STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0502

State of Minnesota,
Respondent,

vs.

Michael Lashone Ferguson,
Appellant.

Filed May 16, 2022
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CR-19-22574

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, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Kirk, Judge.*

NONPRECEDENTIAL OPINION

ROSS, Judge

A jury found Michael Ferguson guilty of second-degree murder while committing a drive-by shooting. Ferguson challenges the sufficiency of the evidence disproving he

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

acted in self-defense, contends that the district court wrongly denied his request for jury instructions on two lesser-included offenses, argues that the district court improperly instructed the jury on self-defense, and identifies five instances of alleged prosecutorial misconduct. Because direct evidence considered in the light most favorable to the verdict of guilt beyond a reasonable doubt established that Ferguson lacked reasonable grounds to fear bodily harm when he fired the fatal shot, and because neither the district court's instruction error nor any alleged prosecutorial misconduct unfairly prejudiced Ferguson's defense, we affirm the conviction.

FACTS

Michael Ferguson shot and killed a man, whom we will call Adam in the interest of privacy. The August 2019 shooting occurred outside a Minneapolis church, whose surveillance camera captured the incident on video. Ferguson fired "three [or] four" times from a car as it pulled away, killing Adam, who had been standing beside the car arguing with Ferguson. Ferguson left the scene, and he also fled Minneapolis to Milwaukee, where police arrested him. The State of Minnesota charged Ferguson with first-degree murder while committing a drive-by shooting, second-degree intentional murder, and second-degree murder while committing a drive-by shooting. Ferguson's two-day trial included investigator testimony, the surveillance video, and Ferguson's testimony.

The district court resolved various disputes over jury instructions. It rejected Ferguson's request to include instructions on third-degree murder and second-degree manslaughter. It gave an instruction on the elements of general self-defense. On Ferguson's request, the district court also instructed the jury on justifiable-taking-of-life self-defense.

The jury rejected Ferguson's argument that he shot Adam in self-defense. It found him guilty of second-degree murder while committing a drive-by shooting but not guilty on the two other charges.

Ferguson appeals.

DECISION

Ferguson gives five reasons we should reverse his conviction. He argues first that the state presented insufficient evidence to disprove he shot Adam in self-defense. He argues second that the district court wrongly refused to instruct the jury on two lesser-included offenses. He argues third that its self-defense instruction was flawed. He argues fourth that the prosecutor engaged in five instances of prosecutorial misconduct. And he argues fifth that the cumulative effect of the district court's errors deprived him of a fair trial. The arguments do not lead us to reverse.

I

We first address Ferguson's contention that the state's evidence was insufficient to support the jury's verdict. Ferguson tacitly concedes that the evidence meets the elements of second-degree murder while committing a drive-by shooting. He contends only that the evidence did not disprove that he acted in self-defense. The record belies his contention.

We must decide whether the state offered sufficient evidence to prove beyond a reasonable doubt that Ferguson lacked the requisite mental state to support his claim of self-defense. Force against another can be justified as self-defense in two alternative statutorily based circumstances, one requiring reasonable grounds for the actor to believe he is in danger of bodily harm, and the other requiring reasonable grounds for the actor to

believe he is in danger of great bodily harm or death. Minn. Stat. §§ 609.06, subd. 1(3) (bodily harm, as interpreted by caselaw, *see State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014)), 609.065 (great bodily harm or death) (2018). For the following reasons, we are satisfied that the jury received sufficient evidence to find that Ferguson lacked any reasonable grounds to believe that he was in any danger of harm at all when he fatally wounded Adam.

After Ferguson proffered "reasonable evidence" on the elements of self-defense, the burden shifted to the state to disprove any element of self-defense beyond a reasonable doubt. *See State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). We apply a direct-evidence standard of review if the evidence directly supports a challenged element, but we apply a circumstantial-evidence standard of review when the evidence only inferentially supports a challenged element. *See State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (restating that direct evidence "is based on personal knowledge or observation and . . . proves a fact without inference or presumption"). We need look only to direct evidence to decide whether the state offered sufficient evidence on the issue of self-defense. Our review of the record informs us that the security-camera video footage constitutes direct evidence indicating whether, objectively considered, Ferguson had any reasonable grounds to believe he was in danger of harm when he fired the fatal shot.

