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. 2017-445

DECEMBER TERM, 2018

State of Vermont v. Glenn H. Delpha, Sr.*	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1491-11-15 Rdcr
		Trial Judge: Thomas A. Zonay

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

Defendant appeals from his conviction of aggravated assault following a jury trial. He argues that the court erred in denying his request for a self-defense instruction and denying his motion for a new trial. We affirm.

Defendant was charged with aggravated assault with a deadly weapon after allegedly threatening a contractor while armed with a loaded shotgun. The contractor testified at trial as follows. He was hired to work on property located on a heavily wooded dirt road. Defendant lives on the same road. On the day in question, the contractor and two crew members were working at the property; they had an excavator, several trucks, and other equipment. Defendant arrived and parked near the property's driveway. Defendant began screaming at the contractors to move their equipment. Defendant claimed that the driveway was his and that the property owner had stolen his land. The contractor pointed at defendant and told him that he needed to leave. Defendant accused the contractor of damaging the main road.

Defendant was parked in a way that made it difficult for the crew to move their vehicles. The contractor yelled out to defendant to move his truck. He then went up to defendant's truck. The contractor stated that he was trying to lighten the mood. He asked defendant to back up to allow them to move their vehicles. Defendant replied that "he didn't know what was keeping him from blowing [the contractor's] f***ing head off," pointing to a shotgun next to him. At that point, defendant was sitting in his truck and the contractor was looking at him through the truck window, leaning his forearm on the truck's open passenger window. The butt of the shotgun was close to defendant, within a foot or so from defendant's right side. The contractor knew that the shotgun was real and he was frightened. He told defendant "I have something for you," meaning that he had his own gun for protection in his truck. The contractor went to his own truck, which was about twenty yards away, grabbed his handgun, and returned to the job site, which was in the opposite direction from defendant's truck. The contractor did not return to defendant's truck nor did he ever brandish the gun. The police were then called.

The other crew members testified as well. Both observed the initial argument between defendant and the contractor from afar; one saw defendant point his finger in the contractor's face.

Neither observed the second incident at defendant's truck. A person who lived on the property observed the interaction at defendant's truck and he heard defendant loudly say to the contractor, "I don't know what's stopping me from blowing your [fu**ing] head off." He did not see the contractor make any threatening gestures toward defendant.

The jury was also shown a video captured by the camera system in the responding state troopers' vehicle. The trooper testified to the events captured by the video. On the video, defendant made various statements about the day's events, discussed below. A loaded shotgun was recovered from defendant's truck. It was leaning against the truck's transmission casing with the barrel pointed down toward the floorboard.

Defendant rested without presenting any evidence. Defendant requested a self-defense instruction. The court denied his request. Defendant essentially argued that he was justified in threatening to kill the contractor because, as reflected in the video shown to the jury, he had told police that the contractor said that he (the contractor) was going to "kick the sh** out of him." The court found that this evidence would not permit the jury to find that defendant had "an honest and reasonable belief that he face[d] imminent bodily harm." State v. Albarelli, 2016 VT 119, ¶ 17, 203 Vt. 551. The court added, moreover, that "mere words do not justify an assault and battery." State v. Buckley, 2016 VT 59, ¶ 22, 202 Vt. 371 (quotation omitted). Even if defendant had testified that he was scared, the court continued, which he did not do, "fear unrelated to actual or threatened force is not sufficient to show a well-founded fear of impending death or serious bodily harm." Id. (quotation omitted). The court found no evidence that defendant issued his threat under any fear at all, let alone a reasonable belief of imminent bodily harm. Because the court found no evidence from which a jury could infer that defendant acted in self-defense, it concluded that defendant was not entitled to a self-defense instruction. The jury found defendant guilty and this appeal followed.

Defendant argues that he presented sufficient evidence to support a prima facie case of self-defense. Specifically, he cites his statement to the arresting officer that the contractor was "going to kick the sh** out of me," and his response to the officer, when asked about threatening to kill the contractor, that the contractor "said he was going to do me in." Defendant also points to the testimony of others who saw the contractor get angry during the first interaction. He argues that his fear could be considered reasonable because "he was a smaller, older man who was very obviously outnumbered." Defendant maintains that the trial court impermissibly assessed his credibility. Defendant cites State v. Bartlett, 136 Vt. 142, 142-44 (1978) (per curiam) in support of his position and attempts to distinguish Albarelli, 2016 VT 119 and Buckley, 2016 VT 59.

We find no error. "To be entitled to a defense instruction, defendant must establish a prima facie case for each element of the defense asserted." Albarelli, 2016 VT 119, ¶ 13. "[A] self-defense instruction is warranted only if a defendant can show that (1) he had an honest belief that he faced imminent peril of bodily harm and that (2) the belief was grounded in reason." Id. We agree with the trial court that there was insufficient evidence here to show that defendant had an honest and reasonable belief that "he faced imminent peril of bodily harm." Id.

