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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-1917**

State of Minnesota,
Respondent,

vs.

Ross Joseph Pool,
Appellant.

**Filed October 19, 2010**
**Affirmed**
**Ross, Judge**

Wright County District Court
File No. 86-CR-09-3511

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

Thomas N. Kelly, Wright County Attorney, Buffalo, Minnesota; and

Mary E. Shimshak, Special Assistant Wright County Attorney, Chaska, Minnesota (for respondent)

Robert J. Fowler, Fowler Law Firm, L.L.C., Little Canada, Minnesota (for appellant)

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

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

**ROSS**, Judge

Ross Pool appeals from his conviction of misdemeanor domestic assault. He asserts that the district court received insufficient evidence to convict him. In the alternative, he asserts that he is entitled to a new trial on two grounds: the district court should have added a defense-of-dwelling jury instruction to its self-defense instruction, and the prosecutor misstated the law of defense of dwelling in his closing argument. The district court did not err by failing to instruct the jury *sua sponte* on defense of dwelling because there was no evidence or argument offered at trial to support the theory. The prosecutor did not commit misconduct because he did not misstate the law and because the law of defense of dwelling was immaterial to the case. Because we see no trial error and sufficient evidence supports the jury's guilty verdict, we affirm.

## FACTS

Ross Pool had been a Wright County deputy sheriff for four years when he and J.L. began a romantic relationship in 2008. The relationship soon encountered problems. Pool described it as "dysfunctional"; J.L. characterized it as an "emotional rollercoaster." By both accounts, the relationship included alcohol-related violence.

This case involves a physical altercation between Pool and J.L. that occurred in the late night and early morning hours of May 14 and 15, 2009. It culminated when J.L. knocked on her neighbor's door around 1:30 a.m., crying and frantic, stating, "Look at my face" and, "He did this." The neighbor put an ice pack on a lump on J.L.'s head and called police. Police investigated and arrested Pool. The state charged Pool with second-

degree assault with a dangerous weapon, making terroristic threats, domestic assault by strangulation, and misdemeanor domestic assault. J.L. and Pool both testified at trial, offering the following conflicting versions of the altercation.

***J.L.'s Version***

According to J.L., she and Pool spent the day resting at Pool's house because Pool was hung over from the previous night. Pool and J.L. had drinks and went to a bar around 9:30 or 10:00 p.m. There they had more drinks, argued, walked back to the house, and had more drinks. J.L. went to bed. Pool got into bed with J.L and she told him to leave her alone. Pool responded by grabbing her hair—pulling some of it out—and biting her head. J.L. fought back, slapping his head. She continued to hit him until he began choking her while saying, "You're going to die, bitch." She hit him again, and he went into the bathroom.

J.L. opened Pool's cellular telephone and saw flirtatious text messages that Pool had exchanged with another woman. J.L. threw Pool's phone. Pool again told her that she was going to die. Pool grabbed J.L.'s arm and hair and dragged her down the hallway and stairs, where she struck her head on the wood banister. J.L. picked up a recycling bin and threw it at Pool. Pool choked her again.

The next thing J.L. remembered was getting up and walking to the bedroom to put a shirt on. Pool pointed a gun at J.L., told her to "get the f--- out of my house," and threatened to blow her head off and then shoot himself. J.L. left and went to her neighbor's house. The neighbor called police. Police arrived and photographed J.L.'s injuries. J.L. was examined in the emergency room the next day. She suffered the

following injuries, which are depicted in photographs introduced at trial: pulled-out hair, bruised arms and wrists, a blackened eye, and a welted head. Her neck had some redness, and it hurt when she swallowed.

***Pool's Version***

Pool's account differed from J.L.'s. According to his testimony, he and J.L. went to a bar and drank. J.L. argued with a woman with whom she believed Pool was flirting, and she left angry. Pool followed her out of the bar and they walked back to his house.

Pool sat down to watch television. J.L. threw a wine opener at him. He opened a bottle of wine for J.L. and she left the room. Pool drank two glasses of whiskey and went into the bathroom. J.L. saw text messages on Pool's cellular phone, said, "You son of a bitch," and threw his phone. Pool retaliated by throwing J.L.'s phone.

