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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0331**

State of Minnesota,
Respondent,

vs.

Henry James Davis,
Appellant.

**Filed May 13, 2008
Affirmed
Stoneburner, Judge**

Hennepin County District Court
File No. 06025779

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Considered and decided by Stoneburner, Presiding Judge; Willis, Judge; and Collins, Judge.*

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

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges his conviction of fleeing a peace officer in a motor vehicle resulting in death, arguing that (1) his right to a speedy trial was violated; (2) the district court erred by not instructing the jury on “duress or necessity”; (3) the district court erred by failing to conduct an in camera review of appellant’s statement to the Internal Affairs Unit of the police department before ordering its disclosure to the state; and (4) the district court erred in allowing the jury to simultaneously determine guilt and the presence of an aggravating sentencing factor. We affirm.

FACTS

Following a report of shots fired from an older, white, four-door Ford Taurus in the area of 14th Avenue North and Girard Avenue North in Minneapolis, police officers went to the area and interviewed witnesses. Two witnesses told the officers that they heard shots coming from the described car, which was occupied by two black males. Other squad cars in the area were alerted to be on the lookout for the vehicle.

About one hour and 45 minutes later, while on patrol in north Minneapolis, officers James Burns and Sean McGinty saw a white Ford Taurus run a stop sign. As they pulled up behind the car and activated their squad-car lights, Burns and McGinty noticed that the Taurus matched the description of the car involved in the shots-fired call. The Taurus did not stop, but instead turned north and abruptly accelerated to a high speed. The officers continued to pursue the Taurus, activating the squad’s siren and video camera. The Taurus ran another stop sign, then hit a tree as it attempted to turn

right. The video from the squad car shows the Taurus dipping forward and its brake lights coming on for the first time just before it hit the tree.

The Taurus's driver, appellant Henry Davis, (Davis) was severely injured in the accident. The front-seat passenger, Roger Davis, Henry Davis's cousin, died from injuries sustained in the crash. Davis's alcohol concentration two hours after the accident was .054. There was expert testimony at trial that it could have been as high as .08 at the time of the accident. Davis was charged with one count of fleeing a peace officer in a motor vehicle resulting in death.

Officers found a loaded .38 caliber revolver in the debris from the crash. The serial number was scratched off the gun. A hole in the car's windshield was consistent with the gun having been catapulted through the windshield at the time of the crash.

While Davis was in police custody in the hospital, he indicated that he wanted to lodge a complaint against the police. An officer from the Minneapolis Police Department Internal Affairs Unit (IAU) took Davis's statement at the hospital. Because the officer was not interrogating Davis, he did not give a *Miranda* warning. Davis told the IAU officer that he felt the police car bump the Taurus at the beginning of the pursuit, which forced his right leg down on the accelerator. Davis said he tried to brake with his left foot but the brakes were inoperable, and because he could not stop, he crashed into the tree.

Subsequent forensic examination of the Taurus showed that one of its brakes was extensively damaged in the crash, one of the three remaining brakes was functioning but had no braking effectiveness, and the other two brakes, though worn, were in working

condition. Based on this evidence, in addition to the video from the squad car, which was played for the jury during trial, the forensic examiner concluded, to a reasonable degree of scientific certainty, that the brakes were properly functioning and were not a factor in the crash.

Davis was represented by a public defender at his first appearance on the criminal charge on May 30, 2006. Davis demanded a speedy trial, and trial was scheduled for July 31, 2006. But at a hearing on July 28, 2006, Davis's counsel requested a continuance because he was involved in an ongoing trial in another case and would not be available to defend Davis until a month after the scheduled trial date. Davis did not waive his right to a speedy trial, but the district court, after informing Davis that he, "in essence," was causing the delay due to the unavailability of his counsel, rescheduled Davis's trial to August 28, 2006. The district court told Davis that, if convicted, he could not complain later that he was denied his right to a speedy trial. The district court asked Davis if he understood and Davis responded, "Yes, sir." Davis further indicated that he fully understood and did not have any questions.

