facts above, the Court finds beyond a reasonable doubt that the respondent was the initial aggressor. The Court finds beyond a reasonable doubt that the respondent did not thereafter in good faith withdraw from the combat in a manner which let [J.P.] know that he was withdrawing or intended to withdraw from further aggressive action.

CP at 44. Gutierrez made no attempt to withdraw from the confrontation after the first fight. Instead, Gutierrez continued to fuel the hostilities by exchanging heated words with J.P., chest bumping J.P., pushing J.P., and repeatedly pointing at J.P. SE 1 at 9:22:08-9:23:35. Mapes testified that he

could not understand most of the exchange between Gutierrez and J.P. because it was in Spanish. RP at 40. The one part he understood was Gutierrez telling J.P. in English something to the effect that he won and would do it again. *Id.* These actions are not consistent with someone evincing an intent to withdraw from the confrontation. Thus, substantial evidence supports this finding of fact.

2. Substantial evidence supports finding of fact number 1.11.

It is unclear from the briefing what specifically Gutierrez is challenging in finding of fact number 1.11. Brief of Appellant at 9. For the sake of argument, Respondent will assume that Gutierrez intended to launch a general challenge to as whether substantial evidence supported the court's finding. In the challenged finding, the court found:

> At approximately 9:22:07 on the video recording (give or take a few seconds) towards the conclusion of the first portion of the fight, Mr. Mapes has his knees up against the respondent and/or [J.P.] asking them to stop. Both parties stood up but the Court finds beyond a reasonable doubt that both parties were talking to each other in an escalated manner and that the respondent was bumping chests with [J.P.]

CP at 44. The video demonstrates that after Gutierrez and J.P. got to their feet following the first fight, there was a chest bump between them. SE 1 at 9:22:08-9:22:10. The testimony of Mapes further corroborates that the

two continued to exchange words once they got to their feet, and that Gutierrez said something to the effect of he won the fight and would do it again. RP at 39. Thus, substantial evidence supports this finding of fact.

3. Substantial evidence supports finding of fact number 1.12.

Gutierrez takes issue with the court's finding that two pushes followed the chest bump. In the challenged finding, the court found:

> Over a duration of approximately the next 10 seconds the respondent actually pushed [J.P.] in the chest twice. Mr. Mapes, whom the Court finds to be a credible witness, testified that the respondent said that he had won the fight.

CP at 44. Meanwhile, in its oral ruling, the court found that:

> . . . [A]t about 9:22:07, and my times might be off a second here or there on the tape. This is toward the conclusion of the first portion of the fight, the teacher has his knees up against one or both of you asking you to stop. And that's when you both got up, but immediately, the evidence established beyond a reasonable doubt that both of you were talking at one another in an escalated fashion and within three seconds you bumped chests with your opponent in this fight. And then over a duration of the next ten seconds actually pushed him in the chest twice. You were in two – about a two-foot proximity from what I can tell on the tape.

RP at 166-67. The video demonstrates that both Gutierrez and J.P. walked toward each other after they got to their feet. SE 1 at 9:22:08-9:22:10. The

video further demonstrates that after the chest bump, Gutierrez pushed J.P. and then Gutierrez raised up both of his arms in close proximity to J.P., which could have been viewed as a push. *Id.* at 9:22:11-9:22:34. The trial court explicitly stated that the "times might be off a second or two." RP at 166. Thus, just because the time between the chest bump and the pushes may have been longer than 10 seconds apart does not mean that there is contradiction between the trial court's oral ruling and this finding of fact. Substantial evidence supports that there was physical contact between Gutierrez and J.P. after the chest bump.

4. Substantial evidence supports finding of fact number 1.13.

The video captured Gutierrez extend his arm and point his finger at J.P. for an extended period of time. SE 1 at 9:22:48-9:22:59. Gutierrez argues that the video also captured a conversation and Gutierrez putting on his shirt. Brief of Appellant at 9. In the challenged finding, the court found:

> The respondent then had his arm extended out and his finger pointed in [J.P.'s] face for about the next 20 or 25 seconds, through 9:23:03 which is when [J.P.] picked up the respondent's electronic device and slammed it on the ground.

CP at 44-45. The trial court also couched its finding in terms of "about" 20 or 25 seconds for the duration of the finger pointing. *Id.* at 44. The court's focus in this finding was the finger pointing leading up to J.P. throwing

Gutierrez's electronic device on the floor. This finding, in turn, is supported by substantial evidence.

5. Substantial evidence supports finding of fact number 1.14.

Gutierrez argues unpersuasively that the trial court erred when it found that Gutierrez continued to point at J.P. until J.P. charged him. Brief of Appellant at 9. The video corroborates that there was a significant period of time that Gutierrez pointed at J.P. before the second fight started. SE 1 at 9:22:48-9:22:59. The court found:

> Mr. Mapes was between the two parties at that point, the respondent was about 5 feet from [J.P.], and Mr. Mapes was asking the parties to retreat from each other. The respondent did not do so, but instead continued to point at [J.P.] until [J.P.] charged the respondent.

CP at 45. The video captured approximately 12 seconds of Gutierrez continuously pointing at J.P. before Gutierrez put his shirt on again. SE 1 at 9:22:48-9:22:57. There was a brief period of about 10 seconds or 11 seconds that Gutierrez did not point his finger at J.P. This was when Gutierrez put his shirt on, paced around, and J.P. threw Gutierrez' electronic device on the floor. After Gutierrez inspected the device on the floor, he pointed at J.P. as he walked by. *Id.* at 9:22:58-9:23:08. Gutierrez pointed at J.P. again after he took off his shirt. *Id.* at 9:23:32. About four seconds

later, J.P. charged Gutierrez. *Id.* at 9:23:35. Thus, the court's finding that Gutierrez "continued to point at [J.P.] until [J.P.] charged the respondent" is supported by substantial evidence. CP at 45.

6. Substantial evidence supports finding of fact number 1.15.

Gutierrez raised this issue, but failed to brief it like he did with finding of fact number 1.11. Brief of Appellant at 9. Respondent will assume that Gutierrez intended to launch a general challenge as to whether substantial evidence supported the court's finding. In the challenged finding, the court found:

> During the 36 second (as shown in the video) lull in the confrontation the respondent put his shirt back on, but then took it off, communicating hostile intent and that the fight was on.

CP at 45. Approximately 22 seconds after Gutierrez took off his shirt, the second fight started. SE 1 at 9:23:16-9:23:36. The video provides substantial evidence to support the trial court's finding that this particular gesture communicated Gutierrez' hostile intent in fighting again. CP at 45.

B. THE TRIAL COURT PROPERLY DETERMINED THAT GUTIERREZ WAS THE INITIAL AGGRESSOR.

There is overwhelming evidence demonstrating that Gutierrez was the initial aggressor. Gutierrez started the first fight and won it. He did not

retreat from the second fight, rather he provoked it. Additionally, Gutierrez dominated the entire second fight that ended with J.P. losing consciousness.

When there is credible evidence a person provoked the need to act in his or her self-defense as there was in this case, that person is considered the initial aggressor. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). In cases where evidence supports that the defendant was the initial aggressor, the initial aggressor instruction may then be given. Because Gutierrez's case was a bench trial, the trial court considered the initial aggressor instruction instead of the jury. Courts have upheld the appropriateness of the initial aggressor instruction where "(1) the jury can reasonable determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant's conduct provoked the fight; or (3) the evidence shows that the defendant made the first move by drawing a weapon." *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008). Gutierrez is correct that words by themselves do not create sufficient provocation. Brief of Appellant at 11; *see also Riley*, 137 Wn.2d at 911. The trial court also recognized this. RP at 168.

The evidence presented at trial depicted two fights. It is undisputed that Gutierrez started the first fight when he picked up J.P. and slammed him to the floor. Brief of Appellant at 3. After the first fight, both Gutierrez and J.P. got to their feet where they continued a heated exchange. SE 1 at

9:22:08. It is from this point on that the parties dispute what the video portrayed.

Gutierrez argues that he "physically withdrew from the fight and continued to engage with [J.P.] only in words and gestures until [J.P.] attacked him." Brief of Appellant at 12. This was not what happened nor was this what the video captured.

The verbal exchange was followed by Gutierrez and J.P. chest bumping each other and Gutierrez pushing J.P. SE 1 at 9:22:08-9:22:11. Gutierrez places far too much emphasis on a brief five second period that followed J.P. throwing Gutierrez's electronic device on the floor. *Id.* at 9:23:08-9:23:13. During this time, Gutierrez put his shirt back on, pointed at J.P., and walked a few steps away from J.P. *Id.* at 9:23:08-9:23:13. Right after Gutierrez walked a few steps, he walked right back toward J.P. and took his shirt off. *Id.* at 9:23:13-9:23:14. This manifested a clear intent by Gutierrez to re-initiate the fight rather than withdraw from it. Approximately 22 seconds later, J.P. walked toward Gutierrez and struck him in the head or neck. *Id.* at 9:23:36. After Gutierrez was struck, he picked up J.P. and slammed him to the floor. *Id.* at 9:23:37-9:23:40. Once on the floor, Gutierrez tried to put J.P. in a naked choke hold. *Id.* 9:23:40-9:23:52. When J.P. tried to get up, Gutierrez slammed him to the floor again and again and again. *Id.* at 9:23:53-9:24.04. After several attempts,

Gutierrez managed to put J.P. in a naked choke hold which rendered him unconscious. *Id.* at 9:23:40–9:24:15.

The trial court reasonably concluded that Gutierrez started the first fight and won it. The trial court also reasonably concluded that although Gutierrez did not start the second fight, his conduct provoked it. Gutierrez' conduct consisted of far more than just words and gestures. Gutierrez pushed J.P., repeatedly pointed at J.P., and re-initiated the fight when he walked back toward J.P. and took his shirt off. These actions signaled that the fight was on again.

B. SUBSTANTIAL EVIDENCE SUPPORTS THAT GUTIERREZ DID NOT WITHDRAW FROM THE SECOND FIGHT.

At no point in time did Gutierrez intend to withdraw from the second fight. Rather he provoked J.P. into fighting him. As discussed above, there was a brief five second period in which Gutierrez walked a few steps away from J.P. after J.P. threw his electronic device on the floor. *Id.* at 9:23:08-9:23:13. What followed those five seconds is significant to the inquiry here. Instead of remaining away and withdrawing from the fight completely, Gutierrez walked right back toward J.P. and took his shirt off. *Id.* at 9:23:08-9:23:36. The trial court concluded that Gutierrez' actions "reflected and conveyed and communicated a quite hostile intent which communicated the fight's on." RP at 168. About 22 seconds after Gutierrez

walked back to where J.P. was at, the second fight started with J.P. striking Gutierrez in the head or neck. SE 1 at 9:23:36. This evidence supports the trial court's determination that Gutierrez wanted to re-initiate the fight rather than withdraw from it.

C. SUFFICIENT EVIDENCE PROVED BEYOND A REASONABLE DOUBT THAT GUTIERREZ DID NOT ACT IN SELF-DEFENSE IN THE SECOND FIGHT.

1. The trial court considered self-defense and determined as a matter of law that Gutierrez was not entitled to the defense.

The trial court properly found that Gutierrez did not act in self-defense in the second fight. A self-defense instruction is appropriate when there is some evidence to support that the defendant acted in self-defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). To prevail on a self-defense claim, the defendant must prove that (1) he or she subjectively feared that he or she was in imminent danger of great bodily harm; (2) his or her belief was objectively reasonable; and (3) he or she exercised no more force than was reasonably necessary. *State v. Werner*, 170 Wn.2d 333, 337-38, 241 P.3d 410 (2010). Self-defense contains both subjective and objective elements. The subjective element considers the defendant's actions in light of all other facts and circumstances known by the defendant at the time. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

Meanwhile, the objective element considers "what a reasonable person would have done if placed in the defendant's situation." *Id.*

Gutierrez argues that the trial court failed to consider his self-defense claim. Brief of Appellant at 11. This is incorrect. The trial court considered Gutierrez' self-defense claim and concluded as a matter of law that Gutierrez had not sufficiently proven self-defense. RP at 169. The court specifically found that Gutierrez "failed to withdraw and communicate in a way that would have told [J.P. he was] ceasing or stopping the fight." *Id.*

The trial court's finding that Gutierrez did not act in self-defense is reviewed de novo by this Court. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1993). Under the self-defense analysis, Gutierrez' argument fails. Even if Gutierrez subjectively believed that he was in imminent danger of great bodily harm from J.P., his belief was not reasonable nor was the force he used reasonable. Gutierrez' belief that he was at risk of great bodily harm from J.P. was not reasonable considering that immediately before the second fight, Gutierrez easily defeated J.P. in a fight he started by slamming J.P. to the floor. Additionally, the force Gutierrez used was not reasonable. Although Gutierrez' expert Guerin testified that the naked choke hold was not in his opinion excessive force, Guerin's subsequent testimony contradicted that. After Gutierrez slammed J.P. to the floor in the second

fight and gained the dominant top mount position, Guerin testified that he did not believe that a reasonable person would have felt like they needed to use force to defend themselves in that situation. RP at 112-13. Gutierrez, however, continued using force against J.P. The force Gutierrez used consisted of slamming J.P. to the ground several times after J.P. tried to get up and get away, attempting several times to put J.P. in a naked choke hold, and finally successfully employing a naked choke hold which rendered J.P. unconscious. Gutierrez' own expert's testimony substantiates that this force was excessive since a reasonable person would not have felt the need to use any force under the circumstances. From the moment that Gutierrez slammed J.P. to the floor in the second fight, he was in complete control. His use of force was therefore excessive.

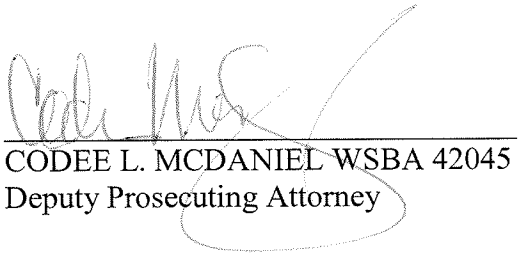
The evidence presented at trial proves that the State met its burden in disproving that Gutierrez acted in self-defense in the second fight. The evidence further proves that the trial court properly declined to find that Gutierrez acted in self-defense in the second fight.

IV. CONCLUSION

In sum, there is substantial evidence to support the trial court's challenged findings of fact. The trial court properly found that Gutierrez was the initial aggressor. Additionally, the trial court properly found that Gutierrez did not retreat from the second fight and that Gutierrez did not act

in self-defense in the second fight. The State also met its burden in disproving Gutierrez' self-defense claim.

Respectfully submitted this 17th day of February, 2016,



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