STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1377

State of Minnesota,
Respondent,

vs.

Jerimiah Micheal McFee,
Appellant.

Filed September 12, 2022
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CR-19-26792

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Slieter, Presiding Judge; Ross, Judge; and Johnson, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

The state accused Jerimiah McFee of attacking another man in a parking ramp, kicking and stomping on the man's head, and leaving him cognitively disabled. The jury found McFee guilty of attempted second-degree murder. McFee appeals from his

conviction, claiming that the evidence does not support the guilty verdict, the prosecutor engaged in misconduct, and the district court improperly excluded evidence. Our de novo review informs us that the evidence readily supports the guilty verdict; our plain-error review reveals no error regarding the alleged prosecutorial misconduct; and McFee's failure to apprise the district court of his theory of admitting otherwise inadmissible evidence leaves his evidentiary challenge forfeited. We therefore affirm.

FACTS

In September 2019 shortly before 3:00 a.m., Jerimiah McFee went with another man into the Minneapolis Mills Fleet Farm parking ramp. Four hours later the parking ramp supervisor discovered the man, whom we will call Adam in the interest of his privacy, lying facedown and unconscious in a pool of his own blood. The supervisor summoned emergency assistance, and police and paramedics quickly arrived.

The paramedics rushed Adam to the hospital where he underwent trauma surgery to save his life. The surgeon described Adam's injuries as severe. He suffered a traumatic brain injury. His eyes were significantly swollen. His face was lacerated and abraded. Blood partially filled his airway. Many of his teeth were loose, and one was lodged in his lung. His face was fractured in multiple places. His brain hemorrhaged. Following surgery and in intensive care, Adam could not communicate or respond to commands. After extensive medical treatment, Adam's hospital physicians discharged him to a long-term care facility. His long-term care physician described Adam's head injuries as having resulted from stomping. Adam has not regained his ability to speak or walk, and he lives in a group home where he needs considerable basic, daily, personal care.

Police who had arrived immediately at the parking ramp found no weapons on Adam's person, in his belongings, or near him. They identified McFee as Adam's attacker from video footage of McFee entering the parking ramp with Adam before the attack and then running out of the parking ramp alone after the attack. McFee admitted to the beating, and the state charged him with attempted second-degree murder and first-degree assault.

McFee notified the state that he intended to rely on the defense of self-defense. The state moved to exclude any specific-act evidence relating to an altercation that occurred three hours before the assault, which Adam had with another person on the U.S. Bank Stadium light rail platform adjacent to the parking ramp where the assault occurred. Metro Transit police officers had separated two combatants, one of whom was Adam. He told those officers that he was on the Metro Transit trespass list for having harassed passengers. McFee argued that this specific-act evidence should be admitted as probative of who was the aggressor in his assault on Adam. The district court excluded the evidence. It observed that the altercation had occurred three hours before McFee assaulted Adam, that McFee had been unaware of Adam's altercation, and that no one had suggested that the man who had been fighting with Adam was present when McFee later assaulted Adam. The district court therefore excluded the altercation evidence as irrelevant to whether McFee believed that Adam posed any threat to him.

The district court held a four-day jury trial. The jury heard testimony from Adam's mother, the parking ramp supervisor, the two responding police officers, a police investigator, the tending paramedic, the trauma surgeon, the long-term care physician, and the police officer who apprehended McFee. The jury also saw video footage of McFee and

Adam entering the parking ramp and McFee leaving, video footage of McFee's interview with the investigator, and police body-camera images depicting Adam's condition as police found him. McFee testified on his own behalf, claiming that he attacked Adam in self-defense.

The jury rejected McFee's self-defense claim and found him guilty of attempted second-degree murder and first-degree assault. The district court entered convictions for both offenses and sentenced McFee to 180 months in prison for attempted murder. McFee appeals.

DECISION

McFee argues that the state introduced insufficient evidence to support the guilty verdict, that the prosecutor engaged in misconduct, and that the district court improperly excluded evidence tending to establish Adam's reputation for violence. We address each argument.

I

We are unconvinced by McFee's argument that the evidence does not support his attempted second-degree-murder conviction. We examine the record to determine whether the evidence, viewed in the light most favorable to the conviction, would allow a jury to find the defendant guilty beyond a reasonable doubt. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). A person is guilty of attempted second-degree murder when he takes a substantial step toward intentionally causing another's death without premeditation. Minn. Stat. §§ 609.17, subd. 1, .19, subd. 1(1) (2018). Intent, which is the only element McFee disputes, requires a showing that the defendant "has a purpose to do the thing or cause the

result specified." Minn. Stat. § 609.02, subd. 9(4) (2018). But there was no direct evidence proving that McFee intended to kill Adam, so the jury relied only on circumstantial evidence.

