**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-1429**

State of Minnesota,
Respondent,

vs.

Chad Nicholas Nelson,
Appellant.

**Filed August 20, 2018**
**Affirmed**
**Reilly, Judge**

Anoka County District Court
File No. 02-CR-15-4192

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Bjorkman, Judge; and Klaphake, 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

**REILLY**, Judge

Appellant Chad Nicholas Nelson challenges his conviction of second-degree felony murder, arguing that (1) the evidence is insufficient to support the verdict; (2) the state failed to present sufficient evidence that appellant did not act in self-defense; and (3) the district court's jury instructions were erroneous. We affirm.

## FACTS

On July 1, 2015, appellant Chad Nicholas Nelson got into an argument at a bar with another patron, O.H. The argument continued into the parking lot. O.H.'s companions, S.H. and J.P., intervened and encouraged O.H. to walk away from appellant. Appellant got into his truck and began to drive out of the parking lot, but then stopped his truck alongside O.H. and continued the argument. No one attempted to block appellant from leaving the parking lot. As the argument continued, O.H.'s third companion, R.M., walked up to appellant's truck and punched him through the open window. Appellant responded by immediately firing two shots at R.M. with his firearm and driving out of the parking lot. R.M. died as a result of this shooting.

The following morning, appellant sought emergency medical treatment for a head injury. Appellant told a police officer at the hospital that he had been "struck in the head" and admitted that he had taken "a gun out and fired two shots at the individual who had hit him." Police officers recovered a black semiautomatic handgun from appellant's truck and forensic analysis later confirmed that cartridges and a fired bullet recovered from the bar parking lot matched this firearm.

The state charged appellant with one count of second-degree murder, drive-by shooting, and one count of second-degree intentional murder. Before trial, the state amended the complaint to add an additional charge of second-degree felony murder with the predicate offense of second-degree assault with a dangerous weapon. Following a ten-day jury trial in April 2017, the jury convicted appellant of second-degree felony murder and acquitted him of the remaining two charges. The district court sentenced appellant to the presumptive guideline sentence of 150 months in prison. This appeal follows.

## D E C I S I O N

### I. The state met its burden of establishing beyond a reasonable doubt that appellant intended to cause fear of immediate bodily harm or death in the victim.

Appellant challenges the sufficiency of the evidence underlying his conviction. Appellant urges this court to apply the circumstantial evidence standard of review on the ground that an element of the offense rests on circumstantial evidence. *See, e.g.*, *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017); *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010) (holding that a conviction based on circumstantial evidence warrants heightened scrutiny); *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997) (recognizing that intent is generally proved by circumstantial evidence). We disagree. "[W]hen a disputed element is sufficiently proven by direct evidence alone . . . , it is the traditional standard, rather than the circumstantial-evidence standard, that governs." *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016). Because the state proved each of the disputed elements through direct evidence, we employ the traditional standard of review.

Under the traditional standard, our review of a sufficiency-of-the-evidence challenge is limited to a "painstaking analysis of the record" to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to support the conviction. *State v. DeRosier*, 695 N.W.2d 97, 108 (Minn. 2005) (quotation omitted). We will not disturb the verdict if the fact-finder, "acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012).

A conviction of felony murder with second-degree assault as the predicate offense requires proof beyond a reasonable doubt of both the elements of felony murder and the elements of second-degree assault. *See State v. Davis*, 864 N.W.2d 171, 177-78 (Minn. 2015). A person is guilty of second-degree felony murder if he "causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense. . . ." Minn. Stat. § 609.19, subd. 2(1). A person is guilty of second-degree assault if he "assaults another with a dangerous weapon. . . ." Minn. Stat. § 609.222, subd. 1 (2016). "Assault" is defined as "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2016). Second-degree assault (fear) is a specific-intent crime and requires a showing that the defendant intended to cause that particular result. *State v. Fleck*, 810 N.W.2d 303, 308-09 (Minn. 2012). Intent may be inferred from the "natural and probable consequences" of the defendant's actions. *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998).

The evidence demonstrates that appellant and O.H. engaged in a verbal argument inside the bar and in the parking lot. Appellant got into his truck and began to pull away, but stopped alongside O.H. to continue arguing. S.H. and J.P. attempted to stop the argument. R.M., who was not participating in the argument, walked up to appellant's truck and punched him in the face. Appellant responded by shooting R.M. twice with his firearm and speeding out of the parking lot. The following morning, appellant admitted to a police officer at the hospital that he took his "gun out and fired two shots at the individual who had hit him." Appellant's statement to the witness that he "fired two shots" at R.M. was direct evidence of his intent. *See Horst*, 880 N.W.2d at 40 (recognizing that defendant's statement to witness constitutes direct evidence of mens rea).

