STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1602

State of Minnesota,
Respondent,

vs.

Jonathon Daniel Rishavy,
Appellant.

Filed January 20, 2009
Affirmed
Worke, Judge

Kanabec County District Court
File No. K4-04-519

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Amy R. Brosnahan, Kanabec County Attorney, 18 North Vine Street, Suite 202, Mora, MN 55051 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Lansing, Judge; and Worke, Judge.

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

WORKE, Judge

On appeal from his convictions of second-degree felony murder, first-degree assault, and fifth-degree assault, appellant argues that the district court (1) abused its discretion by admitting character evidence; (2) abused its discretion by excluding evidence of a witness' prior inconsistent statement, which was also a present sense impression; (3) abused its discretion by excluding portions of appellant's videotaped police statement; (4) committed plain error by failing to define "assault" for purposes of first- and second-degree assault; (5) committed plain error by inaccurately instructing the jury on the revival of an aggressor's right to self-defense; and (6) committed plain error by misstating the applicable self-defense standard. We affirm.

FACTS

On July 31, 2004, a group of teenagers and young adults met at a residence and gathered around a fire pit to drink alcohol and converse. One of the individuals, appellant Jonathon Daniel Rishavy, was recently acquainted with the group. At one point, one of the girls at the gathering, R.B., asked appellant why he had hit another male, P.G., earlier in the week. Appellant responded by calling R.B. a "w***e" and a "s**t." Another member of the group, R.S. told appellant to stop the name calling and to leave. Appellant struck R.S. in the face and they began fighting. R.S. broke away and went inside to tell the homeowners what had happened, and appellant ran off into the woods.

Homeowner, K.B., told his son, D.B., to go outside and tell his friends to stop fighting. D.B. went outside with his girlfriend M.M. Around the same time, appellant

walked out of the woods carrying a stick. D.B. confronted appellant and the two got into an argument. K.B. approached and observed D.B. push appellant away and appellant move towards D.B. K.B. then heard someone yell "he's got a knife" and observed appellant repeatedly stab D.B. in the back. K.B. attempted to intervene and appellant stabbed K.B. in the side.

On August 1, 2004, at approximately 1:23 a.m., officers were dispatched to respond to the stabbing of D.B. When officers arrived, they found two individuals kneeling on appellant and pointing out a small black-handled knife lying nearby. Officers observed D.B. lying on his stomach and individuals tending to the wounds on his back. An ambulance crew arrived and assumed first-aid care of D.B. and K.B. A short time later, D.B. was pronounced dead. Autopsy results revealed that the fatal wound to D.B. was a stab wound to his chest; he also had five stab wounds to his back and one to his arm.

Appellant was charged with second-degree intentional murder of D.B.; second-degree unintentional murder of D.B.; first-degree assault of K.B.; and fifth-degree assault of R.S. During the trial, appellant argued that his actions were done in self-defense. A jury found appellant not guilty of the second-degree intentional murder of D.B., and guilty of the second-degree unintentional murder of D.B., first-degree assault of K.B., and fifth-degree assault of R.S. This appeal follows.

D E C I S I O N

Evidentiary Issues

Appellant first challenges several of the district court's evidentiary rulings. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted).

Spreigl Evidence

Appellant argues that the district court abused its discretion by admitting evidence of appellant's prior assault of P.G., contending that the evidence is impermissible character evidence. The district court admitted the evidence after determining that the evidence would not only assist in explaining appellant's motive and intent, but that it was also relevant to rebut appellant's self-defense claim.

Generally, only relevant evidence is admissible. Minn. R. Evid. 402. Evidence of a defendant's other crimes or wrongs is usually inadmissible to prove the defendant's character. Minn. R. Evid. 404(b). But this type of evidence may be admissible for limited purposes: "to show motive, intent, absence of mistake, identity, or common scheme or plan." *State v. Gomez*, 721 N.W.2d 871, 877 (Minn. 2006); *see also* Minn. R. Evid. 404(b). For such evidence to be admissible

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the

> state's case; and (5) the probative value of the evidence must not be outweighed by the potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 685-86 (Minn. 2006).