J.L. came at him, hitting him on the top of his head. J.L.'s hair got tangled up in his hand "somehow" and some of it came out. J.L. was "out of control" and would not stop attacking, so he positioned her in an arm bar and drove her forward onto the bed to get her to stop hitting him. Pool ordered her to leave, but J.L. continued to attack. Pool grabbed her wrist and led her through the hallway and into the living room. J.L. came after him again, swinging. Pool again positioned her in an arm bar, and he took her down the stairs. They tumbled against the banister, where J.L. hit her head.

Pool retreated to his bedroom. J.L. came into the bedroom, poured beer on Pool's head, threw the can at him, and left the room again. Pool drew an electrical stunning device commonly referred to as a "Taser" from his police duty belt. After J.L. returned to his bedroom doorway, Pool pulled the Taser's trigger, causing an audible and visible

electrical discharge. J.L. then left the house. The log automatically generated by Pool's Taser indicated that he fired it at 12:56 a.m. on May 15. Pool drank more and went to bed.

Pool denied threatening to kill J.L., placing his hands on her neck, or dragging her by the hair. Pool acknowledged that he caused the contusion on her head, the injury to her eye, and the bruising on her wrist and arm. He explained that he did not intend to harm her but was acting in self-defense and trying to bring her under control. Pool claimed that he sustained scratches.

At the close of trial, the district court instructed the jury on the charged offenses and on self-defense. The jury found Pool guilty only of misdemeanor domestic assault, acquitting him of second-degree assault with a dangerous weapon, making terroristic threats, and domestic assault by strangulation. Pool brought a posttrial motion for a new trial or to vacate the judgment, arguing that the district court erred by not instructing the jury on defense of dwelling. The district court denied the motion. Pool appeals from his conviction.

## D E C I S I O N

### I

Pool argues that the district court should have instructed the jury on defense of dwelling. The jury was instructed only on self-defense. After the district court judge gave the jury instructions, he asked the attorneys "if there were any exceptions." Pool's counsel neither objected to the instructions nor requested a defense-of-dwelling instruction.

A defendant who fails to propose specific jury instructions or to object to instructions at trial generally waives the right to challenge the instructions on appeal, *State v. Hersi*, 763 N.W.2d. 339, 342 (Minn. App. 2009), and we have the discretion to review the unobjected-to jury instructions for plain error only, *State v. Gustafson*, 610 N.W.2d 314, 318–19 (Minn. 2000). But if a defendant challenges the jury instruction in a posttrial motion for a new trial and "if the instruction contains an error of fundamental law or controlling principle, a motion for a new trial adequately preserves the issue for appeal." *State v. Glowacki*, 630 N.W.2d 392, 398 (Minn. 2000) (quotation omitted). In that case, we determine whether the instructions are erroneous and, if so, whether the error was harmless. *Id.* at 402. The defendant is "entitled to a new trial if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *Id.* (quotation omitted).

We need not determine whether the error was harmless because omitting the defense-of-dwelling instruction was not erroneous. We review jury instructions "as a whole to determine whether they fairly and adequately explain the law." *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). Defendants are entitled to an instruction on their theory of the case if the facts and the relevant law support the theory. *State v. McCuiston*, 514 N.W.2d 802, 804 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). Pool was not entitled to a defense-of-dwelling instruction because the facts do not support the defense.

Pool argued at trial only that his use of force was justified as self-defense, not as defense of his dwelling. "[S]elf-defense in the home and defense of dwelling are often

intertwined," but they are different defenses. *Glowacki*, 630 N.W.2d at 401. Pool gave notice to the court and the prosecutor before trial that he intended to argue self-defense. *See* Minn. R. Crim. P. 9.02, subd. 1(3)(a) ("The defendant shall inform the prosecuting attorney in writing of any defense, other than that of not guilty, on which the defendant intends to rely at the trial . . . ."). In his written "Issue Statement for Omnibus," Pool stated that "[t]he Defendant asserts a defense of Self-Defense. Specifically, that it was [J.L.] who had attacked Defendant on the night in question and that the only force he used was to restrain her in self-defense, and such force was reasonable." During cross-examination, Pool expressly rejected the prosecutor's characterization of his actions as resisting a trespass. The prosecutor asked Pool, "You were going to do what means it took to get her out?" Pool responded, "No," and he again asserted that he was acting in self-defense. Pool's counsel also never argued defense of dwelling in his closing argument. He instead focused on discrediting J.L.'s testimony and argued specifically that Pool used reasonable force in self-defense: "So the real issue in this case then . . . is did my client use the appropriate level of force. That's the real issue in this case. Because self-defense is a defense. Everyone, all of you, have the right not to be attacked." Pool never even mentioned "defense of dwelling" until he moved for a new trial.