Applying the traditional standard of review, and giving "due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt," the jury could reasonably have concluded that appellant was guilty of the charged offense. *Ortega*, 813 N.W.2d at 100. We therefore conclude that the evidence was sufficient to support appellant's felony-murder conviction.

## II. The state presented sufficient evidence disproving an element of appellant's self-defense claim beyond a reasonable doubt.

Appellant contends that the evidence was insufficient to convict him because the state failed to prove beyond a reasonable doubt that he did not act in self-defense. Our review of the sufficiency of the evidence after a criminal conviction is limited to a thorough review of the record to determine whether the evidence, when viewed in the light most favorable to the verdict, is sufficient to support it. *State v. Webb*, 440 N.W.2d 426, 430

(Minn. 1989). We assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Appellant asserted a claim of self-defense. Minnesota's self-defense statute permits the use of "reasonable force" against a person, without the person's consent, when "resisting or aiding another to resist an offense against the person." Minn. Stat. § 609.06, subd. 1(3) (2016). The elements of self-defense are:

> (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger.

*State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006) (quotation omitted). Self-defense also requires that the degree of force used "must not exceed that which appears to be necessary to a reasonable person under similar circumstances." *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). The defendant bears the burden of presenting evidence to support a claim of self-defense. *Johnson*, 719 N.W.2d at 629. Once this burden is satisfied, the state bears the "ultimate burden" of disproving one or more of the self-defense elements beyond a reasonable doubt. *State v. Radke*, 821 N.W.2d 316, 324 (Minn. 2012).

The state has satisfied its burden here. The fourth element of self-defense requires the absence of a reasonable possibility of retreat to avoid the danger. *See Johnson*, 719 N.W.2d at 629. Generally, the law requires a person to retreat "if reasonably possible before acting in self-defense." *State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014). "As a result, if a person is outside his or her home and can safely retreat, then the person's use

of force is unreasonable as a matter of law." *Id*. Appellant argues that he could not retreat without risking injury to himself or others. The record does not support this argument. Appellant was seated behind the wheel of an operational vehicle, with its motor on, while the other men were standing in the parking lot. No one attempted to obstruct appellant's truck or block him from leaving the parking lot. We assume that the jury believed the state's evidence and disbelieved any evidence to the contrary. *See Moore*, 438 N.W.2d at 108. There was sufficient evidence for the jury to conclude that appellant had a reasonable possibility of retreat.

Because the state disproved one of the self-defense elements beyond a reasonable doubt, appellant's self-defense claim fails and we need not address the remaining factors. *See Radke*, 821 N.W.2d at 325 (concluding that where state disproved one element of a self-defense claim, any evidence bearing on the other three elements "would not have changed the outcome" of trial). The record supports the jury's rejection of appellant's self-defense claim.

## III. Although the district court's jury instruction regarding self-defense was plainly erroneous, appellant is not entitled to a new trial because the erroneous instruction did not affect his substantial rights.

Appellant asserts that he is entitled to a new trial because the district court's self-defense jury instructions were erroneous. While we agree that the jury instructions were plainly erroneous, we determine that appellant is not entitled to a new trial because he cannot satisfy the third prong of the plain-error test and reversal is not necessary to ensure the fairness and integrity of the judicial proceedings.

A district court is afforded broad discretion to formulate appropriate jury instructions and only abuses that discretion if the jury instructions "confuse, mislead, or materially misstate the law." *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). Upon review, we consider whether the instructions, when taken as a whole, fairly and adequately explain the law. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). Because appellant did not raise this objection at trial, we review the instructions for plain error. *See State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012) (noting that invited-error doctrine does not apply if error meets plain-error test). The plain-error test gives a reviewing court the discretion to review unobjected-to errors if (1) there was an error, (2) the error was plain, and (3) the error affected the "substantial rights" of the defendant. *Id.* If all three prongs are satisfied, a reviewing court decides whether to address the error to ensure "fairness and the integrity of the judicial proceedings." *Id*. (quotation omitted). If the court concludes that any prong of the plain-error analysis is not satisfied, it need not consider the remaining prongs. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