In *State v. Smith*, the supreme court addressed a situation similar to the one we are presented with here. 541 N.W.2d 584 (Minn. 1996). In that case, Smith was convicted of first-degree murder, second-degree murder, and aggravated robbery, which arose out of the robbery and beating of one victim and the shooting of another. *Id.* at 586. Smith testified that he was going to buy marijuana from the shooting victim, but when he believed that the contents of the bag did not look or smell like marijuana, he asked for his money back. *Id.* at 586-87. The victim refused to give Smith back his money, a struggle ensued, both men drew guns, the victim shot first, and Smith shot, although he claimed it was in self-defense. *Id.* at 587. On appeal, Smith argued that the district court abused its discretion by admitting evidence that he had been involved in a robbery and shooting two weeks before the current offenses. *Id.* at 589. The supreme court held that the evidence that Smith actively participated in a similar robbery two weeks earlier was relevant to rebutting his self-defense claim. *Id.* at 589.

Here, R.B. had been at a party approximately one week earlier with her cousin C.S. and friend P.G. Appellant expressed interest in C.S. and got upset when he saw P.G. and C.S. acting affectionately toward each other. Appellant was asked to leave the party. While R.B., C.S., and P.G. walked home that night, they saw appellant and he started yelling at C.S. and P.G. and then hit P.G. in the face. The district court concluded that the state had proven by clear and convincing evidence that appellant punched P.G. in the

face without provocation. The court further concluded that the evidence assisted in explaining appellant's reaction to R.B.'s confrontation and appellant's conduct toward R.S. The district court did not abuse its discretion in admitting the evidence of appellant's assault of P.G. because it showed that appellant previously acted as an aggressor, without any provocation, and that his motive and intent were not merely self-defense.

Appellant also contends that the prosecutor impermissibly used this evidence in closing argument. Appellant failed to object to the alleged misconduct at trial. Generally, when a defendant fails to object to a prosecutor's remarks in closing argument, the issue is waived. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). But "[p]lain errors or defects affecting substantial rights may be considered by the court . . . on appeal though they were not brought to the attention of the [district] court." Minn. R. Crim. P. 31.02. Plain error exists if (1) there is an error, (2) that is plain, and (3) that affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *see also Ramey*, 721 N.W.2d at 298 (applying plain-error analysis to alleged prosecutorial misconduct).

This court will reverse a conviction as a result of prosecutorial misconduct if the prosecutor's actions, "when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). The prosecutor stated in closing argument that when appellant attacked D.B. he was acting "true to form." The prosecutor also told the jury that it could believe appellant's account of events "despite the fact that it's inconsistent with his character, not his overall

character, but in the way that we know that he has acted in the past in these sorts of situations." The prosecutor did not argue that appellant acted in conformity with an aggressive, hostile character trait. Rather, the prosecutor argued that in the situations described at trial, appellant had a common reaction and that was to assault someone, not simply defend himself. Furthermore, the prosecutor's alleged improper statements were essentially four sentences of an 80-page closing argument. Considered in the light of the entire trial, the prosecutor's statements were not plain error affecting appellant's substantial rights.

Hearsay Evidence

Appellant next argues that the district court abused its discretion by excluding M.M.'s statement to the police on the night of the incident. Appellant contends that M.M.'s statement was inconsistent with her trial testimony and should have been admitted to attack her credibility and also qualified as a present-sense impression. *See* Minn. R. Evid. 607 (stating that any party may attack the credibility of a witness); Minn. R. Evid. 801(d)(1)(D) (stating that "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter" is not inadmissible hearsay). A district court's "determination that a statement meets [or fails to meet] the foundational requirements of a hearsay exception will not be found erroneous absent a clear showing of abuse of discretion." *State v. Buggs*, 581 N.W.2d 329, 334 (Minn. 1998).

Appellant's counsel called M.M. as a witness. M.M. testified that she remembered K.B. being outside, but that she did not remember him coming outside or if

he was carrying anything or said anything. M.M. testified that she remembered giving a statement following the incident, but that she did not remember what she told the police. Appellant's attorney then asked M.M. if she remembered "telling the investigator that [K.B.] came out with a f***ing huge . . . ." The state objected and the district court sustained the objection. M.M. testified on cross-examination that she had a poor memory of the evening because she was "drunk." Retired special agent Jon Hermann testified that he interviewed M.M. between 3:00 and 5:00 a.m. on August 1, 2004. Appellant's counsel asked, "[M.M.] told you that [K.B.] said . . ." and the state objected; the district court sustained the state's hearsay objection. Appellant's attorney then asked Hermann if M.M. appeared to be under the influence of alcohol at the time of the interview. Hermann replied that if M.M. had been under the influence it was not obvious to him.

