Circuit Court for Wicomico County
Case No.: C-22-CR-22-000415

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2067

September Term, 2022

MICHAEL O. TUCKER

v.

STATE OF MARYLAND

Wells, C.J.,
Friedman,
Kenney, James A., III,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: February 6, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Wicomico County convicted appellant, Michael O. Tucker, of second-degree assault, carrying a dangerous weapon with intent to injure, and reckless endangerment.[1] The court sentenced Tucker to ten years of imprisonment. On appeal, Tucker presents one question for our review, which we have rephrased slightly:

> Did the circuit court err by declining defense counsel's requested instruction on self-defense?

Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of June 24, 2022, Larance Hull visited his friend, Jimmy Carrigan, outside the boarding house where Carrigan was living in Salisbury. After visiting with Carrigan for an hour, Hull went to the store to buy beer. When he returned from the store, he noticed a small radio on a table near Carrigan and asked who owned the radio. Carrigan responded that it belonged to Tucker, who had gone inside the house. Because Hull had difficulty hearing Carrigan over the radio, he reached across the table and turned it off.

Shortly after Hull turned off the radio, Tucker emerged from the house and asked why Hull was "messing with [his] stuff." As Hull recalled, Tucker stated, "I don't mess with your stuff, and you don't mess with mine." Hull tried to explain to Tucker why he had turned off the radio, but because Tucker would not listen, Hull told him to "go eff [himself] and the damn radio."

[1] The jury acquitted Tucker of first-degree assault.

According to Hull, Tucker went back inside the house. When Tucker returned with a "big machete[,]" and rushed towards him, Hull responded by throwing a chair at Tucker and picking up another chair to defend himself. As Hull was trying to fend off Tucker, he felt Tucker hit him "a couple of times" on the side of his head, which resulted in two minor lacerations, but "no gashes or cuts[.]" Hull called the police to the scene, but he declined transport to the hospital for medical treatment.

Tucker testified that on the morning of June 24, 2022, he had been working in the lot across the street from where he lived, using a machete to cut vines. He returned to the house for some breakfast, and while enjoying his breakfast, he listened to music on a "Bluetooth box[.]" When Tucker went outside again and noticed that the music had stopped, he asked Hull why he had turned off the music. Hull replied that he could not hear over the music. According to Tucker, he told Hull that he would have turned off the music if Hull had asked. Hull responded by calling Tucker names.

Because Hull believed that Tucker was "coming at him" when he exited the house carrying the machete that he was using for work, Tucker testified that Hull threw two chairs at him, which caused him to stumble back "up against the house[,]" with the machete in his hand. That caused Tucker's hand and the machete to go back, bounce off the house, and scrape the back of Hull's head. Tucker testified that he was trained to hold a machete with the blade facing him, and that it had hit Hull with the "flat part" of the blade. After Tucker and Hull had "calmed down[,]" Tucker retrieved Hull's phone from inside the house and gave it to him before leaving to work on another job a few blocks away.

Tucker explained that he was not angry that Hull had turned off the radio and that he was not trying to hurt him. But he was disappointed because they were both veterans and he felt that Hull had disrespected him. When asked if he was scared when he saw Hull coming at him, Tucker responded, "Well, I've been bullied before, but I didn't think he would do anything like that. But the way it came out, he got slapped upside the head." According to Tucker, that the machete hit Hull was accidental, "it recoiled when he grabbed me and ran me into the wall, my hand went back, and he got slapped with it."

At the close of all of the evidence, the trial court considered defense counsel's request for a jury instruction on self-defense. The prosecution argued that the defense had failed to generate evidence that Tucker's actions were intentional, noting that Tucker had testified that his contact with Hull was accidental. Defense counsel argued that the evidence warranted the self-defense instruction and that the jury could believe Hull's version of events that Tucker deliberately struck him with the machete. It would then be for the jury to determine whether Tucker used reasonable force. Stating that Tucker did not testify to using "any force, let alone reasonable force[,]" the trial court determined that the evidence did not generate the instruction on self-defense. The court noted defense counsel's objection to the ruling, and to the jury instructions as given. The jury found Tucker guilty of second-degree assault, carrying a dangerous weapon with intent to injure, and reckless endangerment. This appeal followed.

