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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33154-7-III

STATE OF WASHINGTON, Respondent,

v.

ALDO MIGUEL GUTIERREZ, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Aldo Miguel Gutierrez, a juvenile, was found to have committed second degree assault upon J.P. by placing him in a rear-naked choke hold during a classroom fight. The incident was captured on video, which was introduced at trial and showed an initial fight that was initiated by Gutierrez and was stopped by the classroom instructor. While separated, J.P. threw Gutierrez's iPad to the ground, breaking it, and then charged Gutierrez and renewed the fight. Because the trial court erred in concluding that Gutierrez did not make a good faith effort to withdraw from the conflict, insufficient evidence supports the conviction.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in entering finding of fact no. 1.10.

ASSIGNMENT OF ERROR 2: The trial court erred in entering finding of fact no. 1.11.

ASSIGNMENT OF ERROR 3: The trial court erred in entering finding of fact no. 1.12.

ASSIGNMENT OF ERROR 4: The trial court erred in entering finding of fact no. 1.13.

ASSIGNMENT OF ERROR 5: The trial court erred in entering finding of fact no. 1.14.

ASSIGNMENT OF ERROR 6: The trial court erred in entering finding of fact no. 1.15.

ASSIGNMENT OF ERROR 7: The trial court erred in entering conclusion of law no. 2.2.

ASSIGNMENT OF ERROR 8: Substantial evidence does not support Gutierrez's conviction for second degree assault.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Can the trial court's factual findings be substantiated in light of the video-recorded evidence introduced at trial? NO.

ISSUE 2: Did the trial court apply an incorrect legal standard in determining whether Gutierrez was entitled to claim self-defense? YES.

ISSUE 3: In light of the evidence that Gutierrez made a good faith effort to withdraw from the conflict before J.P. renewed it, did the trial court

abuse its discretion in failing to consider Gutierrez's claim of self-defense? YES.

ISSUE 4: Is there sufficient evidence disproving Gutierrez's claim of self-defense beyond a reasonable doubt? NO.

IV. STATEMENT OF THE CASE

The State charged Gutierrez with one count of second degree assault by strangulation arising from a fight with J.P. that occurred at school. P 1, 42. At fact-finding, Gutierrez argued self-defense based upon the fact that he withdrew from the initial conflict. RP (2/2/15) at 18-20. The incident was video-recorded and the video was played at the fact-finding. RP (2/2/15) at 28; CP 42; Exhibit SE-1.

The video shows an initial fight clearly initiated by Gutierrez and broken up by a teacher, Dale Mapes. RP (2/2/15) at 23, 36; Exhibit SE-1 at 9:22:04. For approximately 40 seconds, Gutierrez and J.P. continue to stand close to each other and Gutierrez shoves J.P. one time, until Mapes separates them and Gutierrez steps a few feet away. Exhibit SE-1 at 9:22:01 – 9:22:57. Gutierrez begins to put his shirt back on while Mapes and J.P. look away from him toward the front of the room. Exhibit SE-1 at 9:22:57. J.P. then throws Gutierrez's jacket on the ground and grabs his iPad and throws it on the ground. Exhibit SE-1 at 9:23:02; RP (2/2/15) at

41. Gutierrez initially walks toward the iPad, but then turns and walks away from J.P. toward his chair while Mapes takes J.P. to the side and talks to him, with his hand on J.P.'s shoulder. Exhibit SE-1 at 9:23:06 – 9:23:15. Gutierrez then turns back around and removes his shirt again, but does not advance at all, staying about six feet away from J.P. Exhibit SE-1 at 9:23:15. Mapes then turns around to talk to Gutierrez and they both look away from J.P. toward another student. Exhibit SE-1 at 9:23:15 – 9:23:22. J.P. then takes a step toward Gutierrez before turning back to his chair, removing his shirt, and charging Gutierrez with his hands raised in a fighting position while Gutierrez stands by his desk, holding his shirt. Exhibit SE-1 at 9:23:30-9:23:35. J.P. attempts to strike Gutierrez with a right jab to the back of his head, then grabs Gutierrez around the head and appears to try to slam it into the table. Exhibit SE-1 at 9:23:36 – 9:23:37. Both of them go to the ground and when they stand back up, Gutierrez has his arm around J.P.'s neck in a maneuver an expert testified was a rear naked choke hold. Exhibit SE-1 at 9:23:37 – 9:23:55; RP (2/2/15) at 73. Gutierrez then takes J.P. to the ground twice more before being physically separated. Exhibit SE-1 at 9:23:55 – 9:24:16.

At the close of evidence, the trial court found Gutierrez guilty of second degree assault. RP (2/2/15) at 165; CP 23. The court stated in its oral ruling that Gutierrez forfeited the right to assert self-defense because

he was the initial aggressor. RP (2/2/15) at 166. The court further concluded that Gutierrez did not withdraw from the conflict due to "a continuity of aggressive actions and words." RP (2/2/15) at 168. The trial court entered findings of fact and conclusions of law supporting its verdict and sentenced Gutierrez to a manifest injustice sentence downward of 14 weeks at JRA. CP 42-45, 24. Gutierrez now appeals. CP 30.

V. ARGUMENT

The sole issue on appeal concerns the sufficiency of the evidence supporting the trial court's conclusion that Gutierrez was not entitled to rely upon a self-defense claim. Because the trial court did not apply the correct legal standard, because insufficient evidence supports several of the trial court's findings, and because sufficient evidence supports Gutierrez's right to argue self-defense, the trial court erred in finding him guilty of second degree assault.

Gutierrez's conviction for second degree assault required proof that he intentionally assaulted another by strangulation or suffocation. RCW 9A.36.021(1)(g); CP 1. However, a claim of self-defense defeats the charge by establishing a need to reasonably defend oneself against an unwarranted attack. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). To raise the defense, the defendant bears the initial burden of

producing some evidence tending to show the defendant's actions occurred in circumstances amounting to self-defense. *Id.* at 237. This threshold is low and requires simply that the defendant reasonably apprehended great bodily harm and imminent danger. *Id.* Once the initial evidentiary burden is met, the burden then shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984).

However, a defendant may not raise self-defense if the defendant initiated the conflict, unless he makes a good faith effort to withdraw from the conflict. *State v. Currie*, 74 Wn.2d 197, 198-99, 443 P.2d 808 (1968). The withdrawal must have been done "at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action." *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). Thus, where a robbery escalates to a homicide because the victim attempts to physically resist, self-defense may not be invoked. *See State v. Wilson*, 26 Wn.2d 468, 174 P.2d 553 (1946). Likewise, when in flight from a burglary, a defendant may not claim self-defense when he retains his firearm. *See State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990).

Notably, "words" do not constitute sufficient provocation to prevent a self-defense claim. *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999). This is because, for a victim to use lawful force in self-defense, the victim must reasonably believe he or she was in danger of imminent harm, and words alone cannot create such apprehension. *Id.* at 912. In *Riley*, where the defendant initiated the conflict by pulling a firearm and aiming it at the victim as well as using insulting language, the State was entitled to argue that the defendant was the primary aggressor. *Id.* at 909. But conduct, even if aggressive, may nevertheless be entitled to First Amendment protection if it is expressive. Expressive conduct occurs when the defendant "intends to communicate a message and the message can be understood in context." *State v. Immelt*, 173 Wn.2d 1, 7, 267 P.3d 305 (2011).

Applying these principles to the present case, the video evidence plainly demonstrates that Gutierrez initiated the first confrontation with J.P. However, the question then arises whether Gutierrez presented sufficient evidence of withdrawal to revive his right of self-defense. While no court has directly addressed what quantum of proof is necessary to show withdrawal from the conflict, *Dennison* suggests that where the defendant remains armed and does not surrender, evidence of withdrawal is insufficient. But here, even under the trial court's reasoning, Gutierrez

at most engaged in expressive conduct that tended to taunt J.P. for losing the fight. According to the trial court's oral ruling,

> It was a three-second interval where [J.P.] took the aggressive action, but I did note that the teacher was at that point in between the two of you, you were still about five feet away and he was asking you to retreat from each other. To go away from the close confines that you two had with each other. And you didn't initially. You continued to point and then it was after the last portion of the pushing until [J.P.] ran at you, I have that 36 seconds. And during that 36-second period you had initially moved away, put your shirt on but then moved back toward [J.P.] having taken your shirt off. And I accept the testimony of the martial arts expert that that reflected and conveyed and communicated a quite hostile intent which communicated the fight's on. [J.P.] ran at you, got in a punch or two and then you took him down with the result at the end of the naked chokehold that resulted in his loss of consciousness.
>
> Under those circumstances I can't find that you in good faith withdrew from combat in a time and in a manner to let [J.P.] know that you were in good faith intending to withdraw from further aggressive action. It was a continuity of aggressive actions and words. I understand that words alone aren't sufficient under the law. And I agree with that premise, but here we had a chest bump, two pushes with your arms, a hand in his face, and a movement initially away by about four or five feet and then back towards him with the taking your shirt off which is again an action that would be interpreted by your own expert as aggressive.

RP (2/2/15) at 168-69.