Ample circumstantial evidence supports the jury's finding of McFee's intent to kill Adam. Because the jury relied on circumstantial evidence on this element, we review the evidence with closer scrutiny. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). To do so, we undertake a two-step analysis. We first identify the circumstances proved at trial, deferring to the fact-finder's acceptance of inculpatory evidence and rejecting conflicting evidence; and we second determine whether those circumstances are consistent only with guilt and inconsistent with any rational hypothesis other than guilt. *Id.* at 473–74. We are satisfied that the following circumstances proved at trial establish McFee's criminal intent and support no innocent explanation. McFee went alone with Adam into the parking ramp at about 2:50 a.m. Adam possessed no weapon that could have threatened McFee with death or serious bodily harm. McFee repeatedly kicked and stomped Adam's head with enough force to dislodge his teeth, break the bones in his face, and leave him cognitively impaired. McFee's kicks and stomps to Adam's head occurred while Adam laid helpless on the ground. Adam's injuries were obviously severe. McFee gave Adam no medical aid. McFee fled. McFee did not contact emergency services personnel to render emergency aid. This evidence indicates the brutal nature and severe force of McFee's repeated attack on Adam's head and proves McFee's willingness to leave Adam to die choking on his own blood (and tooth) without medical assistance.

McFee argues unpersuasively that these circumstances show only that he intended to commit a first-degree assault. We reject as untenable his contention that, if he had intended to kill Adam, then "he presumably would not have ceased his conduct and left the scene." Ceasing one's conduct and fleeing the scene after repeatedly kicking and stomping a man's head to the point of crushing his brain is wholly consistent with intending to beat the man to death and then escape the consequences of the crime. And no reasonable person could infer that, by committing the self-evidently lethal acts and then abandoning the man without summoning life-saving medical aid, McFee intended something less than a killing. Because McFee provides no reasonable inference other than his intent to kill Adam, we reject his insufficiency argument.

II

McFee identifies three statements the prosecutor made during closing argument and argues that they constitute misconduct. Because none of these allegedly improper arguments drew McFee's objection during the trial, we review only under a plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). We will not reverse under this standard unless we see an error and the error was plain. *Id.* at 302. If McFee has identified a plain error, the burden then shifts to the state to establish that McFee's substantial rights were not affected or, in other words, that "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *Id.* (quotation omitted). McFee's argument does not pass the first step because he identifies no error.

McFee argues that three statements impermissibly inflamed the jury's passions by urging the jury to reject McFee's defense because "a not-guilty verdict would lead to a chaotic and dangerous society." It is true that a prosecutor must not inflame the jury's passions against the defendant. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). But we see nothing improperly inflammatory in the challenged statements:

Statement 1

> I don't know if Mr. McFee actually believed that [the victim] was reaching for a gun. It's possible that he really believed that. But was it reasonable? The fact that he had an illogical, irrational, paranoid, perhaps meth contributed to his perception, that's not a legal defense. It can't be. That would be chaos.

Statement 2

> Your verdict has to be based on the law as it applies to the facts in this case. We can't live in this fantasy world where all of the defendant's actions are justified by imagined threats that he sees around him. That would be chaos. That wouldn't be a fair or a civil society.

Statement 3

> The law requires that a person act reasonably in self-defense, because otherwise you could always do what [defense counsel] just asked you to do, which is inconsistent with the law, put yourself in somebody else's shoes and think about, you know, how they must have been feeling and speculate about that. That's not fair. That's not reasonable. That's not safe. That's chaos.

Because the same error is alleged in all three statements, we address them together. We see no misconduct in these statements. McFee focuses on the prosecutor's use of the word, "chaos" which, in some contexts, would provoke jurors' passions unfairly against the defendant. But here the prosecutor introduced the word in the context of describing McFee's self-defense argument. In each statement, the term "chaos" is mildly ambiguous

but can most fairly be read as referring to the unreasonableness of McFee's self-defense claim. The second statement's reference to "chaos" immediately before a sentence about "a civil society" comes closest to raising the concern about an unfair provocation. But it too appears in the context of the prosecutor's framing of the legal standard of self-defense, including the fact that legitimate self-defense rests on real and reasonable threats rather than fantastical dangers imagined upon a defendant's confused, drug-influenced mental state. McFee had testified that he smoked methamphetamine shortly before he assaulted Adam, was on methamphetamine at the time of the incident, and had gone with Adam into the ramp to find someone from whom they could purchase more methamphetamine. And although he testified that he speculated that Adam might have possessed a gun, he said that he searched for a gun but then fled in supposed fear for his life even after his search uncovered no gun and even though Adam lay helplessly unconscious. It is not apparent that the prosecutor's use of the term "chaos" was inflammatory in this context, and it does not amount to misconduct under our plain-error review.

III

McFee argues finally that the district court should have admitted evidence to support his self-defense theory. Specifically, he contends that the district court should have admitted evidence that, according to McFee on appeal, would have established Adam's reputation for violence. He points to Adam's trespass status as having been previously ordered not to enter transit property and his having fought with the other man three hours before McFee stomped him unconscious. McFee acknowledges that he offered evidence of Adam's fight only "to show that [Adam] was the aggressor" and that "prior acts are not

admissible for this purpose." But he maintains that, "[a]lthough the request below was framed as specific acts evidence, the proffer was sufficient to show evidence of a reputation for belligerence." In other words, the district court erred, argues McFee, essentially by having failed to admit otherwise inadmissible evidence on an obscure theory that McFee never raised. Defense counsel, not district judges, decide a defendant's trial strategy, and judges are not oracles capable of discerning an undisclosed, unconventional use of evidence that does not occur even to defense counsel until after the trial. We reject the previously unraised argument as forfeited. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). We add that the argument would also have no apparent plain-error survivability had we addressed it on the merits.

Affirmed.