On the first day of trial, Davis waived his right to counsel and chose to represent himself. The district court appointed the public defender as advisory counsel. The questions of Davis's guilt and the presence of an aggravating factor—whether Davis's "conduct was particularly serious and represented a greater than normal danger to the public"—were submitted to the jury at the close of trial. The jury found Davis guilty and found the existence of the aggravating factor. Despite the jury's finding of the

aggravating factor, the district court sentenced Davis within the guidelines to a 210-month prison term. This appeal followed.

D E C I S I O N

I. Speedy Trial Violation

Davis argues that his right to a speedy trial was violated and that he should not be held responsible for a delay due to the unavailability of court-appointed counsel.

Whether a defendant's speedy-trial right has been violated is a constitutional question, subject to de novo review. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), review denied (Minn. July 20, 2004).

Both the United States and Minnesota Constitutions assure the criminally accused "the right to a speedy and public trial." U.S. Const. amend. VI; Minn. Const. art. I, § 6. In Minnesota, a trial is determined speedy if it occurs within 60 days after a demand for speedy trial unless it is delayed for good cause shown. Minn. R. Crim. P. 11.10. If good cause is shown, the commencement date of the trial may be extended to 120 days. *Id.*

Whether a defendant's right to a speedy trial has been violated, or whether good cause exists for the delay, depends on an analysis of four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether and how the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972); *State v. Widell*, 258 N.W.2d 795, 796 (Minn. 1977). "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy

trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193.

Length of Delay

The length of delay in bringing a case to trial is the pivotal factor in a speedy-trial analysis because, until it has been shown that the delay was so long as to raise a rebuttable presumption of prejudice, there is no need to consider the other *Barker* factors. *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986). The state does not dispute that the delay in scheduling Davis’s case triggers the presumption that Davis’s speedy-trial right was violated. Because this factor is met, we consider the other *Barker* factors.

Reason for Delay

In assessing the reason for the delay, appellate courts give different weights to different reasons for delay. *Cham*, 680 N.W.2d at 125. For example, the state’s deliberate attempt to delay a trial and hamper the defense weighs heavily against the state, while negligent or administrative delays receive less weight. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. When a defendant’s actions are responsible for the overall delay, there is no violation of the right to a speedy trial. *State v. DeRosier*, 695 N.W.2d 97, 109 (Minn. 2005). But the responsibility for an overburdened judicial system is weighed against the state, not the defendant. *Jones*, 392 N.W.2d at 235.

Davis acknowledges that, generally, delays caused by defense counsel’s unavailability for trial weigh against the defendant. But he contends that this makes sense only when the defendant has chosen to be represented by an attorney who has scheduling conflicts and not when, as here, the defendant’s attorney is appointed by the

court. Davis asserts that, just as the state must bear responsibility for delays caused by overcrowded court dockets or prosecutors' caseloads, matters over which the state has sole control, the state should likewise bear the responsibility for the delay caused by public defenders' caseloads.

But as Davis acknowledges, even if this factor is weighed against the state, its weight is diminished by the lack of any evidence showing a deliberate attempt by the state to delay trial by overburdening public defenders. In cases with considerably longer trial delays and greater evidence of an overburdened court system, the supreme court has found that defendants' speedy-trial rights were not violated. *See, e.g., Jones*, 392 N.W.2d at 235-36 (finding that a seven-month delay did not violate defendant's speedy-trial right when defendant argued court system was overburdened but no unfair prejudice resulted); *State v. Corarito*, 268 N.W.2d 79, 80 (Minn. 1978) (finding that six-month delay did not violate defendant's speedy-trial right when state was not trying to hamper the defense and defendant did not show any unfair prejudice resulting from the delay).

Assertion of Right to Speedy Trial

In determining whether a defendant has asserted his or her right to a speedy trial, the force and frequency of the demand must be considered. *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989). The strength of the demand reflects the extent and seriousness of the prejudice which has resulted from the delay. *Id.*

Davis formally demanded a speedy trial after pleading not guilty at the omnibus hearing. Although he did not waive his right to a speedy trial at the time defense counsel requested a continuance of the trial date, he did not object to the continuance. Davis did

not again assert the right until he raised it in his “motion for retrial.” Because Davis made a clear speedy-trial demand, this factor weighs slightly in his favor.

Prejudicial Delay

Finally, the court must take into consideration any prejudice Davis faced because his trial was delayed. Prejudice is measured in light of the interests that the right to a speedy trial is aimed at protecting. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. In *Barker*, the United State Supreme Court identified three specific interests: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) restricting the possibility that the defense will be impaired. *Id.* Of those three, the third is the most important. *Id.*

Davis contends that he suffered all three types of prejudice: (1) he was in jail from the date of the accident until trial, except for two weeks when he was in custody in the hospital; (2) the delay caused him to have to deal with unresolved allegations that he caused his cousin’s death as well as ongoing medical treatment for injuries he sustained in the accident; and (3) the delay gave the state time to serve notice of its intent to seek an upward departure, forcing him to have to defend against the additional claim that his conduct represented a greater-than-normal danger to the public.

We conclude that the delay in this case does not reach the level of oppressive pretrial incarceration that the *Barker* court recognized as a factor in determining prejudice. There is no evidence that Davis’s ongoing medical treatment was affected by the delay, and there is no evidence that the delay affected the fact that Davis had to cope with allegations that he caused his cousin’s death. The district court and the attorneys

rescheduled the trial for the earliest date that everyone was available. Davis has not shown any instances of harm, stress, anxiety, or inconvenience more burdensome than those generally experienced by an individual involved in a criminal trial, and he has received credit for all time spent in jail.

Davis further argues that the most important prejudice he suffered was inability to locate two eyewitnesses who had seen “start to finish, what happened in the incident.” Davis contends that because he could not locate the witnesses to testify he was forced to “alter his defense strategy at trial by taking the stand and subjecting himself to cross examination.” But the record does not support Davis’s contention that the delay caused his witnesses to be unavailable.

Davis first notified the district court and the state on August 30, 2006, that he intended to call two eyewitnesses, including a woman named Tina Dawson who would testify that she saw the police bump the white Taurus from behind and “the shooting that started everything.” Davis later struck the other witness, Rose Gordon, from his witness list because he could not get in contact with her.

Dawson was not available to testify on August 30, and the state asserted that it did not have prior notice that she was going to testify. The court cautioned Davis that it was his responsibility to ensure his witnesses’ availability. On August 31, 2006, Davis reported that Dawson could not attend the trial on that day because she had to work, but she could attend the following day. The district court granted a one-day continuance; however, after the continuance Dawson was still unable to attend trial to testify, and Davis decided that he would testify on his own behalf.

There is no evidence indicating that either Dawson or Gordon was available to testify at an earlier trial in July but not available for the continued trial date in August. Davis had not notified the state of his intent to call either witness, and there is no evidence that he subpoenaed either witness. On these facts, we conclude that Davis's right to a speedy trial was not violated.

II. Jury Instructions

Davis argues that the district court's failure to instruct the jury on the defenses of "duress or necessity"¹ was reversible error. The refusal to give a requested jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996).

A defendant is entitled to an instruction on his theory of the case if there is evidence to support that theory. *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977), *cert. denied*, 435 U.S. 996 (1978). "An instruction need be given only if it is warranted by the facts and the relevant law." *State v. McCuiston*, 514 N.W.2d 802, 804 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). The focus of the analysis is on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001).

¹ In Minnesota, duress is now a narrow statutory defense that applies when a person commits a crime because his will has been overborne by threats of death from another participant in the crime, while necessity is a broader defense involving an actor who chooses to commit the lesser of two evils. *See* 9 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 47.17, .18 (3d ed. 2001). Therefore, although Davis contends that the district court erred by failing to instruct on "duress or necessity," to avoid any confusion with the statutory duress defense, Davis refers to and addresses the issue only as a necessity defense in his brief.

“Minnesota courts have acknowledged and applied the common law defense of necessity.” *State v. Hanson*, 468 N.W.2d 77, 78 (Minn. App. 1991), *review denied* (Minn. June 3, 1991). “A necessity defense defeats a criminal charge if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant’s breach of the law.” *State v. Rein*, 477 N.W.2d 716, 717 (Minn. App. 1991) (quotation omitted), *review denied* (Minn. Jan. 30, 1992). “In addition, the defense exists only if (1) there is no legal alternative to breaking the law, (2) the harm to be prevented is imminent, and (3) there is a direct, causal connection between breaking the law and preventing the harm.” *Id.*

A defendant has the burden of establishing justification by necessity by a preponderance of the evidence, provided he is not required to disprove an element of the crime charged. *State v. Hage*, 595 N.W.2d 200, 205 (Minn. 1999). The necessity defense applies only in emergency situations when peril is immediate and the defendant is left with no alternative but to violate the law. *Weierke v. Comm’r of Pub. Safety*, 578 N.W.2d 815, 816 (Minn. App. 1998).

The district court’s proposed jury instructions in this case included the “duress or necessity” instruction, but the state asked that the court strike it for lack of supporting evidence. The district court agreed to strike it if at the close of trial there was no supporting evidence. The district court did not include the instruction in its final jury charge. Davis argues that his testimony established a factual predicate for the necessity defense, and the court’s failure to instruct the jury on necessity requires a new trial “if it cannot be said beyond a reasonable doubt that the error had no significant impact on the

verdict,” quoting *State v. Pendleton*, 567 N.W.2d 265, 270 (Minn. 1997). Davis asserts that the failure to instruct on necessity had a significant impact on the verdict because it prevented the jury from considering his only defense to the charged crime; he states that “the jury had no reason to even consider [his] claim that he fled the police out of necessity to protect his and his cousin’s life.”

During trial, however, the jury heard Davis’s testimony that he and his cousin were driving northbound on Bryant Avenue when they heard shots fired from multiple directions, and he saw two males running toward him, carrying guns. Davis also testified that he wanted to get out of the area to a safe place, so he turned left on 22nd Avenue and then right on Dupont Avenue, heading toward 26th Avenue. He stated that when he slowed down a vehicle bumped him from behind, and when he looked up he thought it was the police but was scared by the gunshots and the subsequent bump. Not knowing what else to do, and wanting to get his cousin and him to a safe place, Davis fled and through the course of events ran into a tree.

But the jury also heard Davis’s admission that although he feared for his own and his cousin’s safety, he did not seek assistance from the police on the scene or from any of the residents in the area, options that were available to him at the time he fled the officers. The officers testified that they did not bump Davis and that they did not hear any gun shots in the area when they saw the Taurus run the stop sign at 22nd Avenue.

Because Davis had options other than fleeing the police, the district court did not err in concluding that Davis failed to produce evidence of necessity sufficient to require

the necessity instruction. Therefore, the district court did not abuse its discretion by eliminating the necessity-defense instruction from the jury instructions.

III. Statement

Davis contends that the district court erred by ordering disclosure of the statement he made to Officer Gross of the IAU without first conducting an in camera review to determine whether the benefits of disclosure outweighed the harm to the confidentiality interests at stake. The district court “has wide discretion to issue discovery orders and, absent clear abuse of that discretion, normally its order with respect thereto will not be disturbed.” *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990).

When the state asked for a court order for production of Davis’s statement to officer Gross, Davis did not argue that the statement was confidential or privileged information. The district court granted the state’s motion for Gross to turn over the statement, but withheld making any determination about whether the statement would be admissible at trial. During trial, Davis again objected to the state’s use of the statement to impeach his testimony, but the district court overruled the objection. The state used Davis’s statement to impeach his testimony regarding the force of the bump when the police car allegedly hit the Taurus from behind. Only two lines of the statement were admitted into evidence.

Minn. Stat. § 595.02, subd. 1(e) (2006), provides that “[a] public officer shall not be allowed to disclose communications made to the officer in official confidence when the public interest would suffer by the disclosure.” The supreme court extended this

broadly enunciated statutory privilege to “cover[] communications made to police officers, including those made during the course of Internal Affairs investigations.” *Erickson v. MacArthur*, 414 N.W.2d 406, 408 (Minn. 1987). In *Erickson*, the supreme court further stated that “[t]he scope of the privilege shall be determined on a case-by-case basis by balancing the need for disclosure against the public interest in confidentiality.” *Id.* The *Erickson* court’s primary concern was the confidentiality of witnesses who provide information to the police; the court stated: “the need for protection of the citizen who provides information to police investigators is a common thread inherent in all Internal Affairs investigations. Accordingly, the trial court should give special weight to the confidentiality interests of those citizens.” *Id.* at 409.

