IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 29647-4-III
Respondent,	)	
v.	)	
CHRISTOPHER J. GARDNER,	)	
Appellant.	)	UNPUBLISHED OPINION

Sweeney, J. — The showing necessary to support a jury instruction on self-defense is modest. The defendant need present only some evidence that he acted in self-defense. Here, the court refused the defendant's request for a self-defense instruction because there was no showing that the defendant struck his victim in self-defense. Indeed, the defense here was that the defendant had not struck the victim at all. We then affirm the conviction for fourth degree assault.

FACTS

Ronnie Martinez Quintana and Christopher J. Gardner were friends. Mr. Gardner

began dating Mr. Quintana's estranged wife and their friendship ended.

The two men had a physical confrontation on March 17, 2010. Mr. Quintana said that Mr. Gardner punched him in the jaw. His physician testified that Mr. Quintana had a broken jaw and that it was consistent with being struck in the jaw. Mr. Gardner testified that there had been a confrontation where Mr. Quintana yelled, gestured wildly, called Mr. Gardner a racial slur, and chest-bumped Mr. Gardner. Mr. Gardner admitted to pushing Mr. Quintana because "I wanted him out of my space." Report of Proceedings (RP) at 173. He denied punching Mr. Quintana: "I don't think so. I mean—there was a lot that happened. He—when I pushed him, he hit the wall. I'm not sure." RP at 177.

Mr. Gardner asked the court to instruct the jury on self-defense. The court refused to do so because Mr. Gardner denied punching Mr. Quintana:

> Whether he has a general sense of apprehension when he goes into the stairwell is not the issue. The question is, is he defending himself at that point, and does he then hit Mr. Quintana in the face in order to defend an assault? That is a whole different kind of case, again, than him saying, I have got some fear when I go over there, and we end up chest bumping.

RP at 194-95. And,

> [y]ou can't have those two defenses stand, because they don't make any sense together. You have to tell the jury there was in fact the alleged assault and that you're excused from the alleged assault; not that you didn't do it, but if you did, it is self[-]defense. That is not my understanding of the way it works.
>
> Again, that I think is the standard of law. It is a little disconcerting—it's of concern to me, excuse me—that the claim isn't made.

> Normally I see the claim is made at the up-front of the trial, right as you come; I'm told that that's an affirmative defense, it's indicated in the opening statements, and the case has that complexion of that, and we all know from the get-go that that is going to be the claim.
>
> It is incumbent upon the defendant to make that defense known at some point.
>
> I suppose even setting that aside, which I suppose we can do, although it's an interesting approach, I don't see how those claims can stand together with each other. That has never been the way I've understood these cases to be tried. And they have never been tried that way to me, where we have two separate defenses standing, one of which admits the act and claims self[-]defense as the excuse, and the other that does not.

RP at 197-98.

The jury found Mr. Gardner not guilty of second degree assault but guilty of fourth degree assault.

DISCUSSION

Whether there was sufficient evidence to require the court to instruct the jury on self-defense is a question of law that we will review de novo. *State v. George*, 161 Wn. App. 86, 100-01, 249 P.3d 202, *review denied*, 172 Wn.2d 1007 (2011).

Mr. Gardner contends that the court improperly denied his request for a self-defense instruction because he failed to disclose that defense in his omnibus application. The court said that Mr. Gardner failed to timely disclose the defense, but the court also concluded that there was no factual support for the instruction.

The use of force is lawful "[w]henever used by a party about to be injured . . . in preventing or attempting to prevent an

offense against his . . . person . . . in case the force is not more than is necessary." RCW 9A.16.020(3). Self-defense has three elements: (1) the defendant subjectively feared that he was in imminent danger of bodily harm, (2) his belief was objectively reasonable, and (3) he exercised no more force than reasonably necessary. *State v. Werner*, 170 Wn.2d 333, 337-38, 241 P.3d 410 (2010).

A criminal defendant is entitled to have the jury instructed on his theory of the case if there is some evidence to support the theory. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). The trial court must evaluate each element of self-defense to determine if a self-defense instruction is required. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998) (citing *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)). The first element is subjective and asks the trial court "to place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances known to the defendant." *Janes*, 121 Wn.2d at 238. The second element is objective and asks "what a reasonable person in the defendant's situation would have done." *Id.* The evidence should be viewed in the light most favorable to the defendant. *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997). And the evidence of self-defense may be inconsistent with the defendant's own testimony. *Id.*

Mr. Gardner urges that he should have been permitted to argue inconsistent defense theories of accident and self-defense. And he argues that a claim of accident does not necessarily conflict with his request for a self-defense instruction. *Id.* at 930 n.2. In *Callahan*, the court addressed whether a defendant can claim self-defense when he admits to intentionally using force, but claims that the injury to the victim was accidental. *Id.* at 930. There, Mr. Callahan admitted that he brandished a gun after a road rage incident but said that he accidentally shot the victim as they struggled over the gun. *Id.* at 928. The court noted that some Washington cases suggest that self-defense and accident conflict. *Id.* at 930 n.2 (citing *State v. Gogolin*, 45 Wn. App. 640, 727 P.2d 683 (1986); *State v. Alferez*, 37 Wn. App. 508, 681 P.2d 859 (1984); *State v Safford*, 24 Wn. App. 783, 791, 604 P.2d 980 (1979), *abrogated on other grounds by State v. Ramos*, 124 Wn. App. 334, 101 P.3d 872 (2004)). However, any conflict is a "false conflict"[1] because there was insufficient evidence of self-defense in those cases. *Id.* at 930 n.3.

So a self-defense instruction is warranted when a defendant claims he accidentally injured the victim if there is also evidence of self-defense. *Id.* at 933.

Mr. Gardner admits that he pushed Mr. Quintana in self-defense, but denies punching Mr. Quintana. The trial court pointed out that the "assault isn't alleged to be

[1] *Callahan*, 87 Wn. App. at 930 n.3 (quoting *People v. Robinson*, 164 Ill. App. 3d 754, 516 N.E.2d 1292 (1987)).

the push. It is alleged to be the striking and the breaking of the jaw." RP at 195. The court invited defense counsel to reconcile Mr. Gardner's denial that he punched Mr. Quintana with his claim that he should be excused from punching Mr. Quintana. Defense counsel suggested that the defense should be allowed because Mr. Gardner presented some evidence of self-defense. We do not find it. Ultimately, Mr. Gardner denied committing the act underlying the second degree assault charge. The court then correctly refused to instruct on self-defense.

The court also suggested that there was insufficient evidence of a subjective belief of imminent danger of bodily harm. It characterized Mr. Gardner as having a "general sense of apprehension" when he came to Mr. Quintana's apartment, not fear of an assault from Mr. Quintana. RP at 194-95. The court also characterized the altercation as "a verbal exchange and some chest bumping," not an altercation presenting danger of bodily harm. RP at 208.

Mr. Gardner testified that Mr. Quintana yelled, gestured wildly with his hands, and called Mr. Gardner a racial slur. Mr. Gardner's testimony also suggests that he pushed Mr. Quintana, not because he believed Mr. Quintana would hit him, but because Mr. Quintana invaded Mr. Gardner's personal space. The court then properly concluded that Mr. Gardner had no subjective fear of imminent bodily harm.

We affirm the conviction for fourth degree assault.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Siddoway, A.C.J.

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Kulik, J.