Pool presented no evidence to support a defense-of-dwelling theory. "[T]he defendant has the initial burden of presenting evidence to support the [defense.]" *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). Pool argues that he was entitled to a defense-of-dwelling instruction based on the following evidence: J.L. was only a guest in

his home; Pool repeatedly asked her to leave and she refused; and J.L. continued to assault him after he asked her to leave.

Pool accurately contends that a person may use reasonable force to resist an offense against the person or a trespass. *See* Minn. Stat. § 609.06, subd. 1(3), (4) (2008). But he cannot point to any testimony establishing that his use of force against J.L. was intended to resist a trespass or to remove her from his home. Pool consistently testified that he used the force to defend himself, to get J.L. to stop hitting him, and to bring her under control. The jury therefore would have been required to speculate beyond the evidence about Pool's motive to have sustained the affirmative defense of defense of dwelling.

Our analysis is informed by *Gustafson*, a case in which the defendant challenged his assault convictions, arguing that the district court erred by failing to give the jury an unrequested self-defense instruction. 610 N.W.2d at 316. The supreme court acknowledged that the evidence might have supported a self-defense argument, but it held that the district court did not err by failing to instruct the jury on self-defense because the defendant did not request the instruction, did not argue self-defense at trial, did not otherwise suggest a reliance on self-defense in questions to witnesses, and did not disclose to the prosecutor the intent to rely on self-defense as required by the rules of criminal procedure. *Id.* at 320. Similar facts are present in this case. Pool also answered questions which tended to negate the defense; when asked whether he was attempting to thwart a trespass, he denied having that motive and emphasized self-defense.

By instructing the jury only on self-defense, the district court gave the appropriate jury instruction based on Pool's own testimony, his express theory of the case, and his questioning of witnesses. The district court did not err by failing to instruct the jury *sua sponte* on defense of dwelling because it was not argued, not supported, and not requested.

**II**

Pool argues for the first time that he is entitled to a new trial because the prosecutor committed misconduct by misstating the law on defense of dwelling. A defendant who fails to object at trial typically waives the right to appellate review of a prosecutor's conduct. *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997). But we have the discretion to review unobjected-to prosecutorial misconduct under a modified plain-error test. *State v. Jones*, 772 N.W.2d 496, 506 (Minn. 2009). The plain-error test as applied to prosecutorial-misconduct claims requires a defendant to show that an error occurred and that the error was plain. *Id.* An error is plain if it was "clear" or "obvious," usually because it violated a law, rule, or standard of conduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the defendant demonstrates plain error, then the burden shifts to the state to show that the defendant's substantial rights were not affected, or in other words, that "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). If all three prongs are met, the court must then determine "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* When reviewing claims of prosecutorial misconduct arising out of closing arguments, we

examine the closing argument as a whole, rather than particular phrases or remarks that "may be taken out of context or given undue prominence." *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (quotation omitted).

Pool argues that the prosecutor gave the jury an erroneous standard of the law for defense of dwelling. The argument is of little concern because, as we have held, the defense-of-dwelling theory was appropriately not presented to the jury. Even if this were not so, Pool has not established that the prosecutor misled the jury on the defense. It is improper for a prosecutor to misstate the law. *State v. Jolley*, 508 N.W.2d 770, 773 (Minn. 1993). Pool complains about the following statement during the prosecutor's closing argument: "You can't extend that and say, I'm going to direct somebody out of my house. And if they don't follow this, that gives you the right to use some force." Taken out of context, this may appear to misstate the law of defense of dwelling. But after examining the prosecutor's entire closing argument, we observe that this statement was part of the prosecutor's argument that Pool acted unreasonably, and it was not a statement of the law on defense of dwelling.

The prosecutor summarized Pool's defense as the mistaken belief that because he was a police officer and had training on the "continuum of force," this continuum of force applied to justify Pool's level of force used in this circumstance with J.L. Pool testified that "whatever I'm trained on duty to do, I will do the exact same or something similar when I'm off duty," and he disagreed with the prosecutor's statement that there was a significant difference between the use of force when one is on duty enforcing the law and when one is off duty enforcing his own will. Pool also introduced an exhibit showing a

chart of the "Wright County Sheriff's Office Force Continuum" that shows that an officer may use a Taser when met with "active resistance." Considering this background and reading the argument in context, Pool has misconstrued the challenged text as a misstatement of the law of defense of dwelling:

> I want to emphasize again that the testimony about the use of force was done in the context of being a law enforcement officer. And there's a big difference. You know that. That when you're dealing with a suspect, there's other dangers that you have. And you're an authority figure. If you tell somebody what to do, they have to do it. This isn't your personal life. You can't extend that and say, I'm going to direct somebody out of my house. And if they don't follow this, that gives you the right to use some force. Or if you get into an altercation with somebody, that suddenly you're going to use a Taser off duty? Five times last year the taser's fired. Mr. Pool has fired his taser twice. Off duty. But Mr. Pool doesn't call for help. He doesn't walk out. He decides that the reasonable thing to do is to use this force of a Taser gun? That just doesn't make sense, and it wasn't necessary.

The prosecutor's statement had nothing to do with the defense-of-dwelling theory.

Pool also argues that throughout his closing, the prosecutor included other instances in which he implied that Pool had no right to use force. Pool does not identify any specific statements and we have found no statements that would support the argument. The prosecutor consistently argued that Pool's use of force was unreasonable, not that he had no right to use force. Because the prosecutor did not commit misconduct, there is no error to consider under the plain-error analysis.

**III**

Pool argues that "there was simply no evidence or facts presented that could have reasonably led the jury to conclude that [he] was guilty" of misdemeanor domestic

assault. Pool asserts that because the jury acquitted him of making terroristic threats, second-degree assault, and domestic assault by strangulation, the jury must have disbelieved J.L., and therefore her testimony cannot provide the basis for his conviction. We will not so easily disregard the jury's verdict.

When considering a claim of insufficient evidence, we review the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach a guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that the jury believed the evidence supporting the verdict and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is particularly true when the case turns on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010).

"It is well-settled that a conviction can rest on the uncorroborated testimony of a single credible witness." *State v. Hill*, 285 Minn. 518, 518, 172 N.W.2d 406, 407 (1969). And even in cases in which the witness's credibility is "seriously called into question," weighing the credibility of witnesses is a function exclusively for the jury. *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002). Pool's argument that the jury disbelieved J.L.'s testimony has some merit. We can infer from the jury's verdict that it did not accept all of J.L.'s testimony. But Pool cites no authority for the proposition that if a jury

disbelieves some of a witness's testimony, on review we must disregard all of that witness's testimony. The contrary is true: "A jury, as the sole judge of credibility, is free to accept part and reject part of a witness's testimony." *State v. Poganski*, 257 N.W.2d 578, 581 (Minn. 1977). It is clear that the jury rejected some but not all testimony of Pool and of J.L., and we must assume that it believed the portions of J.L.'s testimony that support a misdemeanor assault conviction.

A finding of guilt on the misdemeanor domestic assault charge is not inconsistent with the acquittal on the other charges. A misdemeanor domestic assault conviction requires only that Pool inflicted or attempted to inflict bodily harm on J.L. *See* Minn. Stat. § 609.2242, subd. 1(1) (2008). The remaining charged offenses, all felonies, required additional criminal conduct such as using a dangerous weapon (Minn. Stat. § 609.222, subd. 1 (2008)), impeding the victim's normal breathing or circulation (Minn. Stat. § 609.2247, subd. 1(c) (2008)), and making a threat to commit violence with an intent to terrorize (Minn. Stat. § 609.713, subd. 1 (2008)). The jury could have reasonably concluded that Pool inflicted bodily harm on J.L. without engaging in the additional criminal conduct. Pool denied choking J.L., pointing a gun at her, and threatening to kill her, but he did not deny the assaultive acts that he committed in alleged self-defense. J.L. testified that Pool pulled her hair out, hit her, dragged her down the hallway, and pushed her. Physical evidence included the clump of hair that police found on the bedroom floor. The jury also saw photographs taken after the incident showing J.L.'s physical injuries. The evidence is sufficient to support the conviction.

**Affirmed.**