STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1328

State of Minnesota,
Respondent,

vs.

Andrew Gordon Lemcke,
Appellant

Filed December 27, 2011
Affirmed
Ross, Judge

Swift County District Court
File No. 76-CR-08-821

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Robin Finke, Swift County Attorney, Benson, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Worke, Judge.

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

ROSS, Judge

Andrew Lemcke's wife died from a single gunshot to the head fired while she and Lemcke were alone in their home. Lemcke claimed that his wife was threatening him

with the gun and that it discharged accidentally as he struggled to disarm her. A jury convicted Lemcke of second-degree manslaughter. He argues on appeal that his conduct did not constitute negligence and that, because he never asserted that he intentionally killed his wife to save himself, the district court erred by instructing the jury that self-defense authorizes intentionally killing to defend one's own life. He also argues that the district court erred by allowing evidence of his prison-guard training. Sufficient evidence supports the jury's belief that, even if Lemcke's wife introduced the gun into the couple's argument, Lemcke had control of it when it discharged. No injustice results from the allegedly erroneous self-defense instruction, and Lemcke waived any objection to evidence of his guard training. We therefore affirm.

FACTS

Late on September 11, 2004, Andrew Lemcke and his wife, Nichole, arrived separately at a party and later at a bar, where they quarreled over their relationship. Andrew returned home first, leaving the bar before 2:00 a.m., and Nichole left at 2:00 for a rendezvous with a man with whom she was having an extramarital affair. Nichole arrived home after 4:00 a.m.

Later that morning, Dale Blesi, a neighbor, let his dog out. At 6:36 a.m., Blesi heard a gunshot from the Lemcke home and then what he believed to be a woman's voice yelling a name. Seconds later he heard another shot. Seven minutes passed, and Lemcke dialed 911 to report that his wife had been shot. The dispatcher mistook Lemcke's voice for a woman's. Lemcke drove Nichole to the hospital, where she died from the single gunshot to the head.

Lemcke spoke with a police officer at the hospital, but his story bore inconsistencies. He first claimed that he had been sleeping on the couch when the first shot sounded and woke him. But he soon said that he had been awake and watching television. He said that he awoke to see his wife standing in the living room pointing a gun at him, yelling, and asking where her son was. Lemcke claimed that he tried to calm her and asked for the gun. He said that he did not know what kind of gun it was, but later he claimed that he and Nichole had bought it for protection against her former boyfriend, the father of one of her children. He grabbed her arm, he said, and the two struggled. He told the officer that, during the struggle, the gun discharged accidentally. The bullet entered under Nichole's chin and exited through the top of her skull.

Police searched the Lemckes' home. They found an empty holster and ammunition in Nichole's undergarment drawer. They found one bullet hole in the living room wall and one in a sofa. They found two separate pools of blood on the floor and the sofa. They found no identifiable fingerprints on the handgun.

The September 2004 shooting was not quickly prosecuted. Lemcke moved to Arizona in 2006 and worked as a prison guard. He told fellow guards details about his wife's death that differed from statements he had made to police, and a 2008 Minnesota grand jury indicted him for first- and second-degree murder. He stood trial in February 2010.

The jury heard two contradicting theories of Nichole's death—one from the state and one from Lemcke, who testified in his own defense. The state maintained that the couple argued after Nichole returned home from her adulterous rendezvous and that

Lemcke shot her while she slept on the sofa, afterwards planting the holster in her drawer. Lemcke maintained that he had been asleep on the couch and was awakened by Nichole's first shot, after which Nichole screamed about one of the children's whereabouts. He claimed that Nichole was sleepwalking and did not recognize him, so he had to struggle to disarm her, causing the allegedly accidental fatal discharge.

The jury heard testimony from Darren Olson, a trainer and special operations team leader at a Minnesota prison where Lemcke once worked. Olson explained how the special operations team members, like Lemcke, were trained to react to armed inmates.

Two prison guards who worked with Lemcke in Arizona also testified. The first explained that Lemcke told her that he had argued with his wife before they went to sleep in the early morning hours before she died, but the witness could not remember if he told her what they argued about. She also testified that Lemcke told her that his wife had turned the gun on herself and that he was trying to stop her from committing suicide when it discharged. The second guard testified that Lemcke told him that the night before his wife died, he argued with her about one of them cheating (the guard did not recall which one). Lemcke told him that the result of the argument was that Lemcke slept on the couch and his wife slept in the bedroom. He testified that Lemcke told him that he woke up and saw his wife pointing a gun at him, but he said nothing about being awakened by a gunshot.

Dr. Michel Bornemann, a sleep specialist, also testified in the state's case-in-chief. Dr. Bornemann testified that Nichole's behavior was not indicative of sleepwalking and that a gunshot would have awakened her.

The state elicited testimony from Nichole's father, who explained that Nichole had never expressed any desire or need for a gun, that when she started her child-care business she did not want guns in the house and that she wanted all the guns that had been in the house taken to Lemcke's parents' house. He and other state witnesses testified that Nichole never expressed fear of her former boyfriend.

Lemcke testified that Nichole purchased the gun from his father because she feared that her former boyfriend would try to abduct one of her children. He added that Nichole never told him that she wanted a divorce and that they never argued about either of them having an affair. He claimed not to know about Nichole's affair and denied intending to kill her.

At the close of trial, Lemcke successfully moved the district court to add the lesser offense of second-degree manslaughter to the state's murder charges. The district court instructed the jury on the charged offenses and on self-defense, using the self-defense instruction modeled after CRIMJIG 7.05 that Lemcke specifically requested. The jury found Lemcke not guilty of murder, but it convicted him of manslaughter.

Lemcke appeals from his manslaughter conviction.

D E C I S I O N

I

Lemcke first argues that the evidence was insufficient to convict him of manslaughter. We address insufficient-evidence claims by determining whether the evidence, when considered in the light most favorable to the conviction, could support the jury's verdict of guilt beyond a reasonable doubt. *Bernhardt v. State*, 684 N.W.2d

465, 476–77 (Minn. 2004). We do not reweigh evidence, and we assume that the jury believed the evidence supporting the conviction and disbelieved conflicting evidence. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009). To support Lemcke's conviction of second-degree manslaughter, the record must contain evidence that could lead a jury to believe (1) that he caused Nichole's death, (2) that by his culpable negligence he created an unreasonable risk, and (3) that he consciously took chances of causing death or great bodily harm to her. *See* Minn. Stat. § 609.205 (2004).

Lemcke specifically contends that his conduct does not rise to the level of "culpable negligence." Culpable negligence is more than both ordinary negligence and gross negligence. *State v. Back*, 775 N.W.2d 866, 869 (Minn. 2009). It is intentional conduct that the actor may not intend to be harmful but that an ordinary and reasonably prudent person would recognize as involving a strong probability of injury. *Id*. Lemcke argues that his attempt to disarm Nichole in self-defense was not negligent conduct and that she was reckless by arming herself and shooting at him.

The fundamental flaw in Lemcke's argument is that it rests on testimony and a theory of the case that the jury obviously did not materially believe, and we rely on the jury's weighing of the evidence. Lemcke's argument depends on the jury's accepting that he was not in primary control of the gun when it discharged. But forensic evidence and other evidence tends to support the state's theory that Lemcke at least controlled the gun when it discharged. Sufficient probative evidence would also support the jury's belief of various other facts supporting the conviction: Lemcke gave various conflicting stories of the circumstances surrounding the shooting and gave police contradictory key details

undermining his claim of self-defense; expert testimony contradicted Lemcke's claim that Nichole had been sleepwalking; other testimony cast doubt on Lemcke's claim that the gun was Nichole's; Lemcke gave conflicting accounts about the timing of the two shots and having been awakened by the first; an inference existed that Lemcke planted evidence of Nichole's gun ownership by placing the holster in her drawer during the seven minutes between the shooting and his finally calling the police; testimony contradicted Lemcke's claim not to have known that Nichole was having an affair and about arguing with her about it before the shooting; the fact of Lemcke being nearly twice Nichole's weight and a foot taller tended to support the state's theory that he used his superior strength and training to cause the gun that had supposedly been pointed at him to be redirected at Nichole when it discharged; and expert testimony suggested that the orientation of the gun made it difficult or impossible for Nichole to have been in control of it or to have pulled its trigger when it discharged into the bottom of her chin. These facts were all disputed, but the inferences most favorable to the verdict would support them.

Additional evidence supports the jury's apparent decision to discredit at least some of Lemcke's testimony. The medical examiner testified that Nichole lay bleeding on the sofa for three to five minutes and on the floor for one to three minutes. This gave the jury a ground to disbelieve Lemcke's testimony that, after his emergency call, he rushed out of the house with Nichole, pausing and placing her on the sofa only momentarily to get his keys. The evidence would also allow the jury to have gone even further than to reject some of Lemcke's testimony; it provided a reasonable basis for it to have discredited

virtually all of it and determine that he introduced the gun into the argument himself and then fired both shots in anger.

We do not find facts on appeal and cannot know which of the variations of the story the jury actually accepted, because the evidence supports a number of scenarios of Lemcke's guilt. If the jury believed much of Lemcke's version, we are satisfied that the jury still had ample ground to find culpable negligence in his taking substantial control of the gun that Nichole allegedly introduced to the scene. If the jury believed little of Lemcke's version, we are also satisfied that the jury had grounds to find culpable negligence in his introducing the firearm into the argument over his wife's adultery, leading to the alleged struggle and her death. Under either version, the jury's finding of negligence is well supported.

II

Lemcke argues that the district court denied him the right to a fair trial by giving an inadequate self-defense instruction. Not only did Lemcke not make this argument to the district court, Lemcke actually requested the self-defense instruction that he now claims constitutes the error that requires reversal. We are not persuaded.

By failing to object to the jury instructions at trial, Lemcke effectively waived the right to challenge the instructions on appeal. *See State v. Hersi*, 763 N.W.2d 339, 342 (Minn. App. 2009). We have discretion to review the unobjected-to jury instruction for plain error. *State v. Gustafson*, 610 N.W.2d 314, 318–19 (Minn. 2000). Under a plain-error assessment, we will reverse only if we find an error, determine that the error was plain, and hold that the error affected substantial rights. *See State v. Strommen*, 648

N.W.2d 681, 686 (Minn. 2002). An error is "plain" when it is "clear" or "obvious." *Id*. at 688. And an error affects substantial rights if it is prejudicial and it affects the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). Even if Lemcke can prove plain error occurred, we also have discretion to correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Strommen*, 648 N.W.2d at 686.

Lemcke argues that the district court erred when it used the incorrect self-defense jury instruction. He contends that the district court mistakenly used CRIMJIG 7.05, which directs the jury to find his self-defense killing justified only if he believed it was necessary to kill Nichole to save himself. *See* 10 *Minnesota Practice*, CRIMJIG 7.05 (2010). This instruction, he argues, implied to the jury that he intentionally killed Nichole when really he was claiming to have accidentally killed her.

Lemcke is correct that the form instruction CRIMJIG 7.06, which does not require that the defendant believe the killing was necessary, would have been more fitting since he claimed that the death was unintentional. *See State v. Hare*, 575 N.W.2d 828, 833 (Minn. 1998). But we do not believe any error was plain or obvious; Lemcke himself asked before trial that the presently challenged instruction be included and chose not to withdraw the request after trial even after his defense had been clarified and after he had successfully introduced the option of manslaughter into the equation. We also do not believe any error affected the outcome of the case; the jury was repeatedly urged by Lemcke and his counsel to find that he only accidentally shot Nichole, and it clearly accepted the argument since it acquitted him of murder. The evidence of guilt is too

strong for us to believe that any confusion from the instruction might have influenced the verdict. And finally, even if we found a plain error here, we still would not reverse; under these circumstances we would not exercise our discretion to correct the error because we are confident that it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

III

In a pro se supplemental brief, Lemcke claims that the district court erred by accepting evidence about his training as a prison guard and his membership on the special response team because this evidence tended to impose a stricter standard of negligence than the reasonable-person standard. The argument fails.

Evidentiary rulings are within the district court's sound discretion and will not be reversed without a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Lemcke has the burden of establishing that the district court abused its discretion and that he was prejudiced. *See id.* If Lemcke failed to raise the issue at trial, he is deemed to have forfeited it. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Lemcke claims that he made four objections during trial that preserved his right to appeal the admissibility of the evidence of his prison-guard training. But our review of the record reveals that none of the actual objections he identifies preserved the issue. The objections are forfeited and he makes no argument for plain error.

Lemcke first objected about evidence of his prison-guard training during a pretrial hearing at which his attorney clarified that he was *not* objecting to evidence about "a particular technique of disarming someone who is holding a gun," or about "the type of

training the [special operations] team members had." His counsel objected only to potential testimony from a prison guard to the effect that "if you did this training, you would never end up in the position that Nichole ended up in that resulted in the gun being discharged." Not only is this not the evidence Lemcke now challenges, but he also fails to cite to any point in the record when the jury heard the testimony objected to before trial.

Lemcke contends that we can find a second objection purportedly preserving the now-challenged evidence on page 922 of the trial transcript. We find no objection on that page, and we will not mine the record in search of support for his position. Appellants must include a statement of the legal issue with a description of how the issue was raised and preserved for appeal in the district court, including citations to the record. Minn. R. Civ. App. P. 128.02, subd. 1(b)(1), (3). (About ten pages after page 922, we did come across his attorney's objection to evidence of Lemcke's training record, but only on foundational grounds, and during a recess the state cited to the missing foundational data and offered the challenged exhibit again, without any objection.)

Lemcke points to a third objection, given in response to a former guard's testimony regarding "trigger finger indexing," which the guard described as a firearm-safety technique in which the gun holder keeps his finger off the trigger and outside the trigger guard. Lemcke's attorney raised only a relevancy objection to a question about what the guard would have done if he had seen that another guard was not following this safety technique. The objection was overruled, and the guard testified that the offender "would have been immediately corrected to stop that behavior." The objection and the

admitted evidence have no bearing on Lemcke's assertion that the evidence caused the jury to hold him to a higher standard of care.

The fourth objection that Lemcke identifies is a speculation objection raised in response to the question, "If Andrew Lemcke had not been proficient in handling weapons and nonlethal defensive tactics and in prisoner control and restraints, would he have been allowed to be on the [special response] team?" The district court overruled the objection and held that the answer in the negative was not speculative. This objection again does not preserve the issue that Lemcke attempts to raise on appeal.

None of the objections listed by Lemcke preserved his right to appeal the admission of the evidence of his training as a prison guard on the bases he now asserts. And he does not argue that his forfeited objection nevertheless warrants our review.

Affirmed.