The state argues that because Davis did not argue the applicability of section 595.02, subdivision 1(e), during trial, the argument is waived on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that an appellate court will generally not consider matters not argued and considered in the district court). Because Davis objected only generally to the admissibility of the statement, we will consider his argument on appeal under a plain-error analysis. Under the plain-error doctrine the defendant must first show: (1) error; (2) that was plain; and (3) that affected substantial rights. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). Once plain error affecting substantial rights is shown, we will reverse if the error “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (quotation omitted).

Based on *Erickson*, we conclude that the district court erred by failing to review the statement in camera before ordering its production, but the error was not plain error

affecting Davis's substantial rights. There is no basis in the record from which this court could conclude that public policy or any other reasons would have precluded disclosure of the report, and the district court did not abuse its discretion in permitting admission of two lines from the report to impeach Davis.

IV. Unitary Trial

Davis asserts that the district court's decision to submit the issue of the presence of an aggravating sentencing factor to the jury at the same time as the issue of guilt deprived him of his right to a fair trial on the issue of guilt. A district court's decision to hold a unitary trial is reviewed for abuse of discretion. *State v. Laine*, 715 N.W.2d 425, 433 (Minn. 2006).

The state moved for a sentencing departure based on the aggravating factor that Davis's conduct was "particularly serious and represented a greater than normal danger to the public." Minnesota law, in compliance with *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 2537 (2004), mandates that a jury find the existence of aggravating factors to support a departure from the presumptive guidelines sentence. Minn. Stat. § 244.10, subd. 5 (2006).

When the state seeks an aggravated sentencing departure in criminal proceedings, Minnesota law provides that:

(b) The district court shall allow a unitary trial and final argument to a jury regarding both evidence in support of the elements of the offense and evidence in support of aggravating factors when the evidence in support of the aggravating factors:

(1) would be admissible as part of the trial on the elements of the offense; or

(2) would not result in unfair prejudice to the defendant.

The existence of each aggravating factor shall be determined by use of a special verdict form.

Upon the request of the prosecutor, the court shall allow bifurcated argument and jury deliberations.

(c) The district court shall bifurcate the proceedings . . . when the evidence in support of an aggravated departure:

(1) includes evidence that is otherwise inadmissible at a trial on the elements of the offense; and

(2) would result in unfair prejudice to the defendant.

Minn. Stat. § 244.10, subd. 5(b)-(c).

In this case, the district court determined that a unitary trial was appropriate, and Davis did not object even though the district court solicited his opinion. Davis contends that strong evidence of guilt cannot justify denial of the right to a fair trial. Davis argues that evidence in support of the aggravating factor—the danger his conduct posed to the community—was a prominent theme throughout the trial, noting that the state focused heavily on the residential nature of the neighborhood, the time of day, and the danger Davis’s conduct posed to pedestrians and children in the area. As an example, Davis highlights the state’s comment in closing: “It’s a miracle that only one person died from [Davis’s] actions that day, just a miracle. It’s a miracle no kid was out there, no car full of people, nobody else died as a result of his reckless conduct.”

The state asserts that the evidence in support of the aggravating factor was admissible as part of the trial on the elements of the offense and was not unfairly prejudicial to Davis. Specifically, the state argues that the evidence it presented showed

that appellant was in a populated residential area where he was intentionally running stop signs and speeding, all in an obvious attempt to flee police. The state also asserts that the evidence presented was relevant to refute Davis's attempt at establishing the necessity defense, because it showed he had other available options including seeking assistance from police or from people who lived in the area.