The video footage, which the state showed the jury, is direct evidence that circumstances provided Ferguson no reasonable ground to believe that he was in any danger when he killed Adam. We reach this conclusion after considering whether this evidence, viewed in the light most favorable to the conviction, is sufficient to support the

guilty verdict. *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). The footage, which we describe below, leaves no room to reasonably doubt that Ferguson did not fire in self-defense.

The video footage as explained by undisputed witness testimony (including Ferguson's) depicts eight minutes leading up to the shooting and its immediate aftermath. Jurors watched Ferguson and his brother standing on the sidewalk near a black car on the street beside the church. Ferguson was there to meet Adam's brother, who wanted to fight Ferguson. A considerable crowd of about 20 people gathered and milled about. Ferguson argued with Adam and his brother. Ferguson entered the car, sat in the front passenger's seat, and closed the door.

The entire shooting spanned several seconds from Ferguson's first shot to the shot that struck and killed Adam. Adam had been standing on the sidewalk beside the car after Ferguson entered it. Ferguson brandished a handgun. Then Ferguson fired the handgun out of the car's window. The moment Ferguson fired the first shot is evident, as the bystanders suddenly and simultaneously all flinched in apparent shock and began running away. With Adam on foot and Ferguson in the car, Adam and Ferguson moved quickly apart in opposite directions after the first shot. Ferguson continued shooting from the car window in Adam's direction while Adam and others fled. The car had moved a significant distance (at least 100 feet) and completely out of the camera's view, and Adam had taken seven steps before Ferguson's fatal shot struck Adam's head and dropped him motionless to the ground.

This video evidence directly informed the jury of four circumstances foreclosing the possibility that Ferguson had any reasonable belief that he was in danger the moment he

fired the fatal shot. First, a significant distance separated Adam from Ferguson when he fired that shot. Second, Adam had begun moving and was continuing to move on foot rapidly away from Ferguson, with his back to Ferguson. Third, Ferguson had begun moving and was continuing to move by car rapidly away from Adam. And fourth, five seconds elapsed between the moment that Ferguson and Adam had been in close proximity to one another and the moment that Ferguson shot and killed Adam. No person in Ferguson's shoes could have reasonably perceived any danger of harm when he fired the fatal shot. Ferguson told the jury that he feared that Adam might have a gun and that he overheard Adam or Adam's brother use a slang phrase implying that they intended to shoot at him. For the purpose of our review, we can assume that the jury believed these claims. And we can also assume that the jury thought that Ferguson's concern was reasonable. But his claim of self-defense failed based on the direct evidence showing that, when he fired the fatal shot, the circumstances left him no reason to still believe that Adam could harm him. In sum, the video footage constituted sufficient direct evidence to prove beyond a reasonable doubt that Ferguson did not kill Adam in self-defense.

II

Turning to Ferguson's first jury-instruction challenge, we are unpersuaded by his contention that the district court incorrectly denied his request to instruct the jury on third-degree murder and second-degree manslaughter. We review a denial of a requested lesser-included-offense instruction for an abuse of discretion. *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005). But the district court has no discretion to deny a defendant's request for a lesser-included-offense instruction if "the lesser offense is included in the charged

offense," "the evidence provides a rational basis for acquitting the defendant of the offense charged," and "the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *Id*. at 598. The last two elements defeat Ferguson's challenge.

