STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1616

State of Minnesota,
Respondent,

vs.

Antwan Darnell Cosey,
Appellant.

Filed December 14, 2020
Affirmed
Slieter, Judge

Hennepin County District Court
File No. 27-CR-18-6128

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Slieter, Presiding Judge; Bratvold, Judge; and Cochran, Judge.

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

SLIETER, Judge

In this direct appeal from the judgment of conviction, appellant challenges his second-degree murder conviction on the ground that the district court impermissibly

instructed the jury on the order in which to consider the offenses and improperly excluded evidence necessary to his claim of self-defense.[1] Because appellant's substantial rights were not affected by the district court's error in its instruction to the jury and appellant was not prejudiced by the district court's evidentiary rulings, we affirm.

FACTS

Appellant Antwan Darnell Cosey shot and killed victim F.G. in February 2018. Following the shooting, the state charged appellant with second-degree intentional murder, in violation of Minn. Stat. § 609.19, subd. 1(1) (2016). The district court later submitted for jury consideration the lesser-included offense of unintentional second-degree felony murder, in violation of Minn. Stat. § 609.19, subd. 2(1) (2016). Whether appellant acted in self-defense when he pulled the trigger was the main issue at trial. Appellant encountered the victim on the sidewalk in front of the apartment of the victim's girlfriend. During an exchange, both men were facing each other for a confrontation when appellant reached for a firearm and shot the victim in the chest. The exchange lasted approximately 46 seconds. Appellant fled the scene and was arrested in Florida in March 2018. He gave a statement to Minneapolis police the day after his arrest.

[1] Appellant also raises several issues in a *pro se* supplemental brief, including violations of due process and his rights pursuant to the First Amendment, Sixth Amendment, Fourth Amendment, and Fifth Amendment to the U.S. Constitution. He also raises an ineffective-assistance-of-counsel claim. Appellant's factual statements recite error but are unsupported by legal authority and inadequately briefed. Thus, these arguments are forfeited. *See State v. German*, 929 N.W.2d 466, 476-77 (Minn. App. 2001) (stating *pro se* litigants generally held to same standards as attorneys and conclusory arguments that cite no applicable law are forfeited).

After closing arguments, the district court instructed the jury that "you don't consider the lesser crime unless or until you decide there's a reasonable doubt on the greater crime." Appellant's counsel did not object to this jury instruction. The jury found appellant guilty of second-degree intentional murder and did not return a verdict for the lesser-included offense. This appeal follows.

D E C I S I O N

I. The district court did not commit reversible error by its jury instruction.

Appellant argues the district court committed reversible error by its jury instruction and that such instruction significantly impacted the jury's verdict. We agree the instruction constituted error that is plain, but we are not persuaded that this error affected appellant's substantial rights.

A district court has broad discretion in selecting jury instructions. *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). Absent an objection, this court may reverse if a jury instruction constituted plain error. *Id*. at 273-74. Appellant must first satisfy three requirements pursuant to the plain-error doctrine by showing: 1) an error; 2) that is plain; and 3) that affected his substantial rights. *State v. Woodard*, 942 N.W.2d 137, 144 (Minn. 2020). If appellant satisfies this burden, this court "may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Kelley*, 855 N.W.2d at 273 (alteration in original) (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (citation omitted)); *see also Woodard*, 942 N.W.2d at 144 (stating court will address error to ensure fairness and integrity of judicial proceedings only if appellant satisfies burden on plain-error doctrine).

A. The district court committed plain error.

Plain errors are those that are "clear or obvious," which may be demonstrated by contravening case law. *State. v. Prtine*, 784 N.W.2d 303, 314 (Minn. 2010) (quotation omitted). A district court commits plain error when "suggest[ing] the order in which the jury should consider the charges." *Id*. at 317. The district court instructed the jury not to "consider the lesser crime unless or until you decide there's reasonable doubt on the greater crime." The district court again told the jury, "[o]nly if there's a not guilty verdict on count 1 [second-degree murder] do you consider the other count." Because the district court committed plain error by so instructing the jury, we next consider whether that error affected appellant's substantial rights.

