IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

RANDALL CARL WOLF,
Defendant-Appellant.

Umatilla County Circuit Court
AP140002; A158751

Lynn W. Hampton, Judge.

Argued and submitted December 6, 2016, De La Salle High School, Portland.

Anna Melichar, Deputy Public Defender, argued the cause for appellant. With her on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Keith L. Kutler, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Ortega, Presiding Judge, and Egan, Judge, and Lagesen, Judge.

LAGESEN, J.

Reversed and remanded.

LAGESEN, J.

Defendant appeals a judgment of conviction for fourth-degree assault, ORS 163.160.[1] Before trial, defendant raised the defense of self-defense by providing notice in writing to the state and requested that the trial court deliver Oregon Uniform Criminal Jury Instruction 1107 on self-defense.[2] The trial court declined to instruct the jury on self-defense, concluding that the evidence did not support the instruction. On appeal, defendant assigns error to the trial court's refusal to instruct the jury on self-defense. For the reasons that follow, we agree with defendant that the jury should have been instructed on self-defense and that the trial court's failure to deliver the instruction was not harmless. We therefore reverse and remand.

Defendant struck Koskela, the maintenance man for defendant's apartment building, while Koskela was fixing something in the apartment of McDuffie, another tenant. Koskela's resulting injuries included scratches, cuts, back spasms, and pulled muscles. Defendant was McDuffie's Alcoholics Anonymous sponsor. This much is not disputed. What is disputed, and was disputed at trial, are the circumstances surrounding defendant's act of striking Koskela.

According to Koskela, defendant was arguing with him due to a dispute regarding Koskela's maintenance duties. Defendant entered the apartment unexpectedly and started "screaming obscenities and flailing." Koskela asked defendant to leave, but defendant hit Koskela instead. At one point, defendant pulled Koskela to the ground, which was severely painful for Koskela because of a preexisting back condition. Koskela pulled a gun on defendant, but defendant persisted in coming after Koskela. Defendant

[1] ORS 163.160 has been amended by Oregon Laws 2017, chapter 337, section 1. This amendment is not effective until January 1, 2018.

[2] UCrJI 1107 provides:

> "The defense of self-defense has been raised.
>
> "A person is justified in using physical force on another person to defend himself from what he reasonably believes to be the use or imminent use of unlawful physical force. In defending, a person may only use that degree of force which he reasonably believes to be necessary.
>
> "The burden of proof is on the state to prove beyond a reasonable doubt that the defense does not apply."

then exhibited signs of a seizure, which Koskela believed was faked. Defendant's partner, Hudson, entered the apartment and escorted defendant out of the apartment. The whole event lasted three to five minutes.

According to McDuffie, defendant had entered her apartment without permission and immediately started attacking Koskela. The altercation lasted 15 or 20 minutes before Koskela pulled a gun. During that altercation, defendant had a two-minute seizure, also believed by McDuffie to be faked, and then got up and went after Koskela again, attacking him for another 10 minutes. It was then that Koskela pulled a gun. During the altercation, defendant threw Koskela against the kitchen sink, causing him to fall to the ground.

According to defendant, he had entered the apartment on McDuffie's invitation. Defendant had spent most of the day counseling McDuffie, because she had been contemplating drinking again, but had taken a break to eat and unwind in his own apartment. During that time, Koskela arrived at McDuffie's apartment. When defendant returned to McDuffie's apartment (he had called her first and she had told him to come over), Koskela "aggressively" told defendant to leave, but defendant said that he would not leave until he spoke with McDuffie. After that point, defendant does not remember what happened because he had a seizure and blacked out. When he came to, his partner, Hudson, was tending to him.

According to Hudson, shortly before defendant hit Koskela, defendant had come to the door to let Hudson into the apartment building. Defendant went back into the building while Hudson finished his cigarette. Approximately two minutes later, Hudson heard yelling between two people coming from the direction of McDuffie's apartment. Hudson knew that defendant was counseling McDuffie, and he went to her apartment. There, he saw Koskela pointing a pistol at defendant; defendant then "reached out, popped him one, turned around, took two steps, and went into a seizure." Hudson tended to defendant during and after the seizure, and he helped defendant leave the apartment when he recovered. Hudson took defendant to his apartment, where

they called 9-1-1 for assistance. Defendant was taken to the hospital.

