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. 2019-310

JULY TERM, 2020

State of Vermont v. Joseph Albert Wedge Jr.*	}	APPEALED FROM:
	}	
	}	
	}	Superior Court, Addison Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 351-9-18 Ancr
		Trial Judge: Alison S. Arms

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

Defendant appeals a jury conviction of aggravated assault with a deadly weapon, arguing that the trial court committed reversible error by denying his request for a self-defense instruction. We affirm.

Based on an incident that occurred during the morning of August 3, 2018, defendant was charged with aggravated assault with a deadly weapon, in violation of 13 V.S.A. § 1024(a)(5). A one-day trial was held on June 19, 2019. The State presented the testimony of the complainant and his companion, who both were present during the incident. Defendant's attorney cross-examined the State's witnesses, but defendant did not testify, and the defense did not present any other witnesses. Following the close of evidence, defendant requested a self-defense instruction. The State argued that the evidence at trial did not warrant a self-defense instruction, but if one were given, the court should also instruct the jury on the law concerning first-aggressor. The court denied defendant's request and gave no instruction on self-defense. On appeal, defendant argues that the trial court committed reversible error by denying his request because the evidence presented at trial would have allowed a reasonable juror to conclude that he acted in self-defense.

A trial court is required to "provide the jury with an instruction on an affirmative defense [such as self-defense] when the evidence supports that defense." State v. Fonseca-Cintron, 2019 VT 80, ¶ 10; see also State v. Nunez, 162 Vt. 615, 617 (1994) (mem.) ("A court's obligation to charge on a defendant's theory is limited to situations in which there is evidence supporting the theory."). The evidence must be sufficient to "establish a prima facie case for each element of the defense asserted." State v Albarelli, 2016 VT 119, ¶ 13, 203 Vt. 551. Defendant has the initial burden of production "to establish a prima facie case for self-defense." Fonseca-Cintron, 2019 VT 80, ¶ 10. "Once a defendant has satisfied the initial burden of production for the defense, the burden then shifts to the State to disprove self-defense beyond a reasonable doubt." Albarelli, 2016 VT 119, ¶ 13 (quotation omitted). A self-defense instruction is warranted only if a defendant can make a prima facie showing of "an honest belief that [they] faced imminent peril of bodily harm, and that . . . the belief was grounded in reason." Id.

With these elements of self-defense in mind, we examine the trial testimony. The complainant, a fifty-one-year-old man, testified that on the morning of August 3, 2018 he and his companion, a forty-six-year-old woman, headed to a fishing spot near Middlebury, Vermont. While walking to a rock near the river, the complainant noticed a man lying down on the ground with his backpack over his face. The complainant continued to the rock, where he and his companion spoke in low tones so as not to disturb the person lying down—the thirty-five-year-old defendant. At that point, the couple was about forty-five feet from defendant. After about ten minutes, the complainant's companion said she did not feel safe and wanted to leave. As they started heading back, the complainant stopped at a log near where defendant was lying, put his coffee down, and reached into his pocket to get his cigarettes. At that point, the complainant was approximately thirteen-to-fourteen feet from defendant and facing away from him towards his companion. The next thing the complainant heard was his companion saying, "Michael, watch out, he's got a knife." When the complainant turned around, he saw defendant quickly approaching him with a knife in his hand. The complainant immediately grabbed a mace gun attached to his belt and pointed it towards defendant, who continued coming forward, jabbing at the complainant with the knife.

At that point, the complainant recognized defendant as a man named Joe Wedge who had tried to stab him the previous summer. Defendant came within three or four feet of the complainant, jabbing the knife at him three times, the last time coming within inches of the complainant's throat. The complainant warned defendant that he would spray him with the mace gun if he did not back off. According to the complainant, defendant was "screaming, swearing, just acting irrational." In response to the complainant warning him to back off, defendant said, "Fuck you, I sleep with this knife every night. I don't trust any of you Middlebury motherfuckers." The final time the complainant threatened to spray defendant, defendant stumbled backwards and fell to the ground. The complainant's companion then intervened by standing in front of the complainant and saying to defendant, "drop the knife, no one's going to hurt you here." After the complainant ran up the trail to call police, defendant threw the knife on the ground. The testimony of the complainant's companion was consistent with the complainant's testimony.

In his cross-examination of the complainant, defense counsel asked about a man who allegedly had caused trouble between the complainant and defendant. In response, the complainant testified: "Well, the story that had gotten after the fact of this crime, it was because I was supposedly saying to [the other man] that if Joe put his hands on [that man], that I would take [that man's] back and hand [defendant's] ass to him." When defense counsel asked whether a third party was telling defendant "that you were going to beat [defendant] up," the complainant responded, "That's the story I understand." The complainant also acknowledged on cross-examination that the mace gun on his belt "would have been visible" and would have been obvious "at first glance."

Following the close of evidence, defense counsel argued that the evidence warranted a self-defense instruction. The State disagreed, but argued that if one were given, the trial court should also instruct the jury on the law concerning first-aggressor. The trial court denied defense counsel's request for a self-defense instruction. Regarding the complainant's testimony about a third party allegedly causing trouble between the complainant and defendant, the court concluded that the testimony failed to support the notion that defendant believed he was in fear of bodily harm. The court reasoned that the complainant's testimony reflected only what he had heard, as opposed to what he had actually said, and did not establish what defendant knew, as opposed to what the complainant had heard he knew. Regarding the complainant's mace gun, the court concluded that the evidence could not support a determination that defendant feared for his safety because it did not establish that defendant saw the mace gun or that the complainant had removed

it from his belt prior to defendant's attack. In the court's view, absent any evidence that the complainant and defendant recognized each other prior to defendant's attack, and given that the complainant was facing away from defendant at that time, there was no basis for the jury to conclude that defendant reasonably feared he was in imminent danger of bodily harm at the time he came at the complainant with a knife.

Given the evidence presented at trial, we find no error in the trial court's decision to deny defendant's motion for a self-defense instruction. In defendant's view, based on the above testimony, a reasonable juror could conclude that defendant acted in self-defense out of a reasonable fear for his immediate safety because he was awakened by an armed man who had threatened him in the past. We disagree with this assessment. While the evidence could conceivably have supported a reasonable juror's determination that defendant subjectively feared for his safety when he came at the complainant with a knife, it could not have supported a determination that any such belief was reasonable under the circumstances. See Fonseca-Cintron, 2019 VT 80, ¶ 14 (stating "that a defendant's subjective belief alone is insufficient and that a defendant must also prove that the subjective belief is objectively reasonable"); State v. Knapp, 147 Vt. 56, 59 (1986) (stating that "fear unrelated to actual or threatened force is not sufficient to show a well-founded fear of impending death or serious bodily harm"). Even assuming that this evidence could support an inference that defendant had previously heard through a third party that the complainant had threatened to hurt him, there was no evidence that defendant knew who the complainant was at the time he attacked the complainant with a knife, or that defendant could reasonably perceive the complainant to pose an imminent threat of bodily harm to defendant at the time defendant began charging the complainant with a knife. See Albarelli, 2016 VT 119, ¶ 13 (holding that self-defense instruction is warranted only if defendant can show reasonable and honest believe that they faced "imminent peril of bodily harm"); see also 2 W. LaFave, Substantive Criminal Law § 10.4(d) (3d ed. 2019) (explaining that case law and legislation concerning self-defense require reasonable belief that unlawful violence will be "almost immediately forthcoming").

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice