Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-194

MARCH TERM, 2020

State of Vermont v. Robert Gibbs*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 453-5-17 Bncr
		Trial Judge: David A. Barra; William D. Cohen

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction for aggravated assault. On appeal, he argues that the court erred in failing to instruct the jury on self-defense. We affirm.

Defendant was charged with aggravated assault with a deadly weapon and reckless endangerment based on the following facts that were presented at trial. On May 21, 2017, Lieutenant Grande and Officer Diotte were dispatched to an apartment complex in response to a report of an altercation. Officer Diotte arrived first and observed several people outside the apartment complex. The complainant was emotional and had his hands up. The complainant reported that defendant had a gun. Officer Diotte advised Lieutenant Grande when he arrived that defendant had a gun. Lieutenant Grande observed defendant standing in his doorway, approached him, and asked him to turn around and place his hands on his head. Defendant placed his hands on his head, but then dropped his left hand to the front of his body. Lieutenant Grande unholstered his service weapon and ordered defendant again to put his hand on top of his head. Defendant complied but dropped his hand a second time.[1] Lieutenant Grande quickly reached defendant, secured defendant's hands, and did a pat-down for weapons. Lieutenant Grande located a firearm in defendant's waistband, covered by his shirt and pants. Lieutenant Grande handcuffed defendant and removed the firearm. The firearm safety was off, there was a bullet in the chamber, and there were nine rounds in the magazine.

Defendant reported that the complainant had come to his apartment and was banging on the door. Defendant further explained that the complainant had a boxer stance and that defendant had gone inside to retrieve his firearm. He denied pointing the firearm at the complainant. Grande testified that he later found a bullet on the radio speaker in the house.

[1] Defendant testified that a muscle issue made it difficult for him to hold up his hand.

Defendant was arrested and brought back to the police station, where he waived his Miranda rights and spoke with Officer Diotte. The video of the interview was admitted at trial. During the interview, defendant denied pointing his firearm at anyone. He also stated that he was scared when the complainant came to the door because he had recently been assaulted.

The complainant testified that earlier that day his wife had told him about something that happened between her and defendant the evening before. He and his wife were visiting friends close to defendant's apartment, so he walked with a friend to defendant's apartment. The complainant knocked on the door and defendant opened it. The complainant then asked defendant about what had happened and asked defendant to come outside. Defendant declined and invited the complainant inside. The complainant did not enter. Defendant then turned around and walked over to a cabinet, pulled out a gun, cocked it, and pointed it at the complainant, telling him to get the fuck off his doorstep. The complainant stated that it was about thirty to forty-five seconds between when he arrived and when defendant pulled out his gun. The complainant denied that he had his hands in a fist or that he was in a fighting stance. The complainant then immediately turned around and walked away. He told his wife, who called the police.

Defendant testified at trial and his version of events differed from complainant's. He stated that the complainant pounded on his door, did not explain why he was there, and invited defendant outside. Defendant declined to go outside and invited the complainant inside his apartment. Defendant stated that he did not feel threatened when the complainant asked him to go outside. The complainant then took off his sunglasses and held his fists up, and when defendant tried to close the door, the complainant tried to force it open. Defendant closed the door and called 911. He said that he heard the complainant say that he was going to go and find his gun. While defendant was on the telephone, he retrieved his gun out of the cupboard. Defendant stated that he did not cock the gun or raise the gun and when he went back to the door, the complainant had already left. He also stated that he did not take the safety off. Defendant claimed that the bullet on the speaker was left there from the night before. Defendant stated that the complainant did not see him retrieve the firearm. He acknowledged that the complainant did not threaten him verbally and did not attempt to punch him.

After the close of the evidence, defendant requested a self-defense instruction. The State objected, arguing that such an instruction was incompatible with the defense, which was that the complainant did not see defendant retrieve his gun and he did not point the gun at the complainant. Defendant asserted that he was entitled to an instruction in the event the jury believed the complainant's version of events. The State further argued that there was no evidence to show that the complainant was threatening in any manner that justified the use of a firearm. The court concluded that a self-defense instruction was not warranted because there were insufficient facts to support the elements for self-defense. The court then charged the jury without a self-defense instruction. The jury returned a guilty verdict on the aggravated-assault-with-a-deadly-weapon charge and acquitted defendant of reckless endangerment.

On appeal, defendant argues that the court erred in declining to instruct the jury on self-defense.[2] "To be entitled to a defense instruction, defendant must establish a prima facie case for each element of the defense asserted." State v. Albarelli, 2016 VT 119, ¶ 13, 203 Vt. 551. Thus, defendant had the burden of demonstrating that "he was not the aggressor; he used reasonable force against the complainant; he did so based on his honest belief that doing so was necessary to protect himself from immediate bodily harm; and his belief was reasonable." State v. Fonseca-Cintron, 2019 VT 80, ¶ 11.

Defendant asserts that there was sufficient evidence in this case to require an instruction. Defendant points to the following facts introduced at trial: complainant was pounding on his door, removed his sunglasses, assumed a boxer-like stance, and tried to prevent defendant from closing the door. The State responds that there was no basis to give a self-defense instruction because self-defense was inconsistent with defendant's theory of the case, in which he claimed that the complainant did not even see defendant's weapon. See State v. Buckley, 2016 VT 59, ¶¶ 20-21, 202 Vt. 371 (explaining that some courts have held that self-defense instruction is not appropriate where defendant does not admit elements of crime).

We need not reach the question of whether defendant was precluded from seeking a self-defense instruction on the basis that he did not admit to assaulting complainant because we conclude that, based on the evidence at trial, no reasonable jury could conclude that defendant had an honest and reasonable belief that he faced imminent peril of bodily harm or that the use of a firearm was reasonable. First, there is limited evidence that defendant believed himself to be in "immediate danger of unlawful bodily harm." Id. ¶ 22. Defendant admitted that he did not feel threatened when the complainant came to the door and asked him to come outside, that defendant in fact invited complainant inside, and that at no time did the complainant attempt to hit defendant or verbally threaten defendant. Even after complainant allegedly raised his fists and tried to block the door from closing, defendant's actions did not demonstrate that he was fearful of imminent bodily harm. Defendant was able to close the door, he took time to put his holster on when he got his gun, and later came back outside onto his porch.

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[2] The State argues that defendant's argument was not properly preserved below and should be reviewed for plain error because defendant did not renew his objection after the instructions were read to the jury, citing State v. Myers, 2011 VT 43, ¶ 17, 190 Vt. 29 ("We have held fast to the position that absent a specific objection—after the judge reads the charge but before the jury retires—we review any appealed instructions for plain error."). We conclude that the objection was properly preserved. Myers was based on the requirements Vermont Rule of Criminal Procedure 30, which was amended in 2017 to no longer require renewal of all objections. Rule 30 now provides that objections need not be repeated unless the charge read differs from the one approved at the charge conference. Here, the court's instructions to the jury were consistent with its prior decision not to include a self-defense instruction so no further objection was required.

At oral argument, the State asserted that defendant had waived any objection to the jury instructions by indicating that defendant had "No objection" after the instructions were read. This Court does not "address arguments raised for the first time at oral argument." TD Banknorth, N.A. v. Dep't of Taxes, 2008 VT 120, ¶ 33, 185 Vt. 45.

Moreover, even if defendant subjectively felt fearful, the facts do not demonstrate that "his belief of imminent bodily harm was based in reason." Albarelli, 2016 VT 119, ¶ 16. The actions of the complainant, even as described by defendant, did not create a reasonable belief of imminent bodily harm and the use of a firearm in response was not reasonable under the circumstances.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice