STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0969

State of Minnesota,
Respondent,

vs.

Jason Alexander Lott,
Appellant.

Filed May 22, 2017
Affirmed
Stauber, Judge

Dakota County District Court
File No. 19HA-CR-15-1962

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Dain Olson, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Stauber, Judge; and Toussaint, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

Appellant argues that the district court abused its discretion by refusing to instruct the jury on the abandonment defense to the charge of attempted second-degree murder, claims that his convictions of first- and second-degree assault are not supported by sufficient evidence, and otherwise assigns error in a pro se supplemental brief. We affirm.

FACTS

Appellant Jason Alexander Lott and C.K.E.B. had a cohabiting romantic relationship that ended on or about June 14, 2015. During the night of June 15 and the morning of June 16, Lott and C.K.E.B. sent quarrelsome text messages back and forth and argued on the phone. Around 11 a.m. on June 16, C.K.E.B. went into her bedroom and lay down on the bed next to her and Lott's four-year-old child. Two of C.K.E.B.'s other children, including 14-year-old D.B., were also present in the apartment.

Suddenly, Lott entered the apartment, retrieved a chef's knife from the kitchen, and rushed into the bedroom. Lott said, "If I can't have you, nobody else can," and began stabbing C.K.E.B.'s limbs as she struggled and rolled to the floor. Lott kneeled down and continued to stab C.K.E.B. During the attack, D.B. entered the bedroom and began jumping on and hitting Lott and screaming. Lott turned toward D.B. and held up the knife with its blade pointing in D.B.'s direction. He then turned back to C.K.E.B. and stabbed her in the abdomen. C.K.E.B. grabbed the knife blade and held onto it. Lott

tried to get the knife back, but the blade broke off from the handle. Lott threw down the handle, ran out of the bedroom, and fled the apartment and the state.

When police officers arrived at the scene, they used a compress and tourniquets to control C.K.E.B.'s substantial blood loss. C.K.E.B. was taken by ambulance to a hospital, where her treatment included a CT scan, exploratory surgery on her abdomen, orthopedic surgery on her left knee, stitches and staples, postoperative care, and occupational and physical therapy. C.K.E.B. remained in the hospital for two weeks.

Lott was apprehended in Indiana and brought back to Minnesota, where respondent State of Minnesota charged him with attempted second-degree murder (with intent), first-degree assault (great bodily harm), and second-degree assault (substantial bodily harm) as to C.K.E.B. Lott also was charged with second-degree assault (dangerous weapon) as to D.B. After a five-day trial, a jury found Lott guilty as charged, and the district court sentenced Lott to 207 months' imprisonment for attempted second-degree murder and 21 months' consecutive for second-degree assault with a dangerous weapon. Lott appeals.

D E C I S I O N

I.

Lott challenges the district court's refusal to instruct the jury on the abandonment defense to the charge of attempted second-degree murder (with intent). "Denial of a requested jury instruction is reviewed for abuse of discretion." *State v. Wenthe*, 865 N.W.2d 293, 302 (Minn. 2015), *cert. denied*, 136 S. Ct. 595 (2015). "A defendant is entitled to an instruction on his theory of the case if there is evidence to support it." *State*

v. Lilienthal, 889 N.W.2d 780, 787 (Minn. 2017) (quotation omitted). Thus, "[w]hen evidence exists to support an instruction, a [district] court abuses its discretion in not giving the instruction. In deciding whether an instruction is warranted, [appellate courts], like the [district] court, must view the evidence in the light most favorable to the defendant." *State v. Radke*, 821 N.W.2d 316, 328 (Minn. 2012) (citation omitted). But if the evidence, so viewed, does not support the defendant's theory of the case, the district court does not abuse its discretion by refusing to instruct the jury on that theory. *Id.* at 328-29; *see also Lilienthal*, 889 N.W.2d at 788 (concluding that "the district court did not abuse its discretion in refusing to give a defense-of-dwelling jury instruction" because, "even when viewed in a light most favorable to [the defendant], the record does not contain any evidence" that the victim lacked a right to possess the dwelling at which he was killed).

Minnesota statute provides that "[i]t is a defense to a charge of attempt that the crime was not committed because the accused desisted voluntarily and in good faith and abandoned the intention to commit the crime." Minn. Stat. § 609.17, subd. 3 (2014). If a defendant produces evidence of his voluntary and good-faith abandonment of a criminal attempt, the state must prove beyond a reasonable doubt that the defendant did not so abandon the attempt. *See State v. Currie*, 267 Minn. 294, 301 n.1, 306, 126 N.W.2d 389, 395 n.1, 398 (1964) (concluding, as to statutory abandonment defense to accomplice liability, that "once the state has established a prima facie case [of accomplice liability], the burden rests on the defendant of going forward with the evidence of withdrawal to a point where it can be said a reasonable doubt exists and that, having reached that point,

the burden rests on the state of proving beyond a reasonable doubt that the defendant remained as a participant in the consummation of the crime"); *cf.* Paul H. Robinson, *Criminal Law Defenses* § 81(a), at 349 & n.14 (1984 & Supp. 2016) ("The burden of production for the defenses of renunciation, abandonment, and withdrawal is always on the defendant."

In this case, the district court refused Lott's request to instruct the jury on the abandonment defense on the ground that Lott failed to meet his burden to produce evidence that he had abandoned his attempt to kill C.K.E.B., within the meaning of Minn. Stat. § 609.17, subd. 3. On appeal, Lott asserts that he pointed to evidence of abandonment—namely, testimony by C.K.E.B. and D.B. showing that "Lott did not continue to try to kill [C.K.E.B.] after the knife broke despite having ample opportunity to do so." According to Lott, "a reasonable juror could have concluded that, after the knife broke, Lott 'voluntarily and in good faith abandoned the intention to commit' second-degree intentional murder" because "rather than continue to try to kill [C.K.E.B.], Lott left the apartment and the state." The state responds that Lott undisputedly took a substantial step toward the commission of second-degree murder before fleeing and argues that—as a matter of law—a defendant cannot abandon an attempt that he has "already committed" by taking a substantial step with the requisite intent.

Contrary to the state's position, a defendant may abandon his attempt to commit a crime even if he already has taken a substantial step toward the commission of the crime. *See State v. Strommen*, 648 N.W.2d 681, 683-85, 689 (Minn. 2002) (concluding that prosecutor "misstate[d] . . . the law on abandonment" by telling jury that, because

defendant's entry of store was a substantial step toward commission of robbery, "it did not matter what happened after [defendant] walked into the store"); *State v. Cox*, 278 N.W.2d 62, 66-67 (Minn. 1979) (affirming factfinder's rejection of abandonment defense to charge of attempted first-degree murder on ground that factfinder apparently inferred that defendant involuntarily abandoned attempt due to intervening circumstances). Indeed, the abandonment defense to an attempt charge would serve no logical purpose if the defense were unavailable to a defendant who took a substantial step toward the commission of originally-intended crime, because criminal liability for an attempt to commit a crime hinges on the defendant's taking of a substantial step toward the commission of the crime. *See* Minn. Stat. § 609.17, subd. 1 (2014) ("Whoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime . . . ."); *see Robinson*, *supra*, at 347 n.3 ("Where the defendant has not yet satisfied the objective elements of attempt, for example, where there has been no step beyond preparation, there is no attempt and abandonment is merely a failure of proof defense.").

Even so—and contrary to Lott's position—"there come[s] a point at which it is too late" for abandonment of an attempt to commit the originally-intended crime. Wayne R. LaFave, *Criminal Law* § 11.5(b), at 645 (5th ed. 2010). Here, the evidence shows that Lott stabbed C.K.E.B. several times with a chef's knife and that he stopped stabbing her and fled when the knife broke, leaving C.K.E.B. with the blade and Lott with the handle. While Lott is correct that he could have persisted in his criminal effort to kill C.K.E.B., "either by getting another knife from the kitchen or via some other means," he fails to

acknowledge expert testimony at trial that the stab wounds actually inflicted on C.K.E.B. were potentially life-threatening. If C.K.E.B. had died from those wounds, the crime of second-degree murder would have been complete without any further criminal effort by Lott. *See* Minn. Stat. § 609.19, subd. 1(1) (2014) (providing that one who "causes the death of a human being with intent to effect the death of that person or another, but without premeditation," is guilty of second-degree murder). Because Lott's decision to end the attack when the knife broke has no causal link with C.K.E.B.'s survival from the wounds that she sustained before Lott decided to end the attack, Lott cannot show a causal link between his decision to end the attack and his failure to complete the crime of second-degree murder. *See* Minn. Stat. § 609.17, subd. 3 ("It is a defense to a charge of attempt that the crime was not committed *because* the accused desisted voluntarily and in good faith and abandoned the intention to commit the crime." (emphasis added)).

Accordingly, we hold that a defendant cannot abandon an attempt to commit a crime, within the meaning of Minn. Stat. § 609.17, subd. 3, after his substantial step toward the commission of the originally intended crime deprives him of the ability to voluntarily desist in good faith and abandon his intent to commit the crime. In this case, Lott relies on evidence that he inflicted potentially life-threatening stab wounds on C.K.E.B. and desisted only because his attempt was frustrated by the broken knife. We therefore conclude that Lott failed to meet his burden of production on the abandonment

defense. Because Lott was not entitled to a jury instruction on the abandonment defense, the district court did not abuse its discretion by refusing to give one.[1]

II.

Lott challenges the sufficiency of the evidence to support his conviction of second-degree assault (dangerous weapon) against D.B. The elements of that offense are (1) assault of another (2) with a dangerous weapon. Minn. Stat. § 609.222, subd. 1 (2014). The element of assault may be accomplished by doing an act "with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.02, subd. 10(1) (2014). "'Bodily harm' means physical pain or injury, illness, or any impairment of physical condition." *Id.*, subd. 7 (2014).

"Intent is a state of mind that is generally proved using circumstantial evidence 'by drawing inferences from the defendant's words and actions in light of the totality of the circumstances.'" *State v. Smith*, 825 N.W.2d 131, 136 (Minn. App. 2012) (quoting *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997)), *review denied* (Minn. Mar. 19, 2013). "Pointing a weapon at a police officer or another person has been held to supply

[1] The state argues in the alternative that "[Lott]'s request for the [abandonment-defense] jury instruction should have been denied for failure to properly notice the defense as required." Lott implicitly concedes that he did not raise the issue of abandonment until after the close of evidence at trial but argues that his discovery violation, if any, is not an alternative basis for affirmance absent evidence that the state was prejudiced by the violation. We agree with the state that Lott should have made pretrial disclosure of his intended assertion of the abandonment defense to the charge of attempted second-degree murder. *See* Minn. R. Crim. P. 9.02, subd. 1(5) (providing that a felony defendant "must inform the prosecutor in writing of any defense, other than not guilty, that the defendant intends to assert"). But because we conclude that the district court's refusal to give an abandonment instruction was justified on the merits, we decline to decide whether refusal also would have been justified on the identified procedural ground.

the requisite intent to cause fear." *In re Welfare of T.N.Y.*, 632 N.W.2d 765, 770 (Minn. App. 2001) (collecting cases). And "[t]he victim's reaction to a threat is circumstantial evidence of intent." *Smith*, 825 N.W.2d at 136.

> When the State relies entirely on circumstantial evidence to prove the element of intent, [appellate courts] use a two-step test to determine whether the State presented sufficient evidence of intent. First, [appellate courts] identify the circumstances proved, deferring to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proven by the State. Second, [appellate courts] examine the reasonable inferences that might be drawn from the circumstances proved, giving no deference to the fact-finder's choice between reasonable inferences. The conviction is sustained if the reasonable inferences that can be drawn from the circumstances proved as a whole are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.

State v. Griffin, 887 N.W.2d 257, 264 (Minn. 2016) (citations omitted).

Here, Lott argues that the state failed to prove beyond a reasonable doubt that he did an act with intent to cause fear in 14-year-old D.B. Lott acknowledges the state's presentation of testimonial evidence that, in response to D.B.'s attempts to protect C.K.E.B., Lott turned toward D.B. and held up the knife with its blade pointing in D.B.'s direction. But according to Lott, even "[i]f [his] actions are consistent with the intent to cause fear of immediate bodily harm or death, they are at least equally consistent with a person momentarily startled."

Lott ignores the totality of the circumstances proved in this case: Lott was kneeling on the bedroom floor stabbing C.K.E.B. with a chef's knife when D.B. "came in[to the bedroom] saying, 'Get off my mama. Get off my mama.'" After D.B. began

jumping on and hitting Lott from behind, Lott stopped stabbing C.K.E.B, turned toward D.B. with the bloody knife in his hand, and "brought the knife up to [D.B.]" or "kind of held it up" near his shoulder with the blade pointing "between the bed and [D.B.]" At that time, Lott was close enough to D.B. that he could have reached out and touched her. Both C.K.E.B. and D.B. testified that they thought that Lott was going to stab D.B., and D.B. felt "[s]cared" and "kind of jumped back." Lott turned back to C.K.E.B. only after C.K.E.B. "kind of kicked him" in an effort to distract him away from D.B. He then stabbed C.K.E.B. in the abdomen, lost the knife blade in a struggle with C.K.E.B., threw down the knife handle, and fled.

We conclude that the reasonable inferences drawn from the circumstances proved as a whole are consistent with the hypothesis that Lott raised the knife and pointed it in D.B.'s direction with the intent to cause her to fear immediate bodily harm or death. We further conclude that the reasonable inferences that can be drawn are inconsistent with any rational hypothesis except that Lott brandished the knife at D.B. with the intent to cause her to fear immediate bodily harm or death. Sufficient evidence therefore supports Lott's conviction of second-degree assault (dangerous weapon).[2]

---

[2] Lott also seeks sufficiency-of-the-evidence review of his conviction of first-degree assault (great bodily harm). As correctly noted by the state, the district court did not formally adjudicate Lott's guilt of, or sentence Lott for, that offense. *See* Minn. Stat. § 609.035, subd. 1 (2014) (providing that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses"). Because we affirm Lott's conviction of attempted second-degree murder, we decline to review the sufficiency of the evidence to support his conviction of first-degree assault. *See State v. Moua*, 678 N.W.2d 29, 42 n.10 (Minn. 2004) ("Appellant also challenges the sufficiency of evidence supporting his conviction for drive-by shooting first-degree murder. Because appellant was never adjudicated guilty of the drive-by

III.

Finally, Lott identifies three "concerns" in a pro se supplemental brief: (1) a state's witness referred to C.K.E.B. as "the victim" several times after the district court directed the prosecutor to advise state's witnesses to refer to C.K.E.B. only by name; (2) the court answered two mid-deliberation questions from the jury in writing rather than orally in open court; and (3) the DNA evidence undermines the state's case against Lott, because (a) DNA from an unidentified person was found on the knife handle; (b) Lott's DNA was not found on the knife handle; (c) innocent explanations exist for the presence of C.K.E.B.'s blood on Lott's shirt; and (d) the state presented no DNA evidence regarding a blood-like substance seen on the shirt that D.B. was wearing during the attack.

We treat Lott's first pro se argument as a claim of prosecutorial misconduct. "The state has a duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003) (citing *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978)). As a result, such statements by a witness for the state—even if not purposely elicited by the prosecutor—may constitute prosecutorial misconduct. *See State v. Mahkuk*, 736 N.W.2d 675, 689 (Minn. 2007) (stating that whether the state's witness's "violation of the [district] court's order" prohibiting the witness from testifying about a gang's possession of firearms "was intentional or not," the witness's "reference to firearms during his testimony" was "extremely troubling" and constituted "misconduct attributable to the prosecutor").

---

shooting first-degree murder and because we hold the evidence sufficient to support a conviction of premeditated first-degree murder, it is unnecessary to address this issue.").

"Where such misconduct is alleged, the standard of review depends on whether the defendant objected at trial." *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016).

In this case, Lott did not object to any one of the state's witness's three references to C.K.E.B. as "the victim." "When a defendant alleges unobjected-to prosecutorial misconduct, [appellate courts] apply a modified plain-error standard that requires the defendant to show an error was made that was plain." *Caldwell v. State*, 886 N.W.2d 491, 501 n.6 (Minn. 2016). "An error is plain if it is clear or obvious; this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct." *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014). "If plain error is established, the burden then shifts to the State to demonstrate that the error did not affect the defendant's substantial rights." *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016). To do so, "the State must show that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *Id.* at 803-04 (quotation omitted).

We need not decide whether the prosecutor's failure to prevent the three "victim references" was plainly erroneous, because we conclude that no reasonable likelihood exists that the absence of any such error would have had a significant effect on the verdict. At trial, Lott did not dispute that C.K.E.B. had suffered a stabbing attack, and he did not dispute that he was C.K.E.B.'s attacker. Instead, Lott's theory of the case was that he did not intend to kill but he inflicted substantial, but not great, bodily harm. And during closing argument, Lott's attorney did not ask the jury to acquit Lott of second-degree assault of C.K.E.B.:

> As to the two charges of assault in the second degree, you have all the evidence before you. I would submit to you that you should do your duty.
> . . . [R]egarding attempted second degree murder and assault in the first degree, the evidence the State has provided you does not prove those elements beyond a reasonable doubt. And as to those charges I ask you to find Mr. Lott not guilty.

On these facts, we are confident that the state's witness's three fleeting uses of the term "victim" could not have impacted the verdict. *See State v. Hall*, 764 N.W.2d 837, 845 (Minn. 2009) ("The use of 'victim' to describe someone . . . who had been shot and killed is not unfairly prejudicial to [defendant] on this record. There may be a situation in which the reference to 'victim' is so overused that it results in unfair prejudice to a defendant . . ., but that is not this case.").

We treat Lott's second pro se argument as a claim that the district court committed reversible error by the manner in which it handled the jury's two mid-deliberation questions. The court read the jury's questions on the record and in the presence of Lott, his attorney, and the prosecutor. After receiving feedback from both attorneys, the court proposed that it provide the jury with specific written answers and asked both attorneys whether they had "any objections or arguments or concerns regarding the answers." Both attorneys answered in the negative. The record also contains the jury's two written questions and the court's two written answers, which are identical to those discussed by the court and counsel on the record and in Lott's presence.[3]

[3] The first question is: "Can we receive a calendar for June of 2015?" The court responded "The answer to your first question is No. The record is complete and you must base your decision on the record which has been presented." The second question is: "What date and time did Mr. Lott call in to work?" The court responded: "The answer

Lott cites no authority to support a claim that the district court committed reversible error by the manner in which it handled the jury's two mid-deliberation questions. We conclude that, because Lott was personally present and represented by acquiescent counsel when the district court created a complete and accurate record of the jury's written questions and the court's written answers, there was no reversible error. *See State v. Sessions*, 621 N.W.2d 751, 755–57 (Minn. 2001) (stating that "the general rule is that a [district] court judge should have no communication with the jury after deliberations begin unless that communication is in open court and in the defendant's presence," and holding that "the [district] court committed error by engaging in substantive communications with a deliberating jury outside of open court, without the appellant's knowledge, consent or presence, and without the presence of appellant's counsel and the prosecutor, but that, under the specific circumstances, the error was harmless beyond a reasonable doubt" because "[t]he state's evidence was strong" and "the court's communications with the jury were not prejudicial to the rights of the appellant").

Lott's third pro se "argument" is no more than an invitation to retry the case by looking at the evidence and crediting his new theory of the case—namely, that his crimes were committed by someone else. We reject that invitation. *See State v. Flowers*, 788 N.W.2d 120, 133 (Minn. 2010) ("We cannot retry the facts, but must take the view of the

---

to your second question is that you must rely on your own recollections of what the Evidence is and rely solely on your own memories."

evidence most favorable to the state and must assume that the jury believed the state's witnesses and disbelieved any contradictory evidence." (quotation omitted)).

Affirmed.