The trial court described the video evidence in its decision denying defendant's motion for a new trial. This Court has also reviewed the video and finds it consistent with the recitation of facts that follows. As relevant here, when the officer arrived and spoke to defendant, defendant complained about the trucks on "his" property. He then stated, "they said they were going to kick the sh** out of me." When the trooper asked defendant what he said in response, defendant stated, "I told them no." The trooper asked defendant if he said something about his shotgun in the truck, and defendant replied, "he was standing here in the window." Defendant then raised his voice and

said, "I got a right to have my shotgun in my truck on my property." When the trooper asked defendant if he threatened to blow the contractor's head off, defendant stated that "he was going to do me in [unintelligible]." The trooper asked defendant if "he [said] he was going to do you in?" Defendant replied "yeah . . . he's going to kick the sh** out of me." The trooper again asked defendant if he told the complainant that he was going to blow his head off, to which defendant replied, "I told him I'd shoot his ass . . . f***ing right." When asked why he was going to shoot the contractor, defendant said "just for the fun of it . . . just to let him know he ain't going to be on my property no more." When the trooper told defendant that he could not just shoot people, defendant stated "the f**k you can't. They're on my property, they're using it, and they don't pay nothing for the use of it." Defendant compared the contractor and crew to "homegrown terrorists." The conversation continued in this vein. Toward the end of the conversation, the trooper was going over the sequence of events, and asked defendant if he was threatened. Defendant stated, "sure I was threatened there's three of them over here . . . right now . . . I threatened one of them . . . that's right." Defendant added that he would "shoot him anywhere I want when he's on my f***ing property . . . I have the right to do it . . . ."

The evidence also shows that defendant was seated in an operational truck at the time of the exchange with the contractor while the contractor was outside the truck. There was no evidence that the others present at the scene engaged physically or verbally with defendant. There was no evidence that the contractor made any physical actions, gestures, or maneuvers toward defendant before defendant made his threat.

We agree with the trial court that, based on this evidence, no reasonable jury could conclude that defendant had an honest and reasonable belief that he faced imminent peril of bodily harm. Rather than expressing fear, defendant said that he threatened to kill the contractor "just for the fun of it" and "to let him know he ain't going to be on my property no more." Defendant did not indicate when the contractor allegedly threatened to "kick the sh** out" of him. There was no evidence of any physically menacing actions directed at defendant that would create imminent threat of physical harm. Assuming the truth of defendant's assertions, the contractor at most escalated the language used in a shouting match and, as the trial court explained, a mere exchange of words would not justify a threat to use deadly force. Buckley, 2016 VT 59, ¶ 22. The mere fact that the contractor was physically larger than defendant would not allow a reasonable jury to infer that defendant honestly believed that he "faced imminent peril of bodily harm and that . . . the belief was grounded in reason." Albarelli, 2016 VT 119, ¶ 13. Even if defendant was technically "outnumbered" on the property, there was no evidence that anyone else was present during the confrontation at the truck and defendant did not state otherwise to police. The evidence is insufficient, as a matter of law, to justify resorting to a deadly threat. As the initial aggressor, moreover, defendant can claim self-defense only if the complainant wrongfully introduced deadly force into the confrontation. State v. Trombley, 174 Vt. 459, 464 (2002) (mem.). That did not happen here.

This case is not like Bartlett, 136 Vt. at 142-44, as defendant asserts. In Bartlett, the defendant was convicted of simple assault and assault upon a law enforcement officer. The officer testified that the defendant punched him in the face when the officer served him with a court order in the defendant's home. The defendant testified that he had been counting out money in his home when "a person jumped out at him and pushed something toward his face." Id. at 143. The defendant stated that "he raised his hands to block the object thrust at him and in so doing struck the other person." We found the defendant's testimony sufficient to raise a factual question on self-defense for the jury to resolve. Id. at 144. Unlike Bartlett, there was no evidence in this case of any physical action that defendant was trying to fend off. In fact, the contractor was outside of defendant's vehicle during the interaction. Defendant could have left the scene. There was no

question for the jury to decide here, and we reject defendant's assertion that the trial court improperly assessed the credibility of the evidence. The court simply concluded, and we agree, that no reasonable jury could find that defendant acted in self-defense under the circumstances here.

We reached similar conclusions in Albarelli and Buckley, both of which are analogous to this case. In Albarelli, the defendant argued that he acted in self-defense during a fight. He relied on the fact that the complainant was bigger than he was and that the complainant was walking toward the defendant. The complainant did not raise his hands or fight back when the defendant attacked him. We found the evidence insufficient to show that the defendant believed that he was "in peril of imminent bodily harm." 2016 VT 119, ¶ 13. We explained that there was no evidence that the complainant was acting aggressively toward the defendant, and one could not infer "from the evidence of the size difference and the forward progress of the complainant" that the defendant's "belief of imminent bodily harm was based in reason." Id. ¶ 16 (citing similar cases). Thus, there was no basis for a self-defense instruction.

In Buckley, the defendant claimed to be acting in self-defense when he brandished a weapon and threatened to shoot two men who were repossessing a vehicle on his property. We explained that while the defendant and his brother "claimed to be confronted by a spew of billingsgate, there was no 'imminent' physical attack to be defended against and mere words do not justify an assault and battery." 2016 VT 59, ¶ 22 (quotation omitted). The employees were twenty feet away from the defendant and the defendant knew that the employees were not armed. We emphasized that even if the defendant had testified that he was scared, which he did not do, "fear unrelated to actual or threatened force is not sufficient to show a well-founded fear of impending death or serious bodily harm." Id. (quotation omitted). As in these cases, there was simply insufficient evidence here that would allow a reasonable jury to conclude that defendant acted in self-defense.

Having found no error in the court's denial of defendant's request for a self-defense instruction, we reject defendant's related assertion that the absence of a self-defense instruction deprived him of a fair trial.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice