IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TROY DAVID SCHOENBEIN, Appellant.	No. 41803-7-II UNPUBLISHED OPINION

Van Deren, J. — Troy Schoenbein appeals his conviction for fourth degree assault. He argues that the trial court abused its discretion by refusing to instruct the jury on self-defense.[1] We hold that Schoenbein was entitled to a self defense jury instruction and reverse his conviction and remand for further proceedings.

FACTS

Schoenbein and Frank Matesa were neighbors who had a history of animosity toward one another. On January 8, 2010, Matesa was driving down their street when Schoenbein pulled out

[1] Schoenbein also argues that the trial court abused its discretion by imposing the 365-day sentence and in determining the amount of restitution owed. He also argues that his 365-day sentence for fourth degree assault, a gross misdemeanor, violated article I, section 14 of the Washington State Constitution. In his statement of additional grounds for review (SAG), he claims prosecutorial mismanagement, prosecutorial misconduct, violation of the appearance of fairness doctrine, and cumulative error. Because we resolve this matter based on the lack of a self defense jury instruction and reverse his conviction and remand for further proceedings, we do not address these claims.

of his driveway, nearly colliding with Matesa, and Matesa exited his car. The parties and witnesses offered differing accounts about subsequent events.

According to Matesa, he checked his car for damage, Schoenbein rolled down his driver's side window, and Matesa walked toward Schoenbein's car and said, "'Troy[,] enough of this is enough.'" Report of Proceedings (RP) at 796. Schoenbein replied, "'Do you want a piece of me?'" RP at 800. He exited his car and immediately punched Matesa. Matesa fell to the ground, where he felt like he was being "kicked around" as he sustained four or five blows, and felt extreme pain in his right eye. RP at 812.

While on the ground and after sustaining his eye injuries, Matesa saw James Doffing,[2] Schoenbein's friend, pull up in a vehicle, exit, and approach. Schoenbein's brother, Frank,[3] was present but never got out of his truck. Matesa, due to a knee condition, slowly stood up. Schoenbein said, "[Y]ou lost. Go home." RP at 811. Schoenbein, Frank, and Doffing left. Matesa returned home and later was taken to the hospital for treatment of the injuries he sustained.

Schoenbein maintained that Matesa got out of his car and approached Schoenbein's car "very fast" while clenching his fists. RP at 1103. Schoenbein got out of his car and said, "'Don't do it, [Matesa]. Don't do it.'" RP at 1103. Matesa immediately began punching Schoenbein, who blocked all the punches, and they began grappling with each other but Schoenbein never attempted to punch Matesa. Doffing hit Matesa "hard" and Matesa fell to the ground but

[2] During his court testimony, Doffing gave his name as "James Matthias Doffing, III." RP at 237. During the trial, he was referred to by others as "Matthew Doffing" and "Matt Doffing." RP at 236, 1105.

[3] For clarity, we refer to Frank Schoenbein as "Frank" in this opinion. We mean no disrespect.

Schoenbein did not see where Doffing first hit Matesa. RP at 1105. Doffing continued punching Matesa in the "[u]pper face area," while Schoenbein freed himself, stood up, and told Doffing to stop. RP at 1157. Matesa, who had a swollen face with "blood like stuff" on it, quickly "popped back up" and told Schoenbein, "[You're] going down for this one." RP at 1107, 1181. Schoenbein believed he was at risk of serious injury from Matesa during the altercation. He asserted that neither he nor Doffing ever kicked Matesa.

Doffing's version was that Matesa "basically[ ] charge[d]" Schoenbein, swung first, and pinned Schoenbein against his car with punches while Schoenbein unsuccessfully tried to block and return the punches. RP at 294. Doffing walked up to Matesa and said, "'[H]ey,'" received no response and then punched Matesa in the left temple. RP at 305. Following his punch to Matesa's temple, Doffing saw blood "around" Matesa's left eye socket and running down his face. RP at 313. Matesa fell to the ground dragging Schoenbein with him and continued hitting Schoenbein, then began to stand up first. Concerned about Matesa getting up while Schoenbein was still on the ground, Doffing punched Matesa in the right temple. Matesa "kind of sat down on his butt," stood up, exchanged words with Schoenbein, and left the scene in his car. RP at 313. According to Doffing, neither he nor Schoenbein tried to kick Matesa, and Doffing had a swollen right elbow, wrist, hand, and knuckle after the incident.