DISCUSSION

Tucker contends that the circuit court erred by failing to propound his requested self-defense instruction because there was "some evidence" supporting his alternative

theory at trial that he acted in self-defense. More specifically, that there was "some evidence" that Hall was the initial aggressor and that he deliberately struck Hull acting in self-defense.

The State counters that the circuit court did not err in declining to give the self-defense instruction because Tucker never claimed that he intentionally used force to defend himself from Hull. It argues that neither Hull's nor Tucker's version of events would support a self-defense instruction because there was no evidence that Tucker had an honest and reasonable belief that he was in immediate or imminent harm and that he used only that amount of force necessary to defend himself from harm.

Under Maryland Rule 4-325(c), a trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." The trial court is required to give a requested instruction if it (1) is a correct statement of the law, (2) is generated by the evidence, and (3) is not fairly covered by the other instructions given. *Preston v. State*, 444 Md. 67, 81-82 (2015) (and cases cited). But it is not required to give a requested instruction that '"has not been generated by the evidence[.]"' *Coleman-Fuller v. State*, 192 Md. App. 577, 592-93 (2010) (quoting *General v. State*, 367 Md. 475, 487 (2002)).

"[W]hether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Bazzle v. State,* 426 Md. 541, 550 (2012) (quotation marks and citation omitted). Therefore, our task on review "is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports

the application of the legal theory desired." *Id.* (quotation marks and citation omitted). The threshold for establishing that the requested instruction applies to the facts of the case is low. It is only necessary that a party produce "some evidence" to support the instruction. *Page v. State*, 222 Md. App. 648, 668 (2015) (quotation marks and citations omitted); *see also Dykes v. State*, 319 Md. 206, 216-17 (1990) (explaining that the "some evidence" standard "calls for no more than what it says - 'some,' as that word is understood in common, everyday usage").

To generate a self-defense instruction not involving deadly force, there must be evidence of each of the following elements of the defense:

> (1) the defendant was not the aggressor;
>
> (2) the defendant actually believed that he or she was in immediate or imminent danger of bodily harm;
>
> (3) the defendant's belief was reasonable; and
>
> (4) the defendant used no more force than was reasonably necessary to defend himself or herself in light of the threatened or actual harm.

Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 5:07 (brackets and some bracketed language omitted). In determining whether there is "some evidence" sufficient to warrant a defendant's requested instruction, we view the evidence in the light most favorable to the defendant. *Page*, 222 Md. App. at 668-69.

Although his primary defense theory at trial was that Hull was struck accidentally, Tucker contends that he was entitled to raise self-defense as an alternative theory. *See Roach v. State*, 358 Md. 418, 432 (2000) (explaining that "[e]ven if the defense of accident is inconsistent with self-defense, . . . a defendant may raise inconsistent

defenses" and "have the jury instructed on any theory of defense that is fairly supported by the evidence" (quotation marks and citation omitted)). He argues that the evidence satisfied each of the elements required to generate the self-defense instruction. According to Tucker, his testimony that Hull threw chairs at him and charged at him indicated that Hull was the aggressor and supported his belief that he was in immediate or imminent danger of bodily harm. Thus, if the jury, based on Hull's testimony, rejected his testimony that Hull was struck by accident and concluded that he deliberately struck Hull, the jury could conclude based on the minor cuts to Hull's head, that he used no more force than necessary.

As stated above, to justify a self-defense instruction, "[t]here must be 'some evidence,' to support each element of the defense's legal theory[.]" *Bynes v. State*, 237 Md. App. 439, 449 (2018) (quotation marks and emphasis omitted) (quoting *Marquardt v. State*, 164 Md. App. 95, 131 (2005)). A showing that Tucker believed that he was in imminent danger was an "absolute requirement[.]" *Id.*; *see also id.* at 445-46 ("We need some evidence of what the defendant was thinking. Something subjective rather than merely objective"). "Ordinarily, the source of the evidence of the defendant's state of mind will be testimony by the defendant." *State v. Martin*, 329 Md. 351, 361 (1993); *see also Thomas v. State*, 143 Md. App. 97, 117-18 (2002) (holding that where "appellant never expressed fear for his own safety," the trial court did not err in concluding "that the evidence did not establish that appellant believed that the use of force was necessary to prevent imminent death or serious bodily harm to himself").

