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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1104**

State of Minnesota,
Respondent,

vs.

Reid Otis Smith,
Appellant.

**Filed May 28, 2013
Affirmed
Ross, Judge**

Anoka County District Court
File No. 02-CR-11-2511

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

Anthony C. Palumbo, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Smith,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

36-year-old Reid Smith punched his 80-year-old father in the face, hit him with a gun, kicked him, threatened to cut his throat with a shard of glass, smashed a guitar over

his head, and fired gunshots into walls. Now Smith appeals from his convictions for first- and second-degree assault and terroristic threats arising from the battering, arguing that the district court committed plain error by instructing the jury that he had a duty to retreat before he could defend himself (because, he argues, he was in his own home) and that the district court and his counsel committed numerous other errors. Because the record indicates that Smith was merely a guest in his father's home during the assault, and not a resident there, his jury-instruction argument does not warrant reversal. And his other claims of error lack any persuasive merit. We therefore affirm.

FACTS

Reid Smith lived briefly with his aging father, an avid gun collector, in March 2011. Soon after Smith moved out, his father discovered several guns missing and suspected Smith of taking them. He called Smith and demanded their return. Smith promised to return them that night, but he didn't. When Smith arrived at about noon the next day, he beat his father using one of the guns he had taken, as well as with his fists and feet. Smith seized a piece of broken glass and threatened to cut his father's throat with it. He also threatened to kill his father's girlfriend. Then he fired several bullets, striking various walls but not his father, and he smashed a guitar over his father's head. Smith went momentarily into a bedroom and returned with a sword in one hand and a pistol in the other. Smith's father pulled a gun from a case and fired a shot, causing Smith to flee.

A neighbor called police. Police arrived to find Smith's father bleeding badly. He had a ruptured eardrum and suffered persistent dizziness. When police found Smith, they saw a few scratches on his arms and hands.

The state charged Smith with attempted second-degree murder, first-degree assault, second-degree assault, and terroristic threats. Smith testified during his jury trial that he had moved into the house to help his father address his hoarding problem, but that he had left the house to stay elsewhere before the altercation. Smith gave the jury several reasons justifying his actions, or otherwise minimizing his culpability. He asserted that his father had initiated the conflict by pulling a gun on him. He claimed that he chose to stay rather than to flee because he feared that his father would shoot him if he fled. He told the jury that his father's injuries were caused by the struggle over the gun when various household items fell onto him. He insisted that the gun had discharged several times during the struggle only on accident. And he said that he left the house as soon as he could do so safely.

Smith had already agreed through counsel that the jury should be instructed that his right to self-defense includes a duty to retreat. The jury was partially, but not entirely persuaded by Smith's argument. It acquitted him of second-degree murder, but it found him guilty of all other charges. The jury also considered facts bearing on sentencing and found three aggravating factors: Smith's father was particularly vulnerable due to his advanced age; Smith committed the offense within his father's zone of privacy; and Smith treated his father with particular cruelty during the crime. The district court

sentenced Smith to 144 months in prison, an upward departure from the presumptive 86-month prison sentence.

Smith appeals from his convictions.

DECISION

I

Smith argues that we must reverse his convictions because the district court improperly instructed the jury that he had a duty to retreat even though the offense occurred in his own home. The argument has no merit.

Smith did not object to the instruction. When a party does not object to an instruction during trial, we review claims of erroneous jury instructions for plain error only. *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007). To show plain error, an appellant must show that there was an error, that the error was plain, and that it affected his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these prerequisites are met, we may at our discretion reverse a conviction to ensure the fairness and integrity of judicial proceedings. *Id.*

Smith's challenge fails because the instruction is not erroneous, and it certainly is not plainly erroneous. The right to claim self defense normally includes the duty to retreat "if reasonably possible." *State v. Glowacki*, 630 N.W.2d 392, 399 (Minn. 2001). This duty does not apply, however, when the crime occurs in one's own residence, even when that residence is shared with the attacker. *Id.* So Smith's argument that he merely defended himself at the residence he shared with his father fails on the facts. A residence is "an abode, dwelling, habitation, or *place where one actually lives.*" *Buckheim v.*

Buckheim, 231 Minn. 333, 337, 43 N.W.2d 113, 115 (Minn. 1950) (emphasis added). Smith testified that he lived somewhere other than his father's home at the time of the assault. He told the jury that he had left his father's home to "[g]ive him some room to cool off." His testimony is corroborated by his father's having to telephone him to demand the return of the missing guns and by his being absent the night before the assault. The residence exception to the duty to retreat does not apply, and it therefore was not error for the district court to give the instruction in the form that it gave it.

II

Smith raises about 32 additional issues in his separately filed, pro se brief. These fall generally into the categories of challenges to sufficiency of the evidence and claims that his counsel's performance was inadequate. Both fail.

We review sufficiency-of-the-evidence challenges to determine whether the evidence in the record, viewed in a light most favorable to the verdict, was sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Smith argues repeatedly that the evidence was insufficient because his father was not credible and that his version of events was ignored. He highlights the absence of fingerprint evidence and motive evidence. But we defer to the jury to resolve reasonable factual differences, and our deference is particularly broad where, as here, the question of guilt turns mainly on conflicting testimony. *See State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). Smith's "attempt to retry his case by asking us to reevaluate [the witness's] credibility is contrary to our role." *See State v. Bliss*, 457 N.W.2d 385, 391 (Minn. 1990). The jury heard Smith's version of events, and it heard his

father's version; and the two versions—either one of which was plausible—could not both be true. The jury believed his father's version, establishing a factual basis for its verdict, and we have no authority to disturb that verdict in this setting.

Smith also identifies various alleged flaws in his counsel's trial performance. To justify a new trial based on constitutionally deficient defense-attorney performance, a defendant must prove both that his counsel's performance was objectively unreasonable and that except for that deficient performance the trial would have resulted differently. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). Smith lists various questions that he thinks his counsel should have asked, but did not ask, while cross-examining his father. And he points to prosecution weaknesses that his counsel failed to attack. The Constitution affords the right to adequate performance of counsel, not perfect performance. The alleged deficiencies that Smith identifies all appear to be inconsequential or matters of strategy. When evaluating ineffective-counsel claims, we do not review "matters of trial strategy or the particular tactics used by counsel." *State v. Hokanson*, 821 N.W.2d 340, 358 (Minn. 2012). Our review of the record satisfies us that Smith's counsel cross-examined witnesses and made a reasonable opening statement and closing argument. His attorney convinced the jury that the state had not proven that he attempted to murder his father—a substantial victory. This implies effectiveness. Smith also does not assert that the trial would have turned out differently on the other charges but for his counsel's purported errors, and although we can infer the argument, we are not persuaded by it.

Affirmed.