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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1415**

State of Minnesota,
Respondent,

vs.

Franklin Anthony Chosa,
Appellant.

**Filed February 13, 2012
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-09-38278

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

Michael O. Freeman, Hennepin County Attorney, Michael K. Walz, Assistant County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Minge, Judge; and Ross, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Franklin Anthony Chosa punched and kicked Carlos Trevino, Jr., so forcefully and repeatedly in the face that he broke both orbital sockets, both cheekbones, and both the

upper and lower jawbone, along with crushing his nose, causing both eyes to become detached, and causing an immediate, severe brain injury, killing Trevino. On appeal from his convictions of second-degree murder and first-degree manslaughter for the beating death of Trevino, Chosa argues that the evidence was insufficient to support his convictions because the state failed to prove that he did not act in self-defense. He also maintains that the district court committed plain error in instructing the jury about self-defense. Because the record contains no evidence remotely suggesting that Chosa was motivated by self-defense or that his amount of force was consistent with reasonable self-defense, and because the jury instructions do not warrant reversal, we affirm.

FACTS

At about 4:00 in the morning on July 25, 2009, William Bellanger and his friend Carlos Trevino, Jr., approached an apartment building near the corner of Cedar Avenue and 26th Street in Minneapolis. The two men were hoping to buy alcohol or drugs and they were drawn by what appeared to be a party taking place in an apartment rented by Jeanette Chosa, whom Bellanger and Trevino did not know. As Bellanger and Trevino stood in front of the apartment building, Franklin Chosa, his brother Jeffrey Chosa (cousins of Jeanette Chosa), and a third man came outside. Bellanger and Trevino asked the men if they could get them alcohol, and when the men said they could, Trevino gave them \$20. The men went back inside.

Bellanger and Trevino waited outside for about 10 minutes. Franklin and Jeffrey Chosa came back out, announced that they did not have any alcohol, and threatened to harm Bellanger and Trevino if they did not leave. They did not refund the \$20. Bellanger

and Trevino walked from the front of the building to the sidewalk and then north on Cedar Avenue. The Chosas followed. They continued to threaten them as they walked. Bellanger, who was walking ahead of the others, saw Franklin Chosa punch Trevino in the face, knocking him to the ground. Jeanette Chosa later testified that when she looked out of her apartment window she saw Franklin Chosa standing over Trevino's motionless body and Jeffrey Chosa punching Bellanger as Bellanger tried to walk away. Bellanger eventually fell to the ground unconscious. When he awoke, the Chosa brothers were gone and Trevino lay on the boulevard along the sidewalk. Bellanger yelled out to Trevino, but he did not respond, and Bellanger could not wake him.

Before the police and an ambulance eventually arrived, the Chosa brothers went back into Jeanette's apartment. When Franklin entered, one of his arms was covered in blood from his elbow to his fingers. Jeanette asked him if he had gotten cut, and he repeated several times, "This isn't even my blood." Franklin removed his shirt and Jeanette saw that he was not bleeding. Trevino's family members, who lived nearby, had gone outside when they heard the attack and were attempting to aid Trevino. They soon began calling out for the Chosas to come outside and fight, and Franklin Chosa said several times to the others in the apartment, "I will whoop that whole family."

When Trevino arrived at the hospital, he was severely wounded by blunt-force blows to his head and face: his face was extensively swollen and covered with multiple and severe contusions, lacerations, and abrasions, including on his tongue and lips; both his orbital sockets were fractured, as were both his cheekbones and his upper and lower jawbones; the bony structure of his nose had been reduced to fragments; his eyeballs

were detached from their connective tissues; and both his lungs had collapsed. He also had a severe diffuse axonal brain injury—a widespread traumatic brain injury caused by brain movement from multiple severe head blows, typically resulting in a coma or death. Trevino died.

Franklin Chosa turned himself in on July 30, 2009. He had no injuries other than cuts on his knuckles and a small abrasion near his chest. The state charged him with second-degree murder and first-degree manslaughter. The jury heard testimony and saw evidence detailing the attack, and then it found Chosa guilty, rejecting his claim of self-defense. The district court sentenced him to 142 months in prison. This appeal follows.

DECISION

I

Chosa contends that the evidence does not support his conviction. When considering a claim of insufficient evidence, our review is “limited to a painstaking analysis of the record to determine whether the evidence, when viewed in [the] light most favorable to the conviction, [is] sufficient” to sustain the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that the jury believed the state’s witnesses and disbelieved contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). When the district court instructs the jury on the elements of self-defense, we will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty. *See Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

Chosa specifically argues that the state failed to present evidence sufficient to prove that he did not act in self-defense. *See State v. Boitnott*, 443 N.W.2d 527, 532 (Minn. 1989) (noting that the state has the burden of disproving a defendant's claim of self-defense). The right of self-defense justifies a person to use force against another “in resisting or aiding another to resist an offense against the person.” Minn. Stat. § 609.06, subd. 1(3) (2008). The defendant has the burden of producing evidence to support a self-defense claim, but the state retains the burden of proving beyond a reasonable doubt that a defendant did not act in self-defense. *State v. Penkaty*, 708 N.W.2d 185, 207 (Minn. 2006).

A successful self-defense assertion will involve four elements: (1) the absence of aggression or provocation by the party claiming self-defense; (2) the party's actual and honest belief that great bodily harm could otherwise result; (3) a reasonable basis for this belief; and (4) the lack of reasonable means to retreat or avoid the physical conflict. *State v. Soukup*, 656 N.W.2d 424, 428 (Minn. App. 2003). A defendant may prevail on a claim of self-defense only when there was no reasonable alternative to his actions and when he has not needlessly joined the fight. *Id.* at 429. And even if each of these elements is met, a self-defense claim fails if the force used in alleged defense exceeds the reasonable force necessary to defend against the threatened harm. *Id.* at 428. Chosa's claim to self-defense is so baseless on the record that we have no difficulty dismissing his argument that the jury lacked the evidence necessary to reject his claim.

Chosa's argument rests entirely on his assertion that William Bellanger, the only testifying eyewitness to the confrontation leading to Trevino's death, was so “far from

credible” in his statements to the police and at trial that the jury should have disregarded his testimony. Chosa concentrates on inconsistencies between Bellanger’s statements to the police on the night of Trevino’s death and his trial testimony, on his failure to tell police that he and Trevino had been drinking and were trying to buy drugs, on his attempts to report the encounter in a manner intended to cast himself and Trevino in the best light, and on his admission that he was too drunk to remember all of the events. In doing so, Chosa never actually argues that the state failed to rebut his claim of self-defense or cite to any record evidence supporting his claim. Rather, he argues that the gaps and inaccuracies in Bellanger’s testimony, alone, preclude the jury’s finding that he did not act in self-defense in killing Trevino.

We decline Chosa’s invitation to reweigh Bellangers’ credibility. The jury alone determines the weight of evidence and credibility of witnesses. *State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998). If the jury finds a witness credible, a conviction may rest solely on that witness’s testimony, *id.*, and “[m]inor inconsistencies and conflicts in evidence do not necessarily render testimony false or provide the basis for reversal.” *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004); *see also State v. Mosby*, 450 N.W.2d 629, 634 (Minn. App. 1990) (“[I]nconsistencies are a sign of human fallibility and do not prove testimony is false, especially when the testimony is about a traumatic event.”), *review denied* (Minn. Mar. 16, 1990). The jury demonstrably found that the inconsistencies and apparently self-serving omissions in Bellanger’s testimony did not render the testimony incredible as a whole or justify disregarding it.

Independently fatal to Chosa's self-defense argument is his absolute failure to offer any supporting record evidence to substantiate the defense. And we see nothing in the facts and circumstances surrounding Trevino's death that would allow us to disregard the jury's implicit conclusion that Trevino was not the aggressor, that Chosa did not reasonably believe that Trevino might cause him great bodily harm, or that Chosa had a means to retreat. Chosa caused many bone-crushing injuries to Trevino's head while Chosa himself emerged essentially uninjured. The medical examiner testified that Trevino died from blunt-force trauma to his head and face and had no injuries at all on his hands. He explained that the blood on Chosa's shoes was Trevino's. Chosa's girlfriend testified that Chosa's only injuries were to his knuckles. Jeanette Chosa testified that neither Chosa brother was bleeding or appeared injured immediately after the beating. And Bellanger testified that Trevino did not verbally threaten or physically assault anyone.

We add that even if some evidence of Trevino's provocation or aggression existed in the record (and it does not), Chosa's argument for reversal would still fail on account of the obvious excessiveness of his force. The jury saw photographs of Trevino's corpse and heard the testimony of the medical examiner, which together would render almost impossible a finding that the amount of force used by Chosa was reasonably necessary to protect himself. Various factors are relevant to the question of whether the force used was reasonable, including (1) the relative ages and sizes of victim and defendant, (2) the victim's reputation for violence, (3) previous threats or fights between victim and defendant, (4) the defendant's level of aggression, and (5) provocation by the victim.

Soukup, 656 N.W.2d at 429. Even assuming Chosa had perceived Trevino to be provoking or threatening him (for example, by yelling angrily that he wanted the Chosas to return the \$20), the right to self-defense does not cover punching and kicking a man in the face and head violently and repeatedly, as the medical and other evidence establishes happened here.

The record contains no evidence that Chosa acted in self-defense and a great deal of evidence that he did not. This supports the jury's conclusion that Chosa was either the sole aggressor or that he used force beyond any reasonable level, or both. We therefore will not disturb the verdict on Chosa's claim of insufficient evidence.

II

Chosa argues alternatively that he is entitled to a new trial due to an erroneous jury instruction on self-defense. We review the district court's jury instructions for an abuse of discretion. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). District courts are allowed "considerable latitude" in selecting language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Isolated errors justify reversal only if the instructions when viewed in their entirety failed to fairly and adequately explain the law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

Chosa argued at trial that he intended to act in self-defense but that he did not intend to kill Trevino. The two jury instructions relevant to self-defense are CRIMJIG 7.05 (Justifiable Taking of Life) and CRIMJIG 7.06 (Self-Defense—Death Not the Result). The district court here read instruction 7.05 almost exactly as it is written:

No crime is committed when a person takes the life of another, even intentionally, if the defendant's action was taken in resisting or preventing an offense the defendant reasonably believed exposed the defendant or another to death or great bodily harm.

In order for a killing to be justified for this reason, four conditions must be met. *First, the killing must have been done in the belief that it was necessary to avert death or great bodily harm.* Second, the judgment of the defendant as to the gravity of the peril to which he or another was exposed must have been reasonable under the circumstances. Third, the defendant's election to defend must have been such as a reasonable person would have made in light of the danger perceived and the existence of any alternative way of avoiding the peril. Fourth, there was no reasonable possibility of retreat to avoid the danger. All four conditions must be met. The state has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense or the defense of others.

See 10 Minnesota Practice, CRIMJIG 7.05 (2010) (emphasis added). The supreme court has observed that if, as is the case here, a defendant claims that he intentionally acted against the victim in self-defense but without intending to kill the victim, the language in CRIMJIG 7.05 providing, “the killing must have been done in the belief that” is inappropriate because it “implies that the defendant must believe it necessary to kill in order for the killing to be justified.” *State v. Marquardt*, 496 N.W.2d 806, 806 n.1 (Minn. 1993). In those cases, the district court “should modify CRIMJIG 7.05 if necessary [by removing the reference to ‘killing’ and inserting something like ‘the self-defensive act’].” *Id.* at 806; *see also State v. Hare*, 575 N.W.2d 828, 831 n.3 (Minn. 1998) (“Because [the defendant] claimed that he intended to act in self-defense, but did not intend to kill [the

victim], the court [giving instruction 7.05] read the words ‘defendant's action’ and not ‘the killing.’”).

