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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1984

State of Minnesota,
Respondent,

vs.

David Michael Easter,
Appellant.

Filed November 19, 2018
Affirmed
Rodenberg, Judge

Freeborn County District Court
File No. 24-CR-16-1422

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

David J. Walker, Freeborn County Attorney, Albert Lea, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

RODENBERG, Judge

Appellant David Michael Easter challenges his second-degree murder conviction, arguing that (1) the district court erred when it used the self-defense instruction concerning the justifiable taking of life instead of the general self-defense instruction, (2) the district

court abused its discretion when it sentenced appellant to a 306-month prison term, (3) the district court improperly sentenced appellant for both carrying a pistol without a permit and second-degree murder, and (4) the district court exceeded its authority when it amended the restitution amount after sentencing. We affirm.

FACTS

On August 23, 2016, at approximately 9:19 p.m., appellant called 911 to report that he had shot another person. Appellant told the dispatcher, "Someone pulled up when we were uh, gettin' in my car, he stepped out with a bat and uh, I'm a concealed-and-carry person and under self-defense I shot him and he's sitting, lying in his car." Multiple law enforcement officers responded to the park from which appellant had called, and found S.B. dead in his car, with two gunshot wounds to his head. An autopsy later confirmed that S.B. had died from the two bullet wounds—one to his left cheek and the other to his left temple. The state charged appellant with second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2016), and with carrying-a-pistol without a permit in violation of Minn. Stat. § 624.714, subd. 1a (2016).

Appellant testified at trial that he and his family were at the park having a picnic in the park's pavilion area. Appellant became concerned when a car pulled into the park's dark, empty parking lot. The car's headlights were off and, after driving around, the driver (later identified as S.B.) parked across from appellant's truck. Appellant testified that S.B. got out of his car and was shouting, which made appellant uneasy. Appellant described that S.B. began walking toward the pavilion, then toward the woods, and again approached appellant and shouted. Appellant testified that he instructed his wife to gather their infant

and move toward his truck so that they could leave. Appellant testified that S.B. went behind a building and then reappeared. Appellant was "freaked out" by the pace at which S.B. was walking. As appellant started to walk off the sidewalk toward his truck, S.B. "kind of turned with [appellant] and was starting to walk with [him]." Once he noticed this, appellant told S.B. that he was there with his family, and that they were getting ready to leave. S.B. did not reply. Appellant described that the two were walking side-by-side, and that S.B. said "I have something for you" and went toward his car. This startled appellant; he looked over at S.B. and then changed his direction and began walking past his truck and toward S.B.'s car. Appellant testified that he walked toward S.B.'s car so that he could "keep his eye on him" while his wife got their infant into their truck.

Appellant testified that S.B. got into the driver's seat of his car, looked at appellant, and told appellant, "Yes, a--hole, I do have something for you." Appellant testified that S.B. "reached over and closed the door." Moments after, the two locked eyes, and according to appellant, S.B. "reached over to the passenger's side, grasped a barrel of a gun, and was bringing it up." Appellant testified that he "drew his [own] firearm and decided to shoot" as S.B. was "motioning over to bring that barrel up." Appellant testified that he shot S.B. twice as he had been taught in firearms training.

Police found neither a firearm nor a baseball bat in or near S.B.'s car. At trial, S.B.'s former girlfriend, L.G., testified that S.B. kept a golf club in his car to prop open the hood and the back hatch of his car. L.G. also testified that S.B. frequently went to the state park, where he had been shot, to relax after work.

At trial, appellant requested the justifiable-taking-of-life self-defense jury instruction. The district court gave the requested instruction. The jury found appellant guilty of second-degree intentional murder and carrying a pistol without a permit. The district court sentenced appellant concurrently to 306 months in prison for the second-degree-murder offense and to 180 days in jail for the carrying-a-pistol-without-a-permit offense. At appellant's sentencing hearing, the district court ordered that appellant pay restitution in the amount of $5,081.48. Appellant's counsel asked the district court for 30 days to file a response to the restitution order. The district court later amended its restitution order, requiring appellant to also pay $8,597.75 in restitution to the Crime Victims Reparations Board (CVRB). Neither appellant nor his counsel further contested the restitution amount in the district court.

This appeal followed.

D E C I S I O N

I. The district court's error in not instructing the jury concerning the general law of self-defense under Minn. Stat. § 609.06, subd. 1(3), was harmless.

Appellant argues that the district court erred when it instructed the jury on his self-defense claim concerning the second-degree-murder charge. Specifically, he argues that the district court should have given the general self-defense jury instruction and not the justifiable-taking-of-life jury instruction because appellant denied that he intended to kill S.B.

A district court has "broad discretion" to craft jury instructions, and it abuses that discretion if the instructions given "confuse, mislead, or materially misstate the law." *State*

v. Taylor, 869 N.W.2d 1, 14-15 (Minn. 2015) (quotation omitted). Appellant did not object to the jury instruction at trial, and requested the instruction that was given, but raised the issue in a postverdict motion for a new trial under Minn. R. Crim. P. 26.03, subd. 19(4)(f). A motion for a new trial adequately preserves an issue for appeal. *See State v. Glowacki*, 630 N.W.2d 392, 398 (Minn. 2001) ("[D]espite a defendant's failure to object to a jury instruction at trial, if the instruction contains an error of fundamental law or a controlling principle, a motion for a new trial adequately preserves the issue for appeal." (quotation omitted)). Since appellant adequately preserved the issue, we review the claimed jury-instruction error to determine whether the instruction was erroneous and, if so, whether it was harmless. *State v. Larson*, 787 N.W.2d 592, 601 (Minn. 2010). An erroneous jury instruction does not merit a new trial if the error is harmless beyond a reasonable doubt. *State v. Mahkuk*, 736 N.W.2d 675, 683 (Minn. 2007).

Minnesota law recognizes two different forms of self-defense. The general law of self-defense is that reasonable force may be used upon another without the other'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) (2016). A claim of self-defense arising under section 609.06, subdivision 1(3), is reflected in the jury instruction in CRIMJIG 7.06, "Self-Defense—Death Not the Result." 10 *Minnesota Practice*, CRIMJIG 7.06 (Supp. 2017).

A person may *intentionally* take a life when it 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). This statutory section corresponds with the

jury instruction in CRIMJIG 7.05, titled "Self-Defense—Justifiable Taking of Life." 10 *Minnesota Practice*, CRIMJIG 7.05 (Supp. 2017).

At the time of appellant's trial, the general self-defense jury instruction was embodied in CRIMJIG 7.05, 10 *Minnesota Practice*, CRIMJIG 7.05 (2015) and the justifiable-taking-of-life self-defense instruction was in CRIMJIG 7.06. 10 *Minnesota Practice*, CRIMJIG 7.06 (2015). Before appellant's trial, the Minnesota appellate courts had repeatedly held that a district court errs if it fails to provide the general self-defense instruction when a defendant asserts self-defense, but claims that death was not the intended result. *State v. Pollard*, 900 N.W.2d 175, 179 (Minn. App. 2017) (collecting cases); *see also State v. Dolbeare*, 511 N.W.2d 443, 446 (Minn. 1994) ("[E]ven where death has resulted from a defendant's action, the judge should use [the general instruction] if the defendant's theory does not include a concession that there was an intent to kill.").

At trial, the district court gave the justifiable-taking-of-life self-defense jury instruction, as appellant requested and the state agreed.[1]

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[1] The justifiable taking-of-life self-defense instruction, now in CRIMJIG 7.05, is as follows:

> No crime is committed when a person takes the life of another, even intentionally, if the person's action was taken in resisting or preventing an offense the person reasonably believed exposed him or another to death or great bodily harm.
>
> In order for the taking of life to be justified for this reason, four conditions must be met. First, the defendant's act must have been done in a belief that it was necessary to avert death or great bodily harm. Second, the judgement of the defendant as to the gravity of the peril to which he or another was exposed must have been reasonable under the circumstances. Third, the defendant's election to defend must

The district court denied appellant's new-trial motion. It reasoned that, based on the jury's verdict, the death of S.B. was not accidental or unintentional. The jury had necessarily concluded that appellant intended to kill S.B., because it found him guilty of a crime requiring proof that he acted "with intent to effect the death of" S.B. Minn. Stat. § 609.19, subd. 1(1). As such, the district court concluded that the justifiable-taking-of-life jury instruction given was applicable to appellant's self-defense claim.

Appellant argues on appeal that, because the numbering of the jury instruction guide (JIG) changed and the corresponding comments did not, the trial court and appellant's trial counsel mistakenly relied on the JIG commentary, resulting in the wrong jury instruction being given. *See Pollard*, 900 N.W.2d at 180 (noting that although the 2015 version of the criminal jury instruction guide renumbered the justifiable-taking-of-life instruction as CRIMJIG 7.06, it continued to include the same footnote and case descriptions recommending its use in cases where the defendant claims the death was unintended, which was contrary to Minnesota Supreme Court precedent). Appellant argues that, because he

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> have been such as a reasonable person would have made in light of the danger perceived and the existence of any alternative way of avoiding the peril. Fourth, there was no reasonable possibility of retreat to avoid the danger. All four conditions must be met.
>
> 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.
>
> The State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.

did not admit that he intentionally killed S.B., the district court should have given the general self-defense instruction instead of the justifiable-taking-of-life instruction.

Under *Pollard* and other cases to like effect, appellant was entitled to the general self-defense instruction. He denied an intention to kill S.B. Despite appellant not having raised the issue until the posttrial motion, the law was well-settled that a defendant is entitled to that instruction in this circumstance. The district court erred by not instructing the jury concerning the general law of self-defense.

In this case, the error did not affect the verdict. The state presented powerful circumstantial evidence that appellant did intend to kill S.B. It is undisputed that appellant fired two bullets into S.B.'s head from point-blank range. The district court could properly give the justifiable-taking-of-life instruction in light of that powerful circumstantial evidence. We see no basis for concluding that the justifiable-taking-of-life instruction was erroneous. Appellant had actually requested that instruction at trial. The district court should have given at least the general self-defense instruction, but could have properly given both instructions, leaving it to the jury to determine whether appellant intended to kill S.B.

By its verdict concluding that the state proved second-degree murder beyond a reasonable doubt, the jury necessarily concluded that appellant, despite his testimony to the contrary, intentionally killed S.B. That being so, the jury was provided with the self-defense instruction applicable to the facts as it found them—the justifiable-taking-of-life instruction in section 609.065. Therefore, the district court's error in not instructing the jury concerning the general law of self-defense was harmless beyond a reasonable doubt.

That law, applicable to situations where the actor *does not intend* to cause death would have no application to the facts as the jury found them. We therefore affirm the district court's denial of appellant's new-trial motion.

We also observe that, on this record, the district court's *Pollard* error was harmless for at least two other reasons. Under either the general self-defense instruction or the justifiable-taking-of-life instruction, the actor must act reasonably. *State v. Richardson*, 670 N.W.2d 267, 277-78 (Minn. 2003). And, under either instruction, the actor has a duty to retreat or avoid the danger if reasonably possible. *See* CRIMJIGS 7.05, .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.").

Other than S.B.'s alleged shouting, the record does not show that S.B. posed a threat to appellant or his family. The record shows the opposite—during appellant's jury trial, the jury saw text messages from S.B. that were sent minutes before his death. In one of those messages, S.B. said, "I'm happier than I've been in a long time." Here, the record also conclusively shows that appellant did not retreat—he walked toward S.B.'s car when he had the opportunity to leave the park. The record also shows that appellant did not use reasonable force because there was no firearm found in S.B.'s car.

While appellant did not admit that he intentionally killed S.B., appellant testified at trial that he fired his gun almost immediately after he thought he saw S.B. raise what appellant thought was the barrel of a gun inside S.B.'s car. Appellant admitted that he was "not firing randomly" but was "firing at a target." Appellant also admitted that he shot S.B. twice in the head. One of the bullets was fired from between two inches and two feet

away from S.B.'s head. Instead of walking away from S.B.'s car, appellant put two bullets in S.B.'s head.

The jury's guilty verdict reflects, and the record supports, that the state proved appellant did not act reasonably and failed to avail himself of a ready avenue of retreat. For these reasons also, the district court's error was harmless.

II. The district court did not abuse its discretion when it sentenced appellant to a presumptive guidelines sentence.

Appellant argues that the district court abused its discretion when it sentenced him to a 306-month guidelines sentence because it exaggerates his culpability, and that, although Minnesota does not recognize imperfect self-defense, the district court should have considered it as a mitigating factor.

We address the latter argument first. Minnesota does not recognize the defense of imperfect self-defense. *State v. Thompson*, 544 N.W.2d 8, 12 (Minn. 1996). A district court may order a downward departure from the presumptive guidelines if "substantial grounds exist that tend to excuse or mitigate the offender's culpability," even if those grounds do not amount to a defense. Minn. Sent. Guidelines 2.D.3.a(5) (2016). The record confirms that the district court did consider all relevant factors, including appellant's unsuccessful self-defense claim.

Appellate courts afford a district court great discretion in sentencing and will reverse sentencing decisions only for an abuse of that discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). Rarely will we interfere with a decision to impose the presumptive

sentence. *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

When considering a downward durational departure, as appellant requested in this case, a district court is limited to consideration of offense-related factors. *State v. Peter*, 825 N.W.2d 126, 130 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013). Substantial and compelling circumstances for a durational departure "demonstrate that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Leja*, 684 N.W.2d 442, 450 (Minn. 2004) (quotation omitted). But, even if factors are present to support a downward departure, the district court is not required to depart. *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011).

The district court determined that there were no substantial or compelling reasons to depart from the guidelines. The record supports that the district court, having presided over the jury trial, properly considered the offense committed and the circumstances of that offense. In response to appellant's argument that the case was less serious than most murder cases, the district court noted, that "at first blush . . . you can make an argument that this case is less serious . . . you have to look closely at the facts of the case." The district court concluded that, although appellant raised the defense of self-defense, "it [was] clear to the court that the jury rejected the self-defense argument." Ultimately, the district court did not depart. It explained that it could not find that "this situation or murder was less onerous than the typical case of second-degree murder." The district court found no

substantial and compelling reason to depart and sentenced appellant to 306 months, which was within the presumptive guidelines range.

We can discern no failure of the district court to consider the severity of appellant's offense and any mitigating factors. Instead, the district court listened to and considered appellant's arguments concerning both a durational and dispositional departure and acted within its discretion when it sentenced appellant.

III. The second-degree murder and carrying-a-pistol-without-a-permit convictions were separate behavioral incidents, and the district court correctly sentenced appellant.

Appellant argues that the district court erred by sentencing him for both second-degree murder and carrying a pistol without a permit because the offenses arose from a single behavioral incident. Appellant also argues that carrying a pistol without a permit is not a typical crime of possession because possession becomes unlawful only when possession or carrying is in certain places or certain ways.

"Whether an offense is subject to multiple sentences under Minn. Stat. § 609.035 is a question of law, which [appellate courts] review de novo." *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012).

> Whether a defendant's offenses occurred as part of a single course of conduct is a mixed question of law and fact. We review the district court's findings of historical fact under the clearly erroneous standard, but we review the district court's application of the law to those facts de novo.

State v. Jones, 848 N.W.2d 528, 533 (Minn. 2014).

With limited exceptions, a court may only sentence a defendant once for a single behavioral incident, even if the incident results in multiple crimes. Minn. Stat. § 609.035,

subd. 1 (2016); *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000). The supreme court has prescribed two tests for determining whether multiple offenses arise from a singular behavioral incident. Which test applies depends on the intent element of the crimes. When one offense includes an intent element and the other does not, the proper inquiry is whether the offenses "[arose] out of a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment." *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991) (quotation omitted).

Second-degree murder is an intentional crime for purposes of Minn. Stat. § 609.035 (2016). A conviction under Minn. Stat. § 609.19, subd. 1, requires proof that the defendant "causes the death of a human being with intent to effect the death of that person or another, but without premeditation." In contrast, carrying a pistol without a permit requires only that the defendant know that he possessed the pistol. Minn. Stat. § 624.714, subd. 1(a).

A crime of possession is a continuing offense that is complete when the offender takes possession of the prohibited item. *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). The unlawful possession of a firearm is such a continuing offense. *State v. Banks*, 331 N.W.2d 491, 494 (Minn. 1983). Because the unlawful possession of a firearm is a continuing offense, it can be proved without reference to another offense involving a one-time action. *Id.*

The district court concluded that the second-degree murder offense and the carrying-a-pistol-without-a-permit offenses were not committed as part of a single behavioral incident. The district court therefore imposed two concurrent sentences, and appellant

received 186 days of credit for time served (which credit was more than the 180-day sentence on the firearm-possession charge).