There is no record that the district court engaged in the relevant statutory analysis to determine whether the evidence presented by the state during the unitary trial was prejudicial to Davis. But Davis did not contest that he fled the police at a high rate of speed in a residential neighborhood. He instead claimed only that he fled out of necessity. We therefore conclude that the district court did not abuse its discretion in determining that a unitary trial was appropriate in this case.

V. Davis's pro se claims

In his pro se supplemental brief, Davis argues that (1) the district court committed plain error in the jury instruction and verdict forms; (2) the district court made a “non-reversible” [sic] error in letting the state bring the gun into evidence; and (3) the district court erred by denying his “motion for a retrial.”

Verdict form

Davis argues that the verdict forms that the district court initially gave to the jury were misleading and confusing because they stated the charge as “Fleeing a Peace Officer in a Motor Vehicle—Causing Death,” but “Causing Death” was not repeated in the ultimate question of guilty or not guilty. During deliberations, the jury requested clarification from the court regarding this inconsistency by circling and underlining

certain portions of the form to demonstrate the missing language. After conferring with the state and Davis, the court brought the jury into the courtroom and instructed them that the mistake on the forms was the court's mistake. The court told the jury that the forms should have said, "We, the jury, find the defendant not guilty of the charge of Fleeing a Peace Officer in a Motor Vehicle—Causing Death," and "We, the jury, find the defendant guilty of the charge of Fleeing a Peace Officer in a Motor Vehicle—Causing Death."

Davis contends that the omission on the verdict forms should be reviewed under the plain-error analysis, in which we apply a three-prong test for plain error, requiring that there be (1) error; (2) that was plain; and (3) that affected substantial rights. *Crowsbreast*, 629 N.W.2d at 437. In this case, however, there is no error because the omission was corrected before the jury reached a verdict. We conclude that Davis's assertion that the correction in the verdict form denied him a fair trial is without merit.

Gun

Davis next contends that the gun found at the scene of the accident was improperly admitted into evidence because, even if the weapon was found by the scene, that does not mean it necessarily came from the car. At trial, Davis objected to the foundation for the admission of the gun, and the objections were overruled after he had an opportunity to voir dire witnesses. Davis did not object to admission of the gun on relevancy grounds at trial, which appears to be his objection on appeal.

In general, the failure to object to the admission of evidence constitutes a waiver of the issue on appeal. *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). But this court

may exercise discretion to consider an issue if it constitutes plain error or a defect affecting substantial rights of appellant, even if the issue was not brought to the attention of the district court. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

The state contends that the gun was relevant to show, among other things, Davis's motive in fleeing the police, as well as its shape in relation to the broken windshield, tying the vehicle to the earlier report of shots fired from an older white Taurus. Officer Burns testified that, at the scene of the crash, he informed other assisting officers that he believed that the vehicle was the same one involved in the shots-fired call from earlier in the evening, and he suspected that the gun may still be in the car and that the occupants could be attempting to reach for the gun in the car. The gun was ultimately located among other debris from the impact, and its shape was compared with the shape of a hole in the windshield. Burns testified that the hole was rounded near the top, "as if a round object had been pushed through and maybe almost smashed through the windshield." Officer Rodney Timmerman, who was at the scene of the crash, also testified, based on his training and experience, that the scratches on the gun were consistent with it being catapulted out of a vehicle through the windshield, then hitting and sliding along concrete.

Based on this testimony, we conclude that the gun was relevant and that its admission was not overly prejudicial to Davis. Davis had the opportunity to cross-examine the officers and question them regarding the likelihood that the gun came from

the car. Davis took on the challenge of doing so pro se, assisted by advisory counsel. Admission of the gun was not plain error affecting Davis's substantial rights.

Motion for "retrial"

Davis argues that the district court erred in denying his motion for a "retrial" because the errors in the jury instruction and verdict form, and in improperly admitting evidence, warranted a new trial. "The denial of a new trial by a postconviction court will not be disturbed absent an abuse of discretion and review is limited to whether there is sufficient evidence to sustain the postconviction court's findings." *State v. Hooper*, 620 N.W.2d 31, 40 (Minn. 2000) (citation omitted).

Because the district court did not commit any error warranting a new trial, it did not abuse its discretion in denying Davis's motion for retrial.

Affirmed.