Appellant's attorney attempted to present inadmissible hearsay evidence through impeachment. *See* Minn. R. Evid. 801(d)(1)(A) (stating that a statement is not hearsay if it is "inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition"). M.M.'s prior statement was not given under oath, and the supreme court has held that evidence should not be admitted as impeachment evidence if the primary reason a witness is called is to obtain the admission of that otherwise inadmissible prior statement. *State v. Dexter*, 269 N.W.2d 721, 721-22 (Minn. 1978).

Appellant also argues that M.M.'s prior statement should be considered "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." Minn. R. Evid.

801(d)(1)(D). But M.M.'s statement to the police was made two hours after the initial 911 call, and was not a present-sense impression because she did not make the statement as she observed the assaults. Finally, appellant was able to challenge M.M.'s credibility because M.M. testified that she did not remember her prior statement because she was intoxicated when she made it and Hermann testified that M.M.'s intoxication was not obvious. Therefore, the district court did not abuse its discretion by excluding M.M.'s prior statement.

Appellant's Videotaped Statement

Appellant also argues that the district court abused its discretion by excluding the portions of his videotaped statement when he sobbed after learning that D.B. had died, contending that his sobbing was a prior consistent statement that bolstered his credibility. *See* Minn. R. Evid. 801(d)(1)(B) (providing that a statement is not hearsay if it is consistent with the declarant's testimony and helpful in evaluating the declarant's credibility). However, "sobbing" is not a prior consistent *statement*. Further, appellant testified that he did not intend to kill D.B. and the jury convicted him of unintentional second-degree murder. Therefore, the jury believed that appellant did not intend to kill D.B. and that he only intended to commit the assault, which appellant never denied. Appellant was not prejudiced by the exclusion of portions of his statement because the excluded portions would have bolstered appellant's credibility regarding his lack of intent to kill D.B. but the jury acquitted him of intentional murder.

Jury Instructions

Next, appellant argues that the district court plainly erred in instructing the jury. This court reviews the district court's jury instructions for an abuse of discretion. *State v. Medal-Mendoza*, 718 N.W.2d 910, 918 (Minn. 2006). But appellant failed to object to the jury instructions. The failure to object to jury instructions generally constitutes a waiver of the right to appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). "Nevertheless, 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." *Id.*; *see also* Minn. R. Crim. P. 31.02.

It is within this court's discretion whether to review the jury instructions here. *State v. Goodloe*, 718 N.W.2d 413, 420 (Minn. 2006) (noting that a reviewing court has "discretion" to review an unobjected-to jury instruction). This court "may review and correct an unobjected-to, alleged error only if: (1) there is error; (2) the error is plain; and (3) the error affects the defendant's substantial rights." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (citing *Griller*, 583 N.W.2d at 740). An error is plain if the error is clear or obvious. *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002). "Usually [plain error] is shown if the error contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. A plain error affects substantial rights if it is "prejudicial and affect[s] the outcome of the case." *Griller*, 583 N.W.2d at 741. If those three prongs are met, this court may correct the error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 742.

District courts are allowed "considerable latitude" in the selection of language of jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). This court reviews jury instructions in their entirety to determine whether they 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). The district court need not provide detailed definitions of all of the elements of the offense if the jury instructions do not mislead the jury or "allow it to speculate over the meaning of the elements." *Peterson v. State*, 282 N.W.2d 878, 881 (Minn. 1979); *see also State v. Clobes*, 417 N.W.2d 735, 738 (Minn. App. 1988) (concluding that the district court did not err in failing to define "specific intent" in assault case when the "jury instructions, viewed in their entirety, explained the law of the case fairly and accurately"), *rev'd on other grounds*, 422 N.W.2d 252 (Minn. 1988).

Failure to Define "Assault"

Appellant argues that the district court's failure to define "assault" as it related to the first- and second-degree assault charges constituted plain error affecting his substantial rights. "Assault is a specific intent crime." *State v. Edrozo*, 578 N.W.2d 719, 723 (Minn. 1998). Therefore, to prove that an individual committed an assault, the state "must prove beyond a reasonable doubt that the defendant . . . intentionally inflicted or attempted to inflict bodily harm on another." *Id.* The Minnesota Supreme Court has stated:

> While the various degrees of assault require proof of different levels of actual harm, the assault statutes do not require a finding by the jury that a defendant intended to cause a

> specific level of harm. Thus, while the state did not have to prove that [the defendant] intentionally inflicted *substantial bodily harm*, the state did have to prove that he intentionally inflicted *bodily harm*.