The record supports the district court's conclusion that the carrying-a-pistol-without-a-permit offense was not part of a single behavioral incident with the second-degree-murder offense. Appellant testified that he had been carrying a pistol in the state of Minnesota for years, and that he carried the pistol on his person in a holster wherever he went. Appellant began carrying a pistol starting in 2011, when he obtained a permit to carry in Nebraska. Despite living in Minnesota since 2012, appellant did not have a valid Minnesota permit to carry. Appellant testified that, on the day of the shooting, he and his family went to the store to buy food and picnic supplies before going to the park, approximately three hours before the shooting. Appellant's offense of carrying-a pistol-without-a-permit was a continuing offense. The carrying-a-pistol-without-a-permit offense was complete before the act of murder, and appellant was not motivated to obtain a single criminal objective in committing the two offenses.[2]

Appellant argues that, because the state previously argued for joinder of the offenses, and because that standard uses the same single-behavioral-incident analysis, the state should be estopped from arguing that the offenses are not part of the same behavioral incident. Appellant also asserts that judicial estoppel bars the state from now arguing that

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[2] Had the criminal objective of carrying a pistol without a permit been to effectuate S.B.'s death, appellant would have been guilty of *first-degree murder*. *See* Minn. Stat. § 609.185(a)(1) (2016) (defining a killing "with premeditation and the intent to effect the death" as murder in the first degree). Nothing in the record suggests that appellant's objective in bringing the pistol to the park was to kill S.B. or anyone else.

the incidents are not part of the same behavioral incident. Minnesota does not recognize judicial estoppel, and we decline to apply it here. *See State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005) (declining to adopt the doctrine of judicial estoppel).

Pretrial joinder of offenses, under Minn. R. Crim. P. 17.03, uses an analysis similar to that concerning sentencing under Minn. Stat. § 609.035. "We have traditionally analyzed joinder using the same restrictive test we developed in applying Minn. Stat. § 609.035." *State v. Profit*, 591 N.W.2d 451, 458 (Minn. 1999). Generally, two related offenses should be joined before trial where a defendant's behavior falls under more than one criminal offense and each offense should be joined into one case as separate counts. Minn. R. Crim. P. 17.03, subd. 1. Minn. Stat. § 609.035 guides sentencing procedure and is intended to prevent serial prosecution and double punishments that might create double jeopardy problems. *State v. Ross*, 732 N.W.2d 274, 278 (Minn. 2007).

Before appellant's trial, the district court joined the offenses. The district court found as a fact that the offenses were part of a single behavioral incident, and therefore should be joined for one trial. While pretrial joinder of offenses follows the same analysis as posttrial sentencing under Minn. Stat. § 609.035, pretrial joinder does not limit the district court's analysis during sentencing. At sentencing, the district court properly analyzed the offenses under Minn. Stat. § 609.035, and sentenced appellant for two separate offenses. The district court acted within its discretion when it sentenced appellant for both offenses.

IV. The district court acted within its authority when it amended appellant's restitution order.

Finally, appellant argues that the district court improperly amended its restitution order because the extent of the CVRB's loss was known at sentencing. Appellant did not raise this objection to the district court, but asserts that we should address the issue on appeal because the district court's amended restitution order was an unauthorized sentence that can be corrected at any time.

"A district court has broad discretion to award restitution, and the district court's order will not be reversed absent an abuse of that discretion." *State v. Anderson*, 871 N.W.2d 910, 913 (Minn. 2015). The district court's factual findings will not be disturbed unless they are clearly erroneous. *Id.* But, questions concerning the authority of the district court to order restitution are questions of law subject to de novo review. *Id.*

At appellant's sentencing hearing, the issue of restitution was the last issue the district court addressed during an hours-long sentencing hearing. At the hearing, the district court ordered appellant to pay restitution in the amount of $5,081.48. The state later moved to amend the restitution order because the district court had not included the amounts paid by the CVRB. Following the state's motion, the district court ordered appellant to pay an additional $8,597.75 in restitution to the CVRB. Appellant did not challenge that amended order within 30 days, as required by Minn. Stat. § 611A.045, subd. 3(b) (2016).

We view the district court's additional order amending the restitution amount as a correction to a clerical mistake. "Clerical mistakes in a judgement, order, or in the record

arising from oversight or omission may be corrected by the court at any time, or after notice if ordered by the court." Minn. R. Crim. P. 27.03, subd. 10. Based on the record, it appears that the district court's failure to address the restitution owed to CVRB at appellant's sentencing hearing was an oversight. The district court corrected the order, as it is authorized to do.

In sum, the district court's error in not instructing the jury with the general self-defense instruction was harmless because the justifiable-taking-of-life jury instruction was applicable to the facts as found by the jury. The district court acted within its discretion by sentencing appellant to a presumptive sentence under the sentencing guidelines. The district court did not err when it determined that appellant's offenses were two separate incidents because the unlawful-carrying-of-a-pistol-without-a-permit offense was complete before the second-degree murder offense. Finally, the district court did not err when it corrected its clerical error by amending the restitution order.

Affirmed.