Circuit Court for Washington County
Case No.: 21-K-16-52889

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 996

September Term, 2017

JACOB MICHAEL YOUNG

v.

STATE OF MARYLAND

Woodward C.J.,
Fader,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned)

JJ.

PER CURIAM

Filed: July 30, 2018

On April 27, 2017, a jury sitting in the Circuit Court for Washington County convicted appellant, Jacob Michael Young, of second-degree assault. The court sentenced appellant to ten years of incarceration and suspended all but five years. This appeal followed, wherein appellant argues that the "trial court erred in refusing to instruct the jury on self-defense." We affirm.

BACKGROUND

In the evening of March 22, 2016, Gary Mathias was standing in line to purchase items at the Summit Liquors on West Washington Street in Hagerstown. There were several other customers standing in front of him, waiting to be served, when appellant entered the store and walked to the front of the counter. Mathias looked on as appellant spoke to the clerk and demanded to be served. The clerk informed appellant that she was busy with another customer, as appellant waved money in her face. Mathias, who was at the end of the line spoke up and told appellant, "don't be rude, step in line with the rest of us." Appellant acquiesced and got in line behind Mathias. The interaction was caught by the store's surveillance camera and later played to the jury at trial.

Mathias eventually paid for his items, left the store, and began walking the two blocks to his home. As he began to walk down the street, Mathias observed appellant in a car that was exiting the liquor store parking lot. As Mathias attempted to cross the road, the car nearly hit him. Mathias continued walking home until the car returned a short time later. The car stopped, appellant exited the passenger side of the vehicle, walked in front of the vehicle, and yelled "don't be rude, huh? I'll show you don't be rude." Appellant then opened the back door of the car, and let out a large pit bull dog which ran towards

Mathias. Mathias, upon seeing the dog running towards him, was "concerned for his life" and tried to "punt" it. Appellant, who was behind the dog, then attacked Mathias. Mathias, who had previously been in the military and had over two decades of jiu jitsu training, took appellant "down," "mounted him," poked his eye with a thumb, and started a "choke hold." As Mathias was fighting with appellant, appellant called out to the dog to bite him. As Mathias and appellant continued wrestling on the ground, the driver of the car approached Mathias, and "brained" him with a beer bottle over his head. Mathias found the beer bottle with which he had been hit over the head, broke it, and began stabbing appellant in the neck and back with the broken glass. Mathias also heard appellant yell, "shoot him . . . he's stabbing me, shoot him. Man what are you waiting on." When Mathias then looked up and saw the driver of the car holding a gun, he disengaged from the fight and stood up, whereupon appellant and the driver of the car got back into the car and drove away. Mathias sustained a cut on his hand for which he received five stitches, and a knot on the top of his head.[1]

DISCUSSION

Appellant argues that the trial court erred by refusing to instruct the jury on self-defense. He asserts that it exceeded "its authority by making a factual finding that

[1] At trial Mathias's testimony of the fight was lengthy. Although he first testified that he stabbed appellant with the beer bottle *before* he heard appellant yell "shoot him," he later testified that he only stabbed appellant *after* he heard appellant yell "shoot him." A videotape of Detective Blankenship's interview of Mathias soon after the incident was played at trial. In it, Mathias described stabbing appellant *after* he heard appellant yell "shoot him."

[appellant] initiated the fight with deadly force," and that it "erroneously indicated that there is no evidence of self-defense if the defendant does not testify."

Maryland Rule 4-325(c) states:

> The 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 court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

We review a trial court's decision not to give a requested jury instruction for abuse of discretion. *Carroll v. State*, 428 Md. 679, 689 (2012). A requested jury instruction must be given where "'(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.'" *Cost v. State*, 417 Md. 360, 368-69 (2010) (quoting *Dickey v. State*, 404 Md. 187, 197-98 (2008)).

"For an instruction to be generated by the evidence, the defendant need only show that 'some evidence' supports the giving of the instruction." *Preston v. State*, 218 Md. App. 60, 68 (2014) (quoting *McMillan v. State*, 428 Md. 333, 355 (2012)). "The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Dishman v. State*, 352 Md. 279, 292 (1998). The reviewing court determines "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.* "There must be some evidence to support each element of the defense, however." *McMillan*, 428 Md. at 355. "[W]here the evidence would not logically support a finding that the defendant

committed the offense covered by the instruction, the trial court should not instruct the jury on that offense." *Dishman*, 352 Md. at 293.

Perfect self-defense is a defense to a charge of assault. *Jones v. State*, 357 Md. 408, 421-22 (2000). To prove self-defense, one must show that:

> (1) the defendant actually believed that he or she was in immediate or imminent danger of bodily harm;
>
> (2) the defendant's belief was reasonable;
>
> (3) the defendant must not have been the aggressor or provoked the conflict; 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.

Id. at 422. An aggressor is not entitled the defense of self-defense. *Cunningham v. State*, 58 Md. App. 249, 256 (1984). An initial aggressor is entitled to "invoke the law of self-defense," however, if "it was the victim who escalated the fight to the deadly level." *Watkins v. State*, 79 Md. App. 136, 139 (1989).

At closing, the State offered three theories under which appellant was guilty of second-degree assault. In the first theory, the State argued that appellant committed an assault when he ordered the dog to attack Mathias. In the second theory, the State argued that appellant committed an assault when he punched Mathias. Finally, in the third theory, the State argued that appellant committed an intent to frighten assault when he yelled "shoot him" to the driver.

Here, it is clear that appellant was the initial aggressor. Mathias was walking away from the liquor store after his initial encounter with appellant when the vehicle appellant

was riding in nearly hit him. Then appellant returned to where Mathias was, exited his vehicle, and commanded a large dog to attack Mathias. The evidence, therefore, was that the appellant was the initial aggressor, and thus, he was not entitled to the defense of self-defense. Mathias testified that after appellant commanded the dog to attack him, appellant also attacked him, and the two wrestled to the ground. While Mathias and appellant were wrestling on the ground, Mathias was hit over the head with a beer bottle by the driver of appellant's car. Mathias testified that he heard appellant yell to the driver of the car to shoot him. In a videotape of a police interview of Mathias after the incident, Mathias described stabbing appellant with the broken bottle only after he heard appellant screaming for the driver of the car to shoot him.

Appellant could avail himself of the defense of self-defense only if, there was some evidence that Mathias was the one who escalated the fight to the deadly level. Although there was conflicting evidence as to whether Mathias began stabbing appellant before or after appellant yelled "shoot him," there was no dispute that appellant attempted to strike Mathias with the vehicle he was riding in and then ordered a vicious dog to attack him prior to his own physical assault of Mathias. Consequently, we are not persuaded that Mathias was the one who escalated the fight to the deadly level. As a result, there was no assault

against which appellant could raise a self-defense claim. Accordingly, the trial court did not abuse its discretion in failing to give the self-defense instruction.

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