State v. Vance, 734 N.W.2d 650, 656 (Minn. 2007) (citation omitted). In *Vance*, the district court failed to instruct the jury on all of the elements of third-degree assault. *Id.* at 656-57. The supreme court concluded that the district court erred by failing to give the statutory definition of "assault" because the instructions failed to inform the jury that the defendant had to "intentionally inflict bodily harm." *Id.* at 657 (concluding that the instructions were erroneous because they created the possibility that the jury convicted the defendant without finding that he intended to cause bodily harm.).

In *State v. Spencer*, the supreme court declined to reverse an aggravated-assault conviction when the jury was erroneously instructed that the element of intent was not required in order to find the defendant guilty. 298 Minn. 456, 463-64, 216 N.W.2d 131, 136 (1974). The court based its decision on the fact that the controversy at trial centered on the identity of the shooter, not on an issue of intent. *Id.* at 464, 216 N.W.2d at 136. The supreme court noted that there was considerable evidence from which the jury could have inferred intent, namely that "the defendant held a loaded gun on the [victim], deliberately cocked the weapon, and then fired a bullet into [the victim's] back." *Id.*

Appellant was charged with second-degree intentional murder and second-degree unintentional murder for the death of D.B. An individual commits second-degree intentional murder if that individual "causes the death of a human being with intent to effect the death of that person or another, but without premeditation." Minn. Stat.

§ 609.19, subd. 1(1) (2004). An individual commits second-degree unintentional murder if that individual "causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting." *Id.* subd. 2(1) (2004). The underlying "felony offense" was the commission or attempted commission of first- and or second-degree assault. First-degree assault includes the infliction of "great bodily harm" while committing the offense with a dangerous weapon. Minn. Stat. § 609.221, subd. 1 (2004); Minn. Stat. § 609.11, subd. 4 (2004). Second-degree assault includes an assault with a "dangerous weapon and [the] inflict[ion] [of] substantial bodily harm." Minn. Stat. § 609.222, subd. 2 (2004). Appellant was also charged with first-degree assault of K.B. with a dangerous weapon, and fifth-degree assault of R.S. *See* Minn. Stat. § 609.224, subd. 1(2) (2004) (stating an individual is guilty of fifth-degree assault for intentionally inflicting bodily harm upon another).

The district court instructed the jury that, to prove second-degree unintentional murder, the state had to prove the death of D.B., that appellant caused the death of D.B., and that at the time of causing the death of D.B., appellant was committing or attempting to commit the felony of second-degree assault. The district court also instructed the jury that, to prove first-degree assault, the state had to prove that appellant assaulted K.B. and that appellant inflicted great bodily harm on K.B. The district court did not define "assault" within these parts of the jury instructions. But the district court did define "assault" when it instructed the jury on fifth-degree assault. *See* Minn. Stat. § 609.02,

subd. 10 (2004) ("'Assault' is: (1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another."). The court stated that the state had to prove that "[appellant] intentionally inflicted or attempted to inflict bodily harm on [R.S.] 'Bodily harm' means physical pain or injury, illness, or any impairment of a person's physical condition."

Like *Spencer*, appellant's defense at trial did not center on intent, rather, it centered on self-defense. Unlike *Vance*, appellant's asserted defense did not implicate the element of *intent*. Although appellant claimed that he did not intend to kill D.B., he did claim that he intended to assault D.B. in an attempt to protect himself. Moreover, as in *Spencer*, there was considerable evidence from which the jury could readily have inferred intent. Further, the district court did include the definition of "assault" in the instructions. *See Clobes*, 417 N.W.2d at 738 (stating that jury instructions, *viewed in their entirety*, must explain the law of the case fairly and accurately). The district court's failure to define "assault" for the purposes of first- and second-degree assault, although plain error, did not affect appellant's substantial rights.