At trial, defendant sought to develop alternate theories of defense: (1) that his conduct was the product of a seizure and thus involuntary; and (2) that he had acted in self-defense. As noted, before trial, defendant filed written notice of his intent to raise a defense of self-defense and requested that the jury be instructed on that defense. The trial court declined to give the instruction, concluding that "there wasn't any evidence about [defendant] acting in self-defense." Defendant assigns error to that ruling. We review for legal error the trial court's decision not to instruct the jury on self-defense, viewing the evidence in the light most favorable to defendant. *State v. Strye*, 273 Or App 365, 368, 356 P3d 1165 (2015).

Under ORS 161.055(3), a criminal defendant may raise the defense of self-defense in one of two ways: (1) by giving the state written notice of the defense before the start of trial; or (2) by presenting "affirmative evidence by a defense witness in the defendant's case in chief." ORS 161.055(3); *State v. Boyce*, 120 Or App 299, 305-06, 852 P2d 276 (1993). Once a defendant has properly raised the defense, either by notice or affirmative evidence, the state must disprove the defense beyond a reasonable doubt. ORS 161.055(3); *Boyce*, 120 Or App at 306. A defendant is entitled to an instruction on the defense, once raised, provided the request correctly states the law and there is evidence to support a self-defense theory. *Strye*, 273 Or App at 369.

In this case, the evidence was sufficient to require the trial court to deliver the instruction. In assessing whether the evidence is sufficient to support an instruction on self-defense once a defendant has properly raised the defense under ORS 161.055, we bear in mind the allocation of the burden of proof. As it is the state's burden to prove that the defense does not apply, not the defendant's burden to prove that it does, the evidentiary threshold for a defendant seeking the instruction necessarily is a low one. The evidence simply must be such that, when the record as a whole is viewed in the light most favorable to the defendant, it would be rational for a factfinder to find that the state

had not met its burden of proving that self-defense does not apply.[3]

The evidence satisfies that standard here. Hudson's observations could be found to suggest that defendant was acting in self-defense in response to Koskela's threat with a gun. His testimony would allow a reasonable factfinder to find that what happened was a short verbal dispute that led to Koskela pulling a gun on defendant, and defendant, in return, punching Koskela. Moreover, given the significant discrepancies in the versions of events to which Koskela, McDuffie, Hudson, and defendant testified, a reasonable factfinder could find that there was too much uncertainty about what transpired to be persuaded that defendant did not act in self-defense. Under those circumstances, the trial court should have delivered the instruction.[4]

In arguing for a contrary conclusion, the state contends that defendant was not entitled to the instruction because he was the initial aggressor. In particular, the state argues that Hudson's observations are not sufficient to support defendant's claim of self-defense, because Hudson did not observe the start of the encounter and, thus, could not contradict the testimony by Koskela and McDuffie that defendant was the initial aggressor.

That argument overlooks the state's burden of proof on a properly raised claim of self-defense. Defendant was not required to prove that he was not the initial aggressor; the state was required to prove that he was. *State v. Freeman*, 109 Or App 472, 475-76, 820 P2d 37 (1991). Further, given

[3] In articulating this standard, we address only the sufficiency of the evidence to support the giving of a self-defense instruction in a case where the defense otherwise has been properly raised by the defendant through pretrial notice or affirmative evidence, as required by ORS 161.055(3). We are not addressing the evidentiary standard that applies to the determination of whether a defendant's case-in-chief has presented sufficient affirmative evidence to raise the defense under ORS 161.055(3), in a case in which the defendant has not provided pretrial notice. *See Boyce*, 120 Or App at 305-06 (where the defendant has not raised self-defense through pretrial notice, the question is whether the defendant "presented any affirmative evidence of the defense").

[4] As we recognized in *Strye*, the fact that defendant presented two potentially conflicting theories does not mean that defendant was not entitled to an instruction on self-defense. *Strye*, 273 Or App at 371-72. What matters is that the record is such that it would be rational for a factfinder to find that the state had not sustained its burden of proving that self-defense does not apply.

the discrepancies in the testimony, a factfinder could discredit the testimony of Koskela and McDuffie and conclude that she was unpersuaded that defendant was the initial aggressor in the encounter.

The error in omitting the instruction was not harmless. As explained, this was not a case in which a rational factfinder would have to find that self-defense did not apply. Although defendant undisputedly hit Koskela, what else transpired is murky, given the conflicting evidence. Under those circumstances, we are unable to conclude that there is little likelihood that the error affected the verdict. *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003) (error is harmless if there is "little likelihood" that it affected the jury's verdict).

Reversed and remanded.