According to Frank, Matesa "lunge[d]" at Troy and began punching him. RP at 1040. Troy blocked the punches but never returned one, and the two fell to the ground wrestling. Doffing ran toward the back of Schoenbein's car, which prevented Frank from seeing Doffing, Schoenbein, and Matesa while the latter two were on the ground. Frank did not see Doffing hit Matesa.

Stacey Costanti and Scott Grunden, who were at Schoenbein's house on January 8, said that Doffing ran into the house and excitedly said either that he had "just blasted [Matesa] in the face" or that "[Schoenbein] was getting his ass kicked in the middle of the street" and Doffing "had to blast this dude." RP at 1191, 1198.

Matesa suffered a ruptured right eye globe, a fracture of the right orbital medial wall, bruising, small abrasions, lacerations along the bridge of his nose, and chest contusions. He told his attending emergency room nurse that his "neighbor" and his "neighbor's friend" had assaulted him, kicked him in his right eye, and kicked him in his chest. RP at 466. He told his attending emergency physician, Dr. August Stein, that Schoenbein had assaulted him, knocked him to the ground, and kicked him in his right eye, which immediately caused loss of vision, bleeding, and extreme pain. Stein opined that Matesa's eye injuries were consistent with being kicked in the face and could not have been caused by blows to the temple. Stein also testified that a punch could have caused Matesa's eye injuries if delivered from the right angle, but it was "extremely unlikely" that a punch caused the injuries. RP at 521.

Pierce County Medical Examiner Thomas Clark also examined Matesa's medical records. He testified that it is "almost always the case" that Matesa's type of eye injuries are caused by direct contact with the eye and opined that Matesa's injuries were caused by blunt force. RP at 932. He also opined that it was "extremely" and "extraordinarily" unlikely that blows to Matesa's temples caused his eye injuries. RP at 943. He testified that a knuckle slipping inside the eye socket could have caused Matesa's injuries but that a kick from a boot was more likely.

The State charged Schoenbein with first degree assault. At trial, Schoenbein successfully requested a fourth degree assault lesser included offense jury instruction but unsuccessfully

requested a self-defense instruction. In rejecting the self-defense instruction, the trial court reasoned that Schoenbein had offered no evidence that he hit Matesa; thus, either he never struck Matesa or he had assaulted Matesa as the State asserted.

The jury acquitted Schoenbein on the first degree assault charge, but found him guilty of fourth degree assault. Schoenbein appeals.

ANALYSIS

Schoenbein argues that the trial court abused its discretion in refusing to instruct the jury on self-defense. We agree.

Here, the trial court refused to give a self-defense instruction because it found no evidence to support the instruction. This is an issue of fact that we review for abuse of discretion. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

Generally, a defendant is entitled to a self-defense instruction if there is some evidence demonstrating that the defendant acted in self-defense. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). We may determine whether there is sufficient evidence of self-defense warranting a self-defense instruction by evaluating what a reasonable person would do standing in the shoes of the defendant. *Werner*, 170 Wn.2d at 337. The trial court's refusal to give instructions on a party's theory of the case when there is supporting evidence is reversible error when it prejudices a party. *Werner*, 170 Wn.2d at 337.

We recently held in *State v. George*:

> To ensure due process to a criminal defendant, a trial court must provide considerable latitude in presenting his theory of his case; more specifically, a trial

> court should deny a requested jury instruction that presents a defendant's theory of self-defense only where the defense theory is completely unsupported by evidence, which was not the case here. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). We recently articulated the constitutional due process aspects of a defendant's right to present his theory of the case in the context of jury instructions as follows:
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> Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010) (citations omitted), *review denied*, 170 Wn.2d 1022, 245 P.3d 773 (2011). Consistent with the Supreme Court's decision in *Barnes*, we held that "at the very least, the instructions must reflect a defense arguably supported by the evidence." *Koch*, 157 Wn. App. at 33, 237 P.3d 287 (citing *Barnes*, 153 Wn.2d at 382, 103 P.3d 1219).