But even if the jury believed Tucker's testimony that Hull was the aggressor, there was no evidence to suggest that Tucker believed that he was in imminent danger. The only evidence bearing directly on Tucker's state of mind was his testimony that he "didn't think [Hull] would do anything like that." Tucker may have been surprised, disappointed, and felt disrespected by Hull's actions, but there is no indication that he had any fear that Hull might seriously harm him. Absent some evidence that Tucker believed that he was in danger, a self-defense instruction was not warranted. *See Bynes*, 237 Md. App. at 448 (noting that self-defense was not generated where the defendant's testimony regarding his actions indicated that he "was not afraid; he was offended").

In addition, the evidence was also insufficient to support Tucker's argument that if the jury rejected his accident argument and believed Hull's testimony, the jury could also find that he believed that the force used was reasonably necessary under the circumstances. As the trial judge pointed out:

> [Tucker] testified that he didn't use any force, let alone reasonable force.
>
> He's shaking his head. I mean, he agrees with [m]e. He didn't use any force. That's his testimony.
>
> I don't know how you can get around that[.]

Assuming the jury believed that Tucker intentionally hit Hull with the machete, there was no evidence to show that he believed the force used was necessary in light of the actual harm. *See Porter v. State*, 455 Md. 220, 235 (2017) (emphasis in original) (explaining that, to assert imperfect self-defense, a "defendant is not required to show that he used a reasonable amount of force against his attacker – only that he **actually**

believed the amount of force used was necessary"). As the trial court recognized, Tucker testified that he did not use any force, which would not indicate a belief that the force he used was necessary. In short, the trial court did not err in determining that there was insufficient evidence to warrant the requested instruction.

This Court and the Supreme Court of Maryland have affirmed a trial court's refusal to give a self-defense instruction where the defendant failed to satisfy all four requirement elements. *See, e.g., Bynes*, 237 Md. App. at 450-51 (upholding trial court's refusal to give self-defense instruction in a case involving a domestic dispute where neither the appellant nor his partner testified that appellant subjectively believed that he was in danger after his partner slapped him); *Haile v. State,* 431 Md. 448, 471-72 (2013) (setting forth the elements of self-defense and holding that the defendant was not entitled to the self-defense instruction where the evidence established that he was the aggressor who invited the conflict); *Martin*, 329 Md. at 366 (holding that the trial court did not err in refusing to give the self-defense instruction where there was no evidence that, at the time appellant shot the victim, appellant believed that he was in danger).

The cases relied on by Tucker do not warrant a different conclusion. In each of those cases, there was sufficient evidence to support the instruction. In *Roach*, 358 Md. at 423-24, 432, the Supreme Court of Maryland concluded that, even though the defendant testified that the shooting was an accident, his pre-trial statement indicating that he thought the victim "was going to kill [him] right there on the scene but [he] got the gun from him" constituted "some evidence" that he believed himself in immediate danger of serious harm to justify self-defense. In *Dykes*, 319 Md. at 224, the Court held

that the trial court erred in resolving conflicts in the evidence and denying the defendant's request for self-defense instructions where there was "some evidence" supporting each of the elements required for the instructions, including evidence that the defendant had feared that the victim might shoot him or attack him. This Court held in *McKay v. State*, 90 Md. App. 204, 218 (1992) that the defendant was entitled to an instruction on hot blooded response to provocation where sufficient evidence supported inconsistent defenses advanced at trial that he acted out of fear in shooting the victim and that he acted in the heat of passion.

Here, the self-defense instruction was not generated because there was no evidence showing that Tucker actually believed that he was in imminent danger and that the amount of force he used was reasonably necessary under the circumstances.[2] Accordingly, the trial court did not err by declining to give the requested self-defense instruction.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[2] We conclude that the evidence in this case failed to support two elements of self-defense, but we note that the failure of only one element defeats a claim of self-defense. *See Bynes*, 237 Md. App. at 450-51 (stating that the self-defense instruction is not warranted if the court determines that the evidence fails to satisfy one of the required elements of self-defense, though the evidence may fail to satisfy more than one element).