STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1399

State of Minnesota,
Respondent,

vs.

Steven David Pawliszko,
Appellant.

Filed October 13, 2009
Affirmed
Kalitowski, Judge

Chisago County District Court
File No. 13-CR-07-1738

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Janet Reiter, Chisago County Attorney, Chisago County Courthouse, 313 North Main Street, Center City, MN 55012 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55406 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and Wright, Judge.

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

KALITOWSKI, Judge

Appellant Steven Pawliszko challenges his convictions of attempted first-degree intentional murder during a burglary, attempted second-degree intentional murder, first-degree burglary, and second-degree assault with a dangerous weapon. Appellant argues that (1) the district court abused its discretion in denying his request for a self-defense instruction, and (2) the district court committed plain error affecting his substantial rights when instructing the jury on the elements of attempted first-degree felony murder. Appellant also raises several pro se claims. We affirm.

D E C I S I O N

I.

Appellant argues that because he presented evidence to support a theory of self-defense, the district court abused its discretion by denying his request for a self-defense instruction. We disagree.

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). "Defendants are entitled to an instruction on their theory of the case if there is evidence to support that theory. . . . 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) (citations omitted), *review denied* (Minn. June 15, 1994).

Reasonable force may be used by any person in resisting an offense against the person. Minn. Stat. § 609.06, subd. 1(3) (2006). To support a claim of self-defense, a defendant must show:

> 1) the absence of aggression or provocation on the part of the defendant; 2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm; 3) the existence of reasonable grounds for that belief; and 4) the absence of a reasonable possibility of retreat to avoid the danger.

State v. Vazquez, 644 N.W.2d 97, 99 (Minn. App. 2002) (quotation omitted). "The degree of force used in self-defense must not exceed that which appears to be necessary to a reasonable person under similar circumstances." *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). "The defendant . . . has the burden of going forward with evidence to support his claim of self-defense." *State v. Columbus*, 258 N.W.2d 122, 123 (Minn. 1977). The supreme court has upheld the refusal to give a requested self-defense instruction when the defendant was the aggressor and did not actually and in good faith withdraw from the conflict. *State v. Robinson*, 427 N.W.2d 217, 227-28 (Minn. 1988); *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn. 1986).

Here, the district court found that appellant was the aggressor and that appellant failed to make a good-faith effort to retreat. Thus, the court denied appellant's request for a self-defense instruction. Appellant argues that the district court's denial of a self-defense instruction was an abuse of discretion because the evidence, when viewed in the light most favorable to him, shows that he was not the aggressor. *See State v. Edwards*, 717 N.W.2d 405, 410 (Minn. 2006) ("In evaluating whether a rational basis exists in the

evidence for a jury instruction, the evidence is viewed in the light most favorable to the party requesting instruction."). We disagree.

The district court found that appellant was the initial aggressor when he drove his truck through the door of P.P.'s attached garage. Appellant contends that his act was merely one of aggression against the door, not P.P. We disagree. The district court properly found that this was an act of aggression towards P.P. because appellant caused the damage to P.P.'s property as a means to gain entry to her house, which was attached to the garage.

The district court found that appellant's act of entering P.P.'s house after driving into the garage constituted a further act of aggression. Appellant claims that he simply followed P.P. into the house to wait for police to arrive. Based on his prior relationship with P.P., appellant claims, he believed he was permitted to enter the house. But appellant's version of events is contradicted by several facts.

First, appellant's claim that he thought he could enter P.P.'s house because of their past relationship is contradicted by evidence that appellant had been formally evicted from P.P.'s residence. Second, the night before the incident, P.P. told appellant that he could not retrieve his belongings the following day. Third, appellant testified that he left P.P.'s house after the altercation because he "hadn't had good experiences with [the] Chisago County Sheriff" and thought if he stayed, he "would be tasered, . . . first, and questions asked later." This testimony contradicts his claim that he simply entered the house to wait for the police. Finally, appellant testified that prior to driving his truck through the garage door he (1) rang the doorbell and knocked repeatedly, but received no

answer, and (2) went to P.P.'s bedroom window and P.P. responded by closing the curtains. In sum, overwhelming facts in the record contradict appellant's contention that he believed he was allowed to enter P.P.'s house.