B. Appellant's substantial rights were not affected.

Appellant bears the "heavy burden" to prove his substantial rights were affected by a plain error. *Kelley*, 855 N.W.2d at 283. A defendant's substantial rights are affected if "there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict." *Id*. (quotation omitted). It follows that an instruction directing a jury to consider a greater offense first does not have a significant effect on a verdict "if no rational jury would have acquitted the defendant of the more serious charge based on the evidence at trial." *Woodard*, 942 N.W.2d at 145. This court considers the effect of the instruction by analyzing the strength of the evidence presented and the nature of the defense. *Kelley*, 855 N.W.2d at 284.

1. The Evidence Presented at Trial

To convict appellant of second-degree intentional murder, the state had to prove beyond a reasonable doubt that appellant caused the death of another "with intent to effect the death of that person . . . ." Minn. Stat § 609.19, subd. 1(1). The lesser charge of unintentional second-degree murder requires a defendant to cause the death of another "without intent to effect the death of any person, while committing or attempting to commit a felony offense." *Id.*, subd. 2(1).

The state called 19 witnesses to testify during the trial, including three witnesses who observed the shooting. The state also presented surveillance video of the shooting. The evidence demonstrated the following:

- Appellant walked away then back towards the victim three times.
- As reflected by eyewitness testimony and appellant's statements, appellant was aware of the apartment camera's location and, according to eyewitness testimony, appellant said he would not fight on camera and thereafter "lured" the victim away from the building's cameras.
- Two witnesses, T.B and D.S, rejected appellant's claims that the victim was the initial aggressor. Contrary to the testimony of appellant, neither witness heard the victim threaten to kill appellant.
- A third witness, D.Q., a tenant of the building with a view of the sidewalk, heard a loud, verbal altercation with swearing from both sides.
- Appellant shot the victim in the chest from what appeared in the video to be a close distance, stepping forward to do so.
- Testimony from the medical examiner established that the bullet entered on the victim's left side, struck the left lung, heart, right lung, and exited the right side of the victim's body.

- The victim was unarmed.

- Appellant fled the scene without offering aid to the victim.

- Appellant requested money from an acquaintance to obtain a bus ticket out of state, ultimately to Florida, and did not inform the acquaintance of any legal trouble.

- On March 9, appellant was arrested in Florida on a bus bound for Texas.

- Nine months after speaking with police, appellant wrote to his former landlord, who initially identified appellant for the police, asking the landlord to retract his statement.

The Minneapolis police interviewed appellant for two hours while in Florida after his arrest, resulting in a 70-page transcript. The transcript presented to the jury contained all but six pages redacted by the district court's order. Appellant also testified. Appellant presented evidence from both the interview transcript and testimony as follows:

- Appellant testified that he purchased a gun about a month before the shooting for purposes of self-defense.

- Appellant testified he was polite throughout the exchange, only raising his voice to tell the victim to calm down, and that the victim was "hostile and aggressive."

- Appellant stated he could have initially walked away from the exchange, but said as it progressed he felt the victim would not let him walk away.

- Appellant agreed there was nothing "blocking" the sidewalk, alley, or street to prevent him from leaving the encounter.

- Appellant extensively testified that the victim threatened to take appellant's gun and shoot appellant, after appellant warned the victim he was armed. The latter testimony contradicts appellant's earlier

statement to police, also heard by the jury, in which he told the interviewing officers the victim "assumed" appellant had a gun.

- Appellant, as his explanation for leaving the state after the shooting, said he wanted to "buy time" before his ultimate arrest and that he planned to turn himself in to police in Florida.

As required by *Kelley*, after analyzing the strength of the evidence presented, we next turn to the nature of the defense. 855 N.W.2d at 284.

2. The Nature of the Defense

Appellant presented testimony and argued that he shot the victim in self-defense. Because appellant claimed self-defense, "[the] state has the burden of disproving one or more" elements of self-defense "beyond a reasonable doubt." *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006) (quotation omitted). A successful self-defense justification requires:

> (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 . . . 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. Devens, 852 N.W.2d 255, 258 (Minn. 2014) (quotation omitted). For a self-defense justification to stand, one may use only the level of force "reasonably necessary to prevent the bodily harm feared." *Id*.

The state's evidence clearly disproved the first and fourth elements, (1) the absence of aggression or provocation on the part of the defendant, and (4) the absence of a reasonable possibility of retreat to avoid the danger. Additionally, the state presented evidence that the level of force used by appellant exceeded the feared harm. *See*

Montanaro v. State, 802 N.W.2d 726, 733 (Minn. 2011) (concluding self-defense instruction could not have had significant effect on the jury's verdict because "no reasonable jury could find [defendant's] actions to be a reasonable use of force").

In summary, considering both prongs of the *Kelley* analysis, the state presented significant evidence of intent and disproved, at a minimum, two prongs of self-defense. The district court's error had no significant effect on the jury's verdict because "no rational jury would have acquitted the defendant of the more serious charge based on the evidence at trial." *Woodard*, 942 N.W.2d at 145. Therefore, appellant's substantial rights were not affected by the error.

Because we conclude appellant's substantial rights were not affected, we need not determine whether the instruction affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 144.

II. Appellant was not prejudiced by the court's evidentiary rulings.

The district court prohibited, either through testimony or appellant's statement to police, evidence of: (1) the dangerous character of appellant's neighborhood and recent threats against appellant explaining why he purchased a gun; (2) prior attacks against appellant, including attacks from behind; (3) the victim's associations with gang members; (4) police officers previously killing appellant's friend; and (5) fears he would be harmed if he turned himself in to the police. Appellant argues the district court improperly restricted this evidence because it was necessary for the jury to fully consider his self-defense claim. In particular, appellant claims that without the excluded evidence, the jury was unable to: (1) consider the genuineness and reasonableness of appellant's fear;

(2) understand his inability to retreat; and (3) consider testimony related to appellant's flight from the scene and the state.

This court reviews the evidentiary rulings of a district court limiting the scope of a criminal defendant's testimony for an abuse of discretion. *State v. Greer*, 635 N.W.2d 82, 91 (Minn. 2001). A district court abuses its discretion when it has "based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Nelson v. State*, 947 N.W.2d 31, 36 (Minn. 2020) (quotation omitted). "Erroneous exclusion of defense evidence is subject to harmless error analysis." *Greer*, 635 N.W.2d at 90.

We will assume, without deciding, that the district court erred in excluding the evidence. In applying the harmless error test, "we must be satisfied beyond a reasonable doubt that the average jury (i.e., a reasonable jury) would have reached the same verdict if the evidence had been admitted and the damaging potential of the evidence fully realized." *State v. Taylor*, 869 N.W.2d 1, 12 (Minn. 2015) (citations and quotation omitted).

Despite the evidentiary exclusions, appellant was able to present significant evidence supporting self-defense:

- Appellant stated "that whole area, um, I've- I've been terrorized and jumped by people. And had random people just start stuff with me for no reason."

- Appellant testified he did not "trust turning [his] back to [the victim] after he had seen – that he was going to take the gun and kill me with it."

- Appellant testified extensively that the victim threatened to take appellant's gun and shoot him.

- Appellant also testified that he felt he was unable to walk away from the victim, and that specific fear caused by the victim made appellant feel he was unable to retreat.

- Appellant stated he had been previously attacked from behind, in similar situations: "I've had situations where people then did all that, threaten me say all that, and then I turn my back and go - you know, walk away, and then they runnin' up behind me, attacking me and stuff like that."

- Appellant explained why he had the gun: "to protect my life, when people lookin' for me, I'm not lookin' for no conflict."

Likewise, appellant was able to present evidence to explain why he fled the scene and ultimately the state:

- Appellant stated that he did not "really wanna dip like that" because he was scared, stating he could get killed and that "cops can shoot me and stuff like that. Like, I was just scared, man."

- Appellant admitted during trial testimony that he, in a "small part," left town to get away from the police in an effort to "buy time," and that he was in Florida to investigate a person taking financial advantage of his mother.

Given the strength of the state's case, we are satisfied beyond a reasonable doubt that an average jury would have reached the same verdict with the addition of the excluded evidence. Therefore, the district court's error, if any, in excluding the offered evidence was harmless.

Affirmed.