Revival of Self-Defense

Appellant next argues that the district court's instruction on revival of an aggressor's right to self-defense constituted plain error affecting his substantial rights. The district court gave the jury the following instruction:

> If the defendant began or induced the incident that led to the necessity of using force in the defendant's own defense, the right to stand the defendant's ground and thus defend himself is not immediately available to him. Instead, the defendant must first have declined to carry on the affray and

> have honestly tried to escape from it, and must clearly and fairly have informed the adversary of a desire for peace and of abandonment of the contest. Only after the defendant has done that will the law justify the defendant in thereafter standing his ground and using force against the other person.

With the exception of one word, the district court's instruction is the same as CRIMJIG 7.07 as it existed at the time of appellant's trial. 10 *Minnesota Practice,* CRIMJIG 7.07 (2006) (replacing "affray" with "assault"). Appellant contends that this instruction materially misstates the law, citing to *State v. Edwards*, 717 N.W.2d 405 (Minn. 2006) to support his argument. In *Edwards*, the supreme court stated: "Edwards argues, and the dissent agrees, that the first sentence of CRIMJIG 7.07 materially misstates the law because the words 'began or induced the incident' permitted the jury to find that he was the initial aggressor merely because he started a conversation with [the victim]." 717 N.W.2d at 411. The court determined, however, that "CRIMJIG 7.07 does not permit a jury to ground forfeiture of the defense simply on conversation" and that the "instruction requires that the defendant have a 'desire for peace' before the right of self-defense is restored." *Id.* at 412. Appellant also argues that *Edwards* recognized the necessity to revise CRIMJIG 7.07 and that the district court erred by using the unmodified version.

CRIMJIG 7.07 was revised by substituting the word "assault" throughout the instruction to more accurately reflect the circumstances under which forfeiture and revival of the right of self-defense occur. 10 *Minnesota Practice,* CRIMJIG 7.07 (Supp. 2008). This revision was made after appellant's trial, thus, the instruction that the district court read to the jury was not a misstatement of law at that time. Therefore, appellant

cannot show plain error. *See Ramey*, 721 N.W.2d at 302 (stating that plain error is shown if the error contravenes case law, rule, or standard of conduct).

Self-Defense Standard

Finally, appellant argues that the district court's instruction on the applicable self-defense standard was a misstatement of the law that constituted plain error affecting his substantial rights. The district court instructed on self-defense:

> No crime is committed when a person takes the life of another person, even intentionally, if the defendant's action was taken in resisting or preventing an offense the defendant reasonably believed exposed the defendant to death or great bodily harm. In order for a killing to be justified for this reason, three 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 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. All three conditions must be met. Only after the defendant has done that will the law justify the defendant in thereafter standing his ground and using force against the other person.

Again, the court's instruction is the same as CRIMJIG 7.05 as it existed at the time of appellant's trial. *See* 10 *Minnesota Practice*, CRIMJIG 7.05 (2006). Appellant argues that this self-defense standard is only appropriate when a defendant claims that he *intentionally* took a life in self-defense. Appellant claims that this instruction should not have been used in his case because the resulting death of D.B. was unintentional and the instruction conditioned his right to self-defense on whether he reasonably believed that he faced death or great bodily harm. Appellant claims that a better instruction would have

been "[t]he defendant is not guilty of a crime if the defendant used reasonable force . . . to resist . . . an offense against the person, and such an offense was being committed or the defendant reasonably believed that it was." 10 *Minnesota Practice*, CRIMJIG 7.06 (2006).

But the way that appellant argued self-defense during the trial shows that the giving of CRIMJIG 7.05 was not a prejudicial error. Throughout the entire case, appellant argued that he feared for his life, not that he only feared being injured. For example, appellant testified that:

> I could see [K.B.] holding what looked like a long stick or a bat. I couldn't tell. I can see other people, I couldn't tell who they were. They were carrying things also, and I could just hear [R.S.] yelling at the top of his lungs almost that when he finds me he's *going to f***ing kill me*, is what the words I remember him saying.

(Emphasis added.) Appellant then testified that he was receiving blows from K.B. on one side and R.S. on the other side and all that was going through his head was *I don't want to die.* Appellant also testified that D.B. was in his face when he pulled out his knife and the only thing that he knew was that D.B. was yelling: *I'll f***ing kill you.* And that the next thing appellant remembered was grabbing his knife and *just trying to stay alive.* Further, the district gave both instructions to the jury. Therefore, although the district court erred, the instruction did not affect appellant's substantial rights because appellant's self-defense argument focused on defending his life and not just protecting himself from injury.

Affirmed.