Given appellant's initial act of aggression, to be entitled to a self-defense jury instruction appellant must show that he made an actual and good-faith effort to withdraw from the conflict. *Robinson*, 427 N.W.2d at 227-28. Appellant made no such showing. The district court found that after appellant drove through P.P.'s garage door, appellant could have chosen to drive away but instead exited his vehicle, entered P.P.'s home, followed P.P. while yelling at her, and continued to approach her until the physical altercation ensued. The record supports this finding. And the district court further found, based on appellant's own testimony, that during the altercation he took the knife from P.P. and stabbed backward at her after he had gained control of the knife. We conclude that the district court did not abuse its discretion in finding that appellant's actions do not evince an actual or good-faith effort to withdraw from the conflict.

The district court reviewed the evidence presented in the light most favorable to appellant and found that there was no evidence to show that appellant was not the aggressor or that appellant made a good-faith effort to withdraw from the conflict. We conclude that the district court did not abuse its discretion by determining that there was no basis in law or fact to support a self-defense instruction.

II.

Appellant contends that his convictions should be reversed because the district court improperly instructed the jury that "criminal damage to property" was the predicate

crime for the burglary charge and there was insufficient evidence that appellant damaged property while in the building. We disagree.

Appellant did not object to the instruction given by the district court, nor did he request that different language be used in the instruction on burglary. District courts are given considerable latitude in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). A reviewing court will not reverse a district court's decision on jury instructions unless the district court abused its discretion. *State v. Persitz*, 518 N.W.2d 843, 848 (Minn. 1994). Before an appellate court reviews an unobjected-to error, there must be: (1) error; (2) that is plain; and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (citing *Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544, 1549 (1997)). If these three prongs are met, the appellate court must then decide whether it should address the error to ensure fairness and the integrity of the judicial proceedings. *Id.*

Appellant contends, without citation to caselaw, that the felony murder instruction was erroneous because (1) criminal damage to property caused during an unlawful entry is not a crime committed "while in the building," and (2) reliance on the damage caused to P.P.'s garage door improperly conflates the trespass element of burglary with the "crime while in the building" element. Because appellant's criminal damage to P.P.'s vehicle caused during the course of his unlawful entry satisfies the "crime while in the building" element of burglary, we conclude the instruction was not in error.

Here, the district court instructed that to convict appellant of attempted felony murder in the first degree, the jury must find that "at the time of the act of attempting to

cause the death of [P.P.], [appellant] was engaged in the act of committing or attempting to commit the crime of burglary." The burglary statute provides in relevant part that "[w]hoever . . . enters a building without consent and commits a *crime while in the building*," commits burglary. Minn. Stat. § 609.582, subd. 1 (2006) (emphasis added). And the jury was instructed that the state had the burden of proving that the "crime while in the building" was criminal damage to property, in violation of Minn. Stat. § 609.595, subd. 2 (2006).

The district court instructed the jury that the "crime while in the building" element could be satisfied by proof that appellant committed the crime of criminal damage to property either by damaging P.P.'s house or by damaging P.P.'s vehicle that was parked in the attached garage. The court further instructed the jury that the elements of criminal damage to property required proof that appellant intentionally caused damage to P.P.'s vehicle and/or residence and that P.P. did not consent to the damage. And in closing argument, the state relied on the damage caused to P.P.'s vehicle and garage door when appellant drove his truck into P.P.'s garage to show criminal damage to property.

Appellant is correct that for a burglary conviction to stand, the state must prove that the defendant intended to commit a crime other than trespass. *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002) (citing *State v. Larson*, 358 N.W.2d 668, 670 (Minn. 1984)). Here, the record shows that the state proved that appellant intended to commit criminal damage to property, which is a distinct crime from trespass. Moreover, though the first-degree burglary statute proscribes nonconsensual entry into a building with the intent to commit a crime, it does not require that the intent be to commit a crime within

the building entered. *Munger v. State*, 749 N.W.2d 335, 339 (Minn. 2008). The evidence in the record indicates that appellant drove his truck through P.P.'s garage door and caused criminal damage in excess of $4,000 to P.P.'s vehicle, which was parked inside the garage.

The jury was instructed that for purposes of burglary, the term "building" is defined as "a structure suitable for affording shelter for human beings, including any appurtenance or connected structure." This definition, unchallenged by appellant, includes P.P.'s attached garage. *See State v. Hendrickson*, 528 N.W.2d 263, 265-66 (Minn. App. 1995) (stating that the statutory definition of "building" includes "appurtenant structures"), *review denied* (Minn. Apr. 27, 1995).

Appellant argues that the instruction was erroneous because the jury was told that the predicate crime could be *either* the damage to P.P.'s garage door *or* the criminal damage to her van inside the garage. But the Supreme Court has stated that "[i]t may be alleged in a single count that . . . the defendant committed [the offense] by one or more specified means," and held that jurors are not "required to agree upon a single means of commission, any more than the indictments [are] required to specify one alone." *Schad v. Arizona*, 501 U.S. 624, 631, 111 S. Ct. 2491, 2497 (1991). And although this court has suggested that "'either/or' jury instructions should be avoided," the unanimity requirement does not mandate that jurors "always have to agree on the alternative ways a crime can be committed." *State v. Hart*, 477 N.W.2d 732, 739 (Minn. App. 1991), *review denied* (Minn. Jan. 16, 1992). Thus, appellant's claim that the district court committed plain error in this instruction is without merit.

We thus conclude that the jury instructions for the charge of attempted felony murder and the predicate felony of burglary did not constitute plain error.

III.

Witness Credibility

Appellant argues pro se that statements P.P. made to police during the incident contradict her statements at trial. In criminal cases, it is well-settled that judging the credibility of witnesses and the weight given to their testimony rests within the province of the finder of fact. *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997). Minnesota appellate courts show great deference to a fact-finder's determinations of witness credibility. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993). Therefore, even if the victim's statements were inconsistent, the jury was entitled to believe the victim and discredit appellant's testimony. We conclude that appellant's arguments regarding alleged inconsistencies between P.P.'s trial testimony and her statements to police are without merit.

Prosecutor's Rebuttal

Appellant argues pro se that the prosecutor's rebuttal to appellant's closing argument exceeded the response permitted and was inflammatory and prejudicial. The record indicates that there was no objection to the prosecutor's rebuttal argument. We apply the plain-error doctrine when examining unobjected-to prosecutorial error. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). To obtain review under the plain-error doctrine there must be: (1) error; (2) that is plain; and (3) the error must affect substantial rights. *Id.* at 298. Here, the record shows that there was no prosecutorial misconduct.

Minn. R. Crim. P. 26.03, subd. 11, provides that after the defendant presents his closing argument, the prosecution may make a rebuttal argument that is "limited to a direct response to those matters raised in the defendant's closing argument." Appellant claims that the prosecutor's rebuttal argument in this case violated rule 26.03. But the record indicates that the state's rebuttal argument did not exceed the permissible scope of rule 26.03. Moreover, a review of the record reveals nothing inflammatory or prejudicial in the prosecutor's rebuttal argument. Therefore, error, the first requirement of the plain-error standard, is not present, and appellant's argument fails.

Ineffective Assistance of Counsel

Appellant argues pro se that he was denied effective assistance of counsel due to several alleged mistakes by counsel. To prevail on an ineffective-assistance-of-counsel claim, an appellant must demonstrate that the "representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Martin*, 695 N.W.2d 578, 587 (Minn. 2005) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052 (1984)) (quotation marks omitted). An appellant asserting a claim of ineffective assistance of counsel bears the burden of proof on that claim. *Martin*, 695 N.W.2d at 587. We conclude that appellant has not met his burden.