Minnesota law distinguishes between two different forms of self-defense. Reasonable force may be used upon another without the other person's consent "when used by any person in resisting or aiding another to resist an offense against the person." Minn. Stat. § 609.06, subd. 1(3). A claim of self-defense arising under section 609.06, subdivision 1(3), is reflected in the jury instruction in CRIMJIG 7.06, entitled "Self-Defense—Death Not the Result." 10 Minnesota Practice, CRIMJIG 7.06 (6th ed. 2017). Alternatively, section 609.065 provides that a person may intentionally take the life of another when doing so is "necessary in resisting or preventing an offense which the actor

reasonably believes exposes the actor or another to great bodily harm or death. . . ." Minn. Stat. § 609.065 (2016). A claim arising under this statutory section corresponds with the jury instruction in CRIMJIG 7.05, entitled "Self-Defense—Justifiable Taking of Life." 10 Minnesota Practice, CRIMJIG 7.05 (6th ed. 2017).

Appellant asked the district court to use the justifiable-taking-of-life instruction.[1] Based on this request, the district court provided the justifiable-taking-of-life self-defense instruction rather than the general self-defense instruction in its charge to the jury. Minnesota law "clearly mandat[es] that the general self-defense instruction be given in cases where the defendant claims the death was an unintended or accidental consequence of actions taken in defense of self." *State v. Pollard*, 900 N.W.2d 175, 180 (Minn. App. 2017). Thus, it "is error to provide the justifiable-taking-of-life instruction, instead of the general self-defense instruction, when the defendant asserts self-defense but claims that the death was not the intended result." *Id.* at 179 (citations omitted). Given this controlling caselaw, we conclude that the district court committed plain error by giving the justifiable-taking-of-life instruction instead of the general self-defense instruction.

We next consider whether the error affected appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To satisfy this prong, appellant must show that the error was prejudicial and affected the outcome of the case. *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005). A plain error is prejudicial if there is a "reasonable likelihood that the giving of the instruction in question would have had a significant effect

[1] We note that appellant specifically asked the district court three times to use this version of the self-defense jury instruction.

on the verdict of the jury." *Griller*, 583 N.W.2d at 741 (quotation omitted). An appellant claiming that an erroneous instruction affected substantial rights bears a "heavy burden of proving that there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict." *Kelley*, 855 N.W.2d at 283 (quotation omitted). "An erroneous jury instruction will not ordinarily have a significant effect on the jury's verdict if there is considerable evidence of the defendant's guilt." *Id*. at 283-84.

Appellant has not met the heavy burden of demonstrating that the erroneous jury instruction had a significant effect on the verdict. The district court conducted a jury trial over the course of ten days and the jury heard testimony from numerous witnesses, including the men who were quarreling with appellant, police officers, medical personnel, and a forensic analyst. The jury heard uncontroverted testimony that appellant began to drive away and then stopped alongside O.H. to continue the argument. J.P. testified that appellant fired his weapon "immediately" after R.M. punched appellant, and it is undisputed that appellant was seated in an operational vehicle and could have driven away. Both self-defense instructions require the defendant to retreat to avoid the danger. *See* CRIMJIGS 7.05, 7.06 ("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."). Ample evidence demonstrates that appellant was seated in his vehicle and could have driven away from the confrontation to avoid harm. Given this record, appellant would not have satisfied the self-defense test under either of the criminal jury instructions. Further, the district court properly instructed the jury on the elements of the crimes charged. The jury found that appellant did not intentionally kill R.M., but

convicted him of second-degree felony murder. This mixed verdict demonstrates that the jury carefully considered the evidence presented and did not believe that the killing was intentional. Providing the general self-defense instruction instead of the justifiable-taking-of-life instruction would not have had a significant effect on the verdict. The district court's error concerning the jury instruction did not affect appellant's substantial rights.

Because we determine that appellant has not satisfied his "heavy burden" of demonstrating that the erroneous instruction had a significant effect on the jury's verdict, we need not consider whether a new trial is required to ensure the fairness and integrity of the judicial proceedings. Nevertheless, we determine that a new trial is not required in this case. "[F]airness and integrity of the judicial proceedings are called into question by . . . erroneous instructions and [by a] verdict based on those instructions." *State v. Vance*, 734 N.W.2d 650, 662 (Minn. 2007). But reversal is not required to preserve the integrity of judicial proceedings if a new trial would result in an "exercise in futility." *Griller*, 583 N.W.2d at 742. Ample evidence in the record supports the jury's guilty verdict, and granting a new trial is not necessary to ensure fairness or the integrity of the judicial proceedings.

**Affirmed.**