The evidence here allows for no rational basis to acquit Ferguson of the charged offense of second-degree murder while committing a drive-by shooting and convict him of either of the included offenses—third-degree murder or second-degree manslaughter. Analyzing whether a rational basis existed for the jury to acquit on the greater charge and convict of the lesser charge, we consider the evidence in the light that most favors the defendant. *Id*. The evidence could not have allowed for Ferguson's conviction on either of the lesser offenses without also resulting in a conviction of second-degree murder while committing a drive-by shooting. Only the manner of the homicidal action differentiates third-degree murder from second-degree murder while committing a drive-by shooting. In the latter, the death of another is caused by "committing or attempting to commit a drive by shooting." Minn. Stat. § 609.19, subd. 1(2) (2018). And a drive-by shooting occurs when a person, "while in or having just exited from a motor vehicle, recklessly discharges a firearm at or toward another motor vehicle or a building . . . or toward a person." Minn. Stat. § 609.66, subd. 1e(a), (b) (2018). The killing in a third-degree murder is caused by "an act eminently dangerous to others and evincing a depraved mind, without regard for human life." Minn. Stat. § 609.195(a) (2018). Ferguson asserts that a rational basis exists for acquitting him of second-degree murder while committing a drive-by shooting and convicting him of third-degree murder because, he argues, the evidence shows that he fired his gun into a crowd of people. But his firing into a crowd also satisfies the elements of

second-degree murder while committing a drive-by shooting because he fired, killing Adam, from inside the car. The evidence gave the jury no rational basis to acquit on the charged offense and convict on the lesser offense.

The same is so regarding the lesser offense of second-degree manslaughter. In a second-degree manslaughter, the death of another results from an act of culpable negligence, which is gross negligence or recklessness. Minn. Stat. § 609.205(1) (2018); *State v. Schnagl*, 907 N.W.2d 188, 202 (Minn. App. 2017), *rev. denied* (Minn. Feb. 28, 2018). Killing another by recklessly firing into a crowd from a car, as it occurred here, affords no rational opportunity for the jury to convict for a reckless killing while acquitting for a drive-by killing.

III

We turn next to Ferguson's challenges to the district court's jury instructions on self-defense. He contends the district court should have instructed the jury only on self-defense generally, not on both self-defense generally and justifiable-taking-of-life self-defense. But he asked for both instructions, affecting our review standard. Although we review a district court's jury instructions for an abuse of discretion, we review only for plain error where, as here, a party invites the alleged mistake. *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). To prevail under plain-error review, an appellant must establish that an error occurred, that the error was plain, and that the error affected his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If he meets all three elements, we will reverse only if reversal is necessary to ensure the fairness and integrity of the judicial proceedings. *Id*. The state correctly concedes that the district court

committed a plain error by giving both instructions. An error is "plain" if it is clear or obvious, such as when the error contravenes caselaw, a rule, or a standard of conduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). And it is settled that a district court errs by instructing the jury on justifiable-taking-of-life self-defense when the defendant asserts, as Ferguson asserted, that the killing was unintentional. *State v. Pollard*, 900 N.W.2d 175, 179 (Minn. App. 2017). We therefore consider whether the plain error affected Ferguson's substantial rights.

The erroneous instruction did not affect Ferguson's substantial rights. A plainly erroneous jury instruction affects substantial rights if there is a "reasonable likelihood that giving the instruction . . . had a significant effect on the jury verdict." *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006). The jury could not have credited Ferguson's claim of self-defense under either instruction unless it first found that Ferguson reasonably feared that Adam would harm him. And as outlined above in our discussion of the evidence against Ferguson's claim of self-defense, it is not reasonably likely that the jury would have entered a verdict of not guilty if it received only the general self-defense instruction. Because the erroneous instruction did not affect Ferguson's substantial rights, the error does not support reversal.

IV

Ferguson cites five instances of alleged prosecutorial misconduct, only one of which drew his objection during trial. We review the first four only for plain error, *Ramey*, 721 N.W.2d at 302, and the objected-to instance for harmless error beyond a reasonable

doubt, *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). None of the instances lead us to reverse.

Misconduct in Opening Statements?

Ferguson's assertion of prosecutorial misconduct during opening statements fails. He asks us to fault the prosecutor for saying that a named participant at the scene had "said, 'We're going to have a fist fight.'" It is true that a prosecutor cannot refer to information in an opening statement if the prosecutor has some indication that the witness who can attest to the facts would not testify. *State v. Gaitan*, 536 N.W.2d 11, 16 (Minn. 1995). The prosecutor did not intend to (and did not) call the named participant to testify, but he did call a police sergeant who testified that Ferguson told him that the person threatened to fight him. The statement does not constitute misconduct.

Misconduct in Three Lines of Cross-Examination?

Ferguson's three assertions of prosecutorial misconduct during cross-examination succeed partially in that two of them involve improper questioning. But neither of these two affected his substantial rights.

1. Cross-Examination: Two Prior Felonies

The first of the three allegedly improper lines of questioning called attention to Ferguson's prior felonies, as follows:

> Q: What makes the felonies of [Adam] and [another participant] so much scarier than your own felonies?
> A: Mine's was a robbery.
> Q: You mentioned their reputation for carrying guns?
> A: Yes.
> Q: That's a reputation you have as well, isn't it?
> A: No.

Q: Was your 2015 conviction not an armed robbery?
A: Yeah, it was.

This was improper impeachment. The trial court had allowed the prosecutor to introduce two sanitized felonies as impeachment evidence if Ferguson testified. Impeachment evidence of a previous felony conviction is sanitized when it is admitted "without revealing the nature or details of the conviction at the time of impeachment." *State v. Hill*, 801 N.W.2d 646, 650 n.1 (Minn. 2011). By directing Ferguson to describe why others' convictions were "scarier" than his, the prosecutor led Ferguson to identify one of his felonies as a "robbery." He then immediately introduced Ferguson's reputation for carrying guns and followed by announcing that the conviction was for an armed robbery. The state defends this conduct first by asserting that Ferguson "spontaneously offered the name of his 2015 offense" and second by asserting that Ferguson "opened the door" to questioning about details of his felonies. We reject both assertions.

Ferguson did not "spontaneously" announce the nature of the prior conviction; the prosecutor's questions prompted him to describe why his were not as scary as the others' violent crimes. And the prosecutor, not Ferguson, specified that the "robbery" was "an *armed* robbery." Nor did Ferguson open the door to discuss the nature of the prior felonies. The door is opened when "one party by introducing certain material . . . creates in the opponent a right to respond with material that would have otherwise been inadmissible." *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006). We have examined Ferguson's direct examination and see nothing in his discussion of the behavior of Adam and the other named participant that introduced the information about Ferguson's prior convictions the

prosecutor sought to get before the jury. Nor did Ferguson testify about his own character in a way that invited the excursion. The line of questioning was improper.

But we hold that the improper questioning did not affect Ferguson's substantial rights. We so hold after "we [have] consider[ed] various factors, including the pervasiveness of improper suggestions and the strength of evidence against the defendant." *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). Although the inquiry was limited, the district court had already implicitly determined that revealing any details of the prior convictions would be unfair, requiring only sanitized references for impeachment. The evidence of Ferguson's guilt, however, was so overwhelming that the only possible avenue of acquittal was a self-defense theory that was almost entirely implausible considering the video footage depicting Ferguson killing the fleeing and nonthreatening Adam. The footage was not the only obstacle to the jury's believing Ferguson's claimed fear for his own life; the claim depended on Ferguson's credibility, which the state brought into serious doubt with undisputed evidence that Ferguson had fled the scene, fled the state, lied to police about being at the scene, and lied to police about his reason for being there.

2. Cross-Examination: Ineligibility to Possess Firearm

The second challenged line of cross-examination regarded the gun Ferguson used to kill Adam and was also improper. It went as follows:

> Q: You don't recall how you got this loaded gun?
> A: No.
> Q: And you weren't supposed to be carrying a loaded gun anyways, were you?
> A: No.
> Q: In fact, you can't possess a firearm for the rest of your life, correct, not legally?

A: Not legally.
Q: But you do it anyways, right?
A: Yeah.
Q: Okay. So you're carrying this gun you're not supposed to have on August 24th and you go to meet [Adam's brother]?
A: Yes.

Ferguson accurately contends that this line of questioning about his ineligibility to possess a firearm exposed evidence of a prior bad act under Minnesota Rule of Evidence 404(b), which required the state to provide prior notice of its intent to introduce it. The state's counter contentions are specious. It maintains that the prosecutor did not venture into a prior bad act requiring notice under rule 404(b) because the prosecutor never actually mentioned "the charge of possession of a firearm by an ineligible person" but merely "referred to a consequence of the convictions about which [Ferguson] had already testified." The state also maintains that introducing this evidence was fair to impeach Ferguson's testimony that he did not have a reputation for carrying guns.

The state's claim that the prosecutor referenced only "the consequence" of the conviction that Ferguson himself introduced fails for two reasons. The first reason is that the prosecutor referred to more than the consequence (meaning, presumably, the fact of Ferguson's ineligibility to possess a firearm resulting from the armed robbery conviction); the prosecutor referred instead to Ferguson's *failure* to abide by the consequence—twice informing the jury that Ferguson had been doing what he was "not supposed" to be doing, violating a firearm restriction that was in place "for the rest of [his] life." And we have already explained why we reject the state's contention that Ferguson, rather than the prosecutor, instigated the evidence of Ferguson's armed robbery. The second reason is that

this line of questioning never explored anything about Ferguson's "reputation" for carrying guns; it explored only the wrongfulness of his carrying guns.

This line of questioning constitutes plain-error prosecutorial misconduct. But the misconduct did not affect Ferguson's substantial rights for the same reasons the other line of improper questioning is not prejudicial. And the district court also immediately cautioned the jury not to convict Ferguson based on the prior bad acts and then later offered to instruct the jury more formally in that regard. Ferguson declined.

3. Cross-Examination: Finger-as-Gun Demonstration

We see no misconduct in the third challenged line of cross-examination. It went as follows:

> Q: Could you point at me right now, Mr. Ferguson.
> A: Can I point at you?
> Q: Point at me.
> A: (The witness complies)
> Q: You pointed at me with your right hand, right?
> A: Yeah.
> Q: Let's say hypothetically I had a gun, I don't, but if I did do you think you could shoot me from where you're sitting?
> A: Maybe.
> Q: Now, if you wanted to scare me why would you have to pull the trigger?
> A: If I wanted to scare you why would I pull the trigger?
> Q: Right, don't you think I'd be scared enough with a gun pointed at me?
> A: No.

The exchange continues with the prosecutor asking Ferguson about ways he could shoot the gun so as only to frighten rather than kill.

We are unpersuaded by Ferguson's argument that this questioning was unfairly inflammatory and served no legitimate purpose. The questioning led Ferguson to

demonstrate that he knew he could fire a weapon in a direction that would cause no harm. This was relevant both to the elements of the offense and the elements of Ferguson's self-defense claim. And asking Ferguson to use his finger in the demonstration was certainly not inflammatory in a case involving a real gun fired into a crowd. We hold that this questioning was not improper under our plain-error review.

Misconduct in Closing Arguments?

Ferguson objected during trial concerning his final allegation of prosecutorial misconduct, which involved the prosecutor's statements during closing arguments. We conclude that the alleged misconduct was harmless beyond a reasonable doubt. Ferguson contends that the prosecutor improperly asked the jury to consider the fact that the shooting took place near a church by saying, "I hope it's not lost on everyone, he was lighting up a church with that firearm." Ferguson objected, and the district court directed the prosecutor to move on. The prosecutor used the same phrasing later, saying, "He lit up a church." Ferguson asks us to consider the fact that faith is deeply personal and that highlighting the setting of this shooting "implicitly invited the jurors to reflect on their own religious practices or fears they might have about the increase in violence and fatal shootings in places of worship." The prosecutor's comment did not merely provide context about the location of the shooting; it instead included inflammatory verbiage calling special attention to a circumstance that was not germane to any of the elements of the offense or of self-defense. Stressing that Ferguson "was lighting up a church with a firearm" and emphasizing his "hope [that] it's not lost on everyone" (meaning, every one of the jurors), was needlessly inflammatory. But we hold that it was also harmless beyond a reasonable

doubt given its isolated use and the overwhelming evidence of Ferguson's guilt, already discussed.

V

Ferguson argues finally that, even if no individual trial error warrants reversal, the cumulative effect of all the errors does. But three of the seven alleged errors were not errors at all, and the four errors we have recognized could not on their own or in the aggregate have reasonably affected the verdict under the circumstances of this case.

Affirmed.