State v. George, 161 Wn. App. 86, 249 P.3d 202 (2011).

Schoenbein's, Doffing's, and Frank's testimony suggests that Matesa first charged Schoenbein, causing Schoenbein to defend himself from Matesa's blows and resulting in Matesa and Schoenbein falling to the ground. Schoenbein stated that he (1) blocked Matesa's punches, (2) wrestled with him, (3) Doffing intervened and punched Matesa in the head, and (4) then Matesa fell to the ground somehow entangled with Schoenbein. RP at 1104-05. Whether the struggle between Matesa and Schoenbein began with Schoenbein defending himself from Matesa's blows and the ensuing struggle resulted in Matesa's eye injury is a question for the jury to decide, not the trial court. *George*, 161 Wn. App. at 100.

We hold that the trial court abused its discretion in refusing to give a self-defense instruction because a self defense argument was not totally unsupported by the evidence and, in fact, Schoenbein adduced evidence that the jury could conclude supported his self defense theory.

We reverse Schoenbein's conviction and remand for further proceedings.

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

Van Deren, J.

I concur:

Johanson, A.C.J.

Quinn-Brintnall, J. (concurring) — I agree with the majority that the trial court erred by refusing to give Troy Schoenbein's proposed self-defense instruction. I write separately because, in my opinion, the appropriate standard of review is whether the evidence supports giving the proposed instruction.

In general, we review a trial court's choice of jury instructions for an abuse of discretion. *State v. Douglas*, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005). But a criminal defendant is entitled to a jury instruction on the defense theory of the case if evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). It is reversible error to refuse to give a proposed instruction if the instruction properly states the law and the evidence supports it. *Ager*, 128 Wn.2d at 93 (it is reversible error to refuse to give an instruction on good faith claim of title defense if the evidence supports the defense).

The majority relies on *State v. Read* to support its assertion that the proper standard of review is abuse of discretion. 147 Wn.2d 238, 243, 53 P.3d 26 (2002) ("If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact, the standard of review is abuse of discretion."). But, in my opinion, the court's analysis in *Read* belies the assertion that the court reviewed the trial court's decision for an abuse of discretion. The *Read* court actually held that "Read [fell] short of producing evidence demonstrating he reasonably believed he was in imminent danger of death or great personal injury" and was not entitled to a self-defense instruction. 147 Wn.2d at 244.

Irrespective of *Read*, the case law is clear that a defendant is entitled to a self-defense instruction if some evidence supports giving the instruction. *Ager*, 128 Wn.2d at 93; *State v.*

Hicks, 102 Wn.2d 182, 186-87, 683 P.2d 186 (1984). Once the trial court has determined whether the defense has presented some evidence supporting the proposed defense instructions, the trial court has no discretion regarding whether to give the instruction. *See Ager*, 128 Wn.2d at 93 (reversible error for a trial court to refuse to give an instruction supported by the evidence); *Hicks*, 102 Wn.2d at 186-87 (same); *State v. Hoffman*, 116 Wn.2d 51, 111, 804 P.2d 577 (1991) ("[I]t is error to give an instruction which is not supported by evidence."); *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986) ("[I]t is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it."). Therefore, I believe *Read* incorrectly states that abuse of discretion is the appropriate standard of review when a trial court refuses to give an instruction based on the finding that no evidence supports giving the instruction. Instead, the appropriate inquiry is whether the defendant has presented some evidence supporting giving the proposed instructions. If this court determines that such evidence was presented, failure to give the proposed instruction requires reversal.

Here, both Shoenbein and Matthew Doffing testified that Frank Matesa was the aggressor. Because evidence supported Schoenbein's theory of self-defense, the trial court had no discretion and was required by law to give Schoenbein's requested self-defense jury instruction. Accordingly, I concur with the majority in the result that Schoenbein's conviction should be reversed and the case remanded for further proceedings.

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QUINN-BRINTNALL, J.