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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1605**

State of Minnesota,
Respondent,

vs.

Dominic NMN Gemelli,
Appellant.

**Filed October 20, 2009
Reversed and remanded
Stoneburner, Judge**

Clay County District Court
File No. 14CR08728

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Brian Melton, Clay County Attorney, Clay County Courthouse, 807 North 11th Street, Box 280, Moorhead, MN 56561 (for respondent)

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Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant was convicted of and sentenced for second-degree assault for stabbing his brother-in-law in an altercation that occurred in appellant's bedroom. On appeal,

appellant argues that the district court committed plain, reversible error by including the duty to retreat in the self-defense instruction given to the jury. We agree and therefore reverse and remand.

FACTS

Appellant Dominic Gemelli and his wife entertained his wife's parents, brother, and nephew for dinner and drinks at the Gemellis' apartment. By late that night, everyone except wife's parents was very intoxicated. Around midnight, Gemelli felt he was being excluded from the conversation and went to his bedroom to sleep.

Gemelli later testified that he came out of the bedroom twice to complain about the noise made by the family, and, on the second occasion, he told his wife that he would be leaving her in the morning. He testified that his wife's brother, Jesse Gibson, and nephew, Tommy Gibson, followed him back to the bedroom and asked Gemelli why he was being such a "dick," or "prick." Gemelli testified that he felt threatened by the Gibsons and when he found his camping knife while packing his belongings, he decided to keep it near him. He took the knife to bed with him and fell asleep.

Gemelli's wife and her family testified that Gemelli came out of the bedroom once to complain about noise and that Gemelli's wife later entered the bedroom looking for something. Gemelli's wife testified that while she was in the bedroom Gemelli kicked or hit her, and she fell onto the desk. She crawled out of the bedroom crying, saying that Gemelli had physically assaulted her, and asked Jesse Gibson to talk to Gemelli.¹

¹ Gemelli had no recollection of his wife coming into the bedroom.

Jesse Gibson then entered the bedroom. According to Gibson, Gemelli was standing near the door with his hands at his sides. Gemelli “chest bumped” Gibson, and then swung his arm and stabbed him. Gibson began punching Gemelli. They struggled and fell onto the bed, and Gemelli stabbed Gibson again.

Gemelli’s version of the stabbing is that he was asleep in his bed when Gibson jumped on him and began punching him in the face and head. Gemelli testified that he was unable to punch or to kick Gibson off of him, so he grabbed the knife that was by his side and stabbed Gibson in the side. Gibson did not stop punching Gemelli, so Gemelli stabbed him again in the back, whereupon Gibson rolled off of him.

Gibson thought he had suffered a mortal wound. Tommy Gibson came into the bedroom and took the knife from Gemelli. The police were called, and Gemelli was arrested and charged with two counts of second-degree assault.

The district court granted Gemelli’s request for a self-defense instruction, which was not objected to by the prosecutor. Neither party objected to the wording of the district court’s proposed self-defense instruction, which included an instruction that Gemelli had a duty to retreat. The jury found Gemelli guilty of both counts. He was sentenced, and this appeal followed.

D E C I S I O N

The parties agree that because the self-defense instruction was not objected to at trial, our review is for plain error affecting substantial rights or an error of fundamental law. Minn. R. Crim. P. 26.03, subd. 18(3), 31.02; *State v. Baird*, 654 N.W.2d 105, 113, (Minn. 2002) (citing *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)); *State v.*

Malaski, 330 N.W.2d 447, 451 (Minn. 1983). Under the plain-error test, Gemelli must show: (1) error; (2) that is plain; and (3) that affects substantial rights. *Baird*, 654 N.W.2d at 113 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). Even if all three prongs are satisfied, we must determine whether a new trial is required to ensure the fairness and integrity of the judicial proceeding. *Id.*

The state concedes that including a duty to retreat in the self-defense instruction in this case constituted error that was plain.² *Id.* (holding that including a duty to retreat in a self-defense instruction was plain error where the case involved an altercation in the defendant's home). The only issues are whether the error is prejudicial and affected the outcome of the case and, if so, whether a new trial is required. *See Griller*, 583 N.W.2d at 741 (stating that an error affects substantial rights if it was prejudicial and affected the outcome of the case).

Gemelli relies on *Baird* to argue that the third prong of the plain-error test is met and that a new trial is required. *See Baird*, 654 N.W.2d at 114 (rejecting the state's argument that, as a matter of law, Baird's use of excessive force precluded his reliance on self-defense so that the erroneous inclusion of the duty to retreat in the self-defense instruction did not prejudice Baird). In *Baird*, the supreme court stated that "it is simply impossible to determine whether the jury rejected Baird's version of the facts or whether it accepted his version but concluded that he was guilty nevertheless because he failed to

² The district court instructed the jury: "The state has the burden of proving beyond a reasonable doubt that [Gemelli] did not act in self-defense. . . . The legal excuse of self-defense is available only to those who act honestly and in good faith. This includes the duty to retreat or avoid the danger if reasonably possible."

retreat.” *Id.* Noting that the state emphasized Baird’s duty to retreat in closing argument, the supreme court concluded that the jury may not have considered whether Baird’s conduct was reasonable under the circumstances and held that fairness required a new trial. *Id.*

In this case, the state similarly argues that under either version of the events, this court should hold, as a matter of law, that Gemelli used excessive force such that the legal excuse of self-defense is not available to Gemelli. But we conclude that the issue of excessive force in this case was properly submitted to the jury and decline to hold that, as a matter of law, Gemelli was not entitled to assert self-defense due to his use of a knife. *See State v. Soukup*, 656 N.W.2d 424, 431 (Minn. App. 2003) (stating that “whether a defendant’s use of force was reasonable is a fact question”).

Unlike the closing argument in *Baird*, the prosecutor’s closing in this case did not mention, let alone emphasize, the duty to retreat. Indeed, if the jury accepted Gemelli’s testimony that Gibson jumped on him while he was sleeping and immediately began punching him in the head, Gemelli would not have had an opportunity to retreat. But despite this distinction from *Baird*, as in that case, it is impossible to know if the jury in this case was influenced in its verdict by the erroneous instruction. If the jury believed Gemelli that he felt threatened after the Gibsons entered the bedroom and called him names, the jury may have concluded that Gemelli had the opportunity to remove himself from the apartment before Jesse Gibson entered the bedroom again. And if the jury believed Gibson that Gemelli was awake and standing when Gibson entered the bedroom just before the assault, the jury may have concluded that Gemelli could have left the

bedroom to avoid Gibson. For these reasons, we conclude that the third prong of the plain-error test has been met and that fairness for Gemelli, as it did for Baird, “requires that [he] be given an opportunity to present his account of the facts to a jury under the proper instructions.” *Baird*, 654 N.W.2d at 114.

Reversed and remanded.