First, with respect to the trial court's findings as to continued physical aggression by Gutierrez, substantial evidence simply fails to

support them. The findings were based nearly in their entirety upon the video exhibit introduced at trial, and review of the video cannot substantiate the facts as the court perceived them. In finding 1.11, the trial court describes Mapes having his knees up against one of the parties while Gutierrez "was bumping chests" with J.P. CP 44. The video shows that at 9:22:08, J.P. gets to his feet and moves in close toward Gutierrez, who pushes him back. Exhibit SE-1 at 9:22:08 – 9:22:11. While J.P. then approaches Gutierrez *again*, there is no additional physical contact between them, which contradicts the trial court's finding that Gutierrez pushed J.P. in the chest two more times. Exhibit SE-1 at 9:22:11 – 9:22:17; CP 44.

Finding 1.13 states that Gutierrez "had his arm extended out and his finger pointed in [J.P.]'s face for about the next 20 or 25 seconds" until J.P. broke Gutierrez's iPad. CP 44-45. But the videotape shows a conversation that is punctuated with gestures, concluding with J.P. breaking the electronic device while Gutierrez is in the act of putting on his shirt. Exhibit SE-1 at 9:22:17 – 9:23:03. Gutierrez then walks away from J.P. while Mapes turns toward J.P. and puts a hand on his shoulder. Exhibit SE-1 at 9:23:03 – 9:23:08. Finding 1.14 states that Gutierrez continued to point at J.P. until J.P. charged Gutierrez. This simply did not occur. Exhibit SE-1 at 9:23:08 – 9:23:36.

But even aside from the trial court's factual errors, the circumstances presented in the video exhibit are starkly distinguishable from the circumstances in *Dennison*. In *Dennison*, the defendant claimed that he was inside the home with a firearm when the homeowner appeared in the doorway, also armed with a gun. The defendant grabbed the homeowner's gun hand and pushed it into the air, then held his own gun into the homeowner's stomach, backed him out of the house, and told him he did not intend to hurt the homeowner and just wanted to leave. He then lowered his gun and released the homeowner's hand, at which time he claimed the homeowner shot at him. He then fired in return, killing the homeowner. *Dennison*, 115 Wn.2d at 613.

In *Dennison*, then, the defendant remained a clear and imminent threat to the victim throughout the initial encounter leading up to the fatal shots. Here, however, Gutierrez was not posing any threat to J.P. and it was, in fact, J.P. who deliberately initiated a new round of physical aggression leading to Gutierrez using the rear naked choke. The *Dennison* victim's aggressive response continued to be justified by the imminent present threat of violence. But Gutierrez used only words and taunting postures that, while certainly threatening J.P. with embarrassment, did not pose any threat of harm that would have justified the use of force to prevent it.

In failing to apply the principle that speech does not constitute defensible aggression, the trial court here misapplied the law by construing Gutierrez's expressive conduct as a physical threat to J.P. It was not. Under the standard applied by the trial court, even though Gutierrez was no longer posing a threat of harm to J.P., his communications justified J.P.'s violent response such that Gutierrez was faced with the choice to suffer physical injury or criminal conviction. This is precisely the opposite of the outcome countenanced by *Riley*. 137 Wn.2d at 911-12.

For these reasons, the trial court erred in failing to consider Gutierrez's self-defense claim. Moreover, its findings are insufficient to show that the State met its burden to prove beyond a reasonable doubt that Gutierrez did not act in self-defense. The defense presented expert testimony that the rear naked choke hold was not excessive force that is justified in response to being attacked as J.P. attacked Gutierrez, and the State did not present evidence that contradicted his opinion. RP (2/2/15) at 104-05. Ordinarily, the remedy for deficient findings and conclusions is to vacate the judgment and remand for entry of the needed findings and conclusions. *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998). But when insufficient evidence supports the conviction, double jeopardy

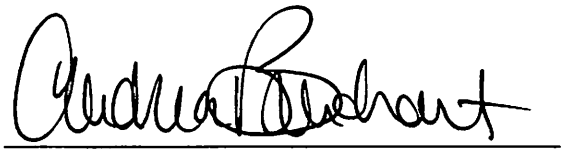
principles unequivocally prohibit retrial and the cause must be dismissed. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

In the present case, Gutierrez submits that the State failed to disprove self-defense beyond a reasonable doubt when the evidence showed that Gutierrez physically withdrew from the fight and continued to engage with J.P. only in words and gestures until J.P. attacked him. As such, insufficient evidence supports the conviction and the cause should be dismissed.

VI. CONCLUSION

For the foregoing reasons, Gutierrez respectfully requests that the court reverse and dismiss his second degree assault conviction.

RESPECTFULLY SUBMITTED this 25th day of September, 2015.



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