Rejection of the plea deal

Appellant argues pro se that he was offered a plea deal by the state for a 48-month sentence, but that he rejected the plea deal on the advice of his counsel and therefore, he was denied effective assistance of counsel. Appellant presents no evidence to support

this claim and the district court record does not indicate that appellant's counsel made inaccurate or misleading factual statements that affected appellant's decision to reject the plea. An assignment of error based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Wilson*, 594 N.W.2d 268, 271 (Minn. App. 1999). Because appellant's ineffective-assistance-of-counsel claim is not supported by argument or authority and prejudicial error is not obvious on mere inspection, his claim is waived.

Failure to contact a building inspector

Appellant contends that his counsel was ineffective due to counsel's failure to contact a building inspector to confirm appellant's claim that the garage and house were separate buildings. Generally, we will not review ineffective-assistance-of-counsel claims based on trial strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). And trial strategy includes the extent of counsel's investigation. *Id.* Moreover, appellant has not shown any legal basis for his argument that the existence of a firewall between a house and a garage is relevant under the burglary statute. Thus, we conclude that appellant has not shown that, but for the alleged investigatory error, the result of the proceeding would have been different.

Impeaching the victim

Appellant argues that his trial counsel was ineffective because his counsel could have impeached P.P. "every time she spoke" but did not because his counsel did not want to appear to be "badgering her" to the jury. The amount of vigor with which an attorney chooses to cross-examine a witness, or attempt to impeach a witness, is a matter of trial

strategy and is not reviewable for competency. *State v. Vick*, 632 N.W.2d 676, 688-89 (Minn. 2001). Therefore, appellant's complaint about his attorney's examination of the witness is not reviewable and fails on the merits.

Failure to object to the prosecutor's rebuttal

Appellant contends that "defense counsel did not object once during trial" and did not object during the prosecutor's rebuttal to the defense's closing argument. But the decision whether or not to object at trial is a matter of trial strategy and is not reviewable. *Id*.

In conclusion, appellant has not met his burden to show that his counsel performed below an objective standard of reasonableness and that his counsel's alleged deficient performance denied him a fair trial.

Sufficiency of the Evidence

Appellant argues that the evidence underlying his attempted murder conviction was legally insufficient because (1) the evidence of his intent to kill was insufficient, and (2) he voluntarily desisted from the commission of the crime. We disagree.

We reject appellant's claim that the evidence of intent to kill was insufficient. Criminal intent is generally proven by inferences drawn from the totality of the circumstances. *State v. Thompson*, 544 N.W.2d 8, 11 (Minn. 1996); *see Smith v. State*, 596 N.W.2d 661, 665 (Minn. App. 1999) (holding that facts elicited during plea colloquy may suffice to infer guilt), *review denied* (Minn. Aug. 27, 1999). A jury may infer that "a person intends the natural and probable consequences of their actions." *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000). And intent to cause death can "be inferred from the

nature and extent of the [victim's] wounds." *State v. Raymond*, 440 N.W.2d 425, 426 (Minn. 1989) (holding that intent to cause death could be inferred from defendant stabbing the victim 10 or 11 times and leaving her to bleed to death). Here, although P.P. did not suffer fatal wounds, the record indicates that her death would have been a natural and probable consequence of appellant's actions of repeatedly stabbing her and not assisting her in seeking medical attention.

Appellant's argument that he could not be found guilty of attempted murder because he voluntarily desisted from committing the crime is wholly lacking in merit. The record indicates that any voluntary cessation of the attack occurred after appellant stabbed P.P. multiple times.

And finally, appellant's argument that he merely prepared for the commission of the crime fails. The record shows that appellant's actions went beyond "mere preparation" because it is undisputed that he completed the act of stabbing P.P. several times.

Affirmed.