The supreme court has stated repeatedly that when a defendant claims he acted in self-defense but did not intend to kill the victim, the district court should either give a modified version of instruction 7.05 or instruction 7.06. *See, e.g., Marquardt*, 496 N.W.2d at 806; *State v. Sanders*, 376 N.W.2d 196, 201 (Minn. 1985); *State v. Edwards*, 343 N.W.2d 269, 277 (Minn. 1984). After reading the jury CRIMJIG 7.05, the district court here also gave the following version of CRIMJIG 7.06:

The defendant is not guilty of the crime if the defendant used reasonable force against or to resist or to aid in resisting an offense against the person and such an offense was being committed or the defendant reasonably believed that it was.

It is lawful for a person, who is being assaulted and who has reasonable grounds to believe that bodily injury is about to be inflicted upon the person, to defend from an attack. In doing so, the person may use all force and means which the person reasonably believes to be necessary and that would appear to a reasonable person in similar circumstances to be necessary to prevent the injury which appears to be imminent.

The kind and degree of force a person may lawfully use in self-defense is limited by what a reasonable person in the same situation would believe to be necessary. Any use of force beyond that is regarded by the law as excessive.

The state has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.

See 10 Minnesota Practice, CRIMJIG 7.06 (2010).

Chosa argues that by giving both self-defense instructions, and by failing to modify instruction 7.05 to reflect that he only intended to defend himself rather than to kill Trevino, the district court acted contrary to controlling caselaw and confused the jury. We are not persuaded.

As a threshold matter, we point out that not only did Chosa not object to these instructions at trial, he specifically requested through counsel that both instructions be given and did not request that instruction 7.05 be modified. The failure to offer specific jury instructions or object to instructions before they are given generally constitutes a waiver of the right to challenge the instructions on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). The supreme court has held that a party who requests a specific instruction is nearly estopped from raising a subsequent objection to it. *See State v. Harris*, 255 N.W.2d 831, 831 (Minn. 1977) (“Since defense counsel not only did not object to the instructions but requested instructions similar to those the court gave, we must hold that defendant waived the . . . issue.”).

But “a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law.” *Cross*, 577 N.W.2d at 726. The plain-error standard is met by an error that is plain and that affects a party’s substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error affects substantial rights if the error was prejudicial, influencing the outcome. *Id.* at 741. Even if these three elements are met, a reviewing court must nevertheless determine “whether it should address the error to ensure fairness and the integrity of the judicial proceeding.” *Id.* at 740.

Chosa has not demonstrated that the instructions constituted plain error. A plain error does not occur in jury instructions unless they are misleading or confusing on fundamental points of law. *State v. Caine*, 746 N.W.2d 339, 353 (Minn. 2008). It is true that giving instruction 7.05 unmodified is inconsistent with the supreme court's statements in this circumstance. But the district court also gave a variation of 7.06. Chosa contends that giving both instructions was prejudicial because although 7.05 says that Trevino's death was justified only if it was necessary to prevent death or great bodily harm, 7.06 says the death was justified if Chosa felt it was necessary to prevent bodily injury; the resulting jury confusion, Chosa argues, prejudiced him because the jury might not have understood that it could acquit him solely because he was in fear of bodily harm. And he argues that the unmodified instruction 7.05 prejudicially created the erroneous impression that the killing was intentional.

Chosa's arguments disregard the other aspects of both instructions: that to acquit him, the jury would have to find that he acted reasonably under the circumstances and did not use more force than was necessary. The state's evidence that Chosa did not act in self-defense was voluminous, conclusive, and factually unchallenged; there was little (or no) evidence to support Chosa's contention that he reacted reasonably to any perceived threat from Trevino. The medical evidence and the only testifying eyewitness established that Chosa instigated the confrontation with Trevino, who first sought to escape Chosa and who was apparently rendered helpless early in the confrontation. For Chosa to rely on self-defense to justify the severe and deadly force that he used, he must have reasonably believed that the amount of force was necessary to prevent death or great

bodily harm. There was no evidence that Trevino presented any threat to Chosa, let alone a threat of death or great bodily harm. We are satisfied that, on the whole, the combined instructions did not mislead or confuse the jury on any relevant fundamental issue.

Even if some instructional error might be unearthed, the error did not affect Chosa's fundamental rights. And equally dispositive, under the factual and procedural circumstances here, we are certain that reversing would do nothing to ensure the fairness and integrity of the judicial proceeding.

Affirmed.