STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2261

State of Minnesota,
Respondent,

vs.

Azell Torie Collins,
Appellant.

Filed December 21, 2010
Affirmed
Worke, Judge

Douglas County District Court
File No. 21-CR-08-2026

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Christopher Karpan, Douglas County Attorney, Alexandria, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Collins, Judge.*

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

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

WORKE, Judge

Appellant challenges his second-degree-assault conviction, arguing that the district court committed plain error by giving the jury the self-defense-revival instruction. We affirm.

D E C I S I O N

A jury found appellant Azell Tori Collins guilty of second- and fifth-degree assault. Although he failed to object to the jury instructions, appellant now argues that the district court plainly erred in instructing the jury. While 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), it is within this court's discretion whether to review the jury instructions. *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).

We "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 *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). "An error is plain if the error is clear or obvious." *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002) (quotations omitted). "Usually [plain error] is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). 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 the 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 instructed the jury on self-defense and the revival of the aggressor's right of self-defense. The district court instructed the jury:

> [Appellant] is not guilty of a crime if [appellant] used reasonable force against [the victim] to resist an offense against the person, and such an offense was being committed, or [appellant] reasonably believed that it was.
>
> It is lawful for a person who's being assaulted and who has reasonable grounds to believe that bodily injury is about to be inflicted upon the person to defend from an attack. In doing so, the person may use all force and means that the person reasonably believes to be necessary and that would appear to a reasonable person in similar circumstances to be necessary to prevent an injury that appears to be imminent.
>
> An 'assault' is either, again, the intentional infliction or attempt to inflict bodily harm upon another, or, the commission of an act done with the intent to cause fear of immediate bodily harm or death in another.
>
> Now, the degree and kind of force a person may lawfully use in self-defense is limited by what a reasonable person in the same situation would believe to be necessary. Any use of force beyond that is regarded by the law as excessive.
>
> The [s]tate has the burden of proving beyond a reasonable doubt that [appellant] did not act in self-defense. If [appellant] began or induced the assault that led to the

> necessity of using force in [appellant's] own defense, the right to stand [appellant's] ground, and thus defend himself, is not immediately available to him.
>
> Instead, [appellant] must first have declined to carry on the assault and have honestly tried to escape from it. [He] must clearly and fairly have informed the adversary of a desire for peace and of abandonment of the assault. Only after [appellant] has done that will the law justify [appellant] in thereafter standing his ground and using force against the other person.
>
> The legal excuse of self-defense is available only to those who act honestly and in good faith. This includes the duty to retreat or avoid the danger if reasonably possible.

The district court's instruction follows the standard jury instructions. *See* 10 *Minnesota Practice*, CRIMJIGs 7.06, .07 (2008). But appellant claims that while the self-defense instruction was appropriate, the self-defense-revival instruction was inapplicable to the facts of the case and misled the jury.

Self-defense is available to a person (1) who is being assaulted and (2) who has reasonable grounds to believe that bodily injury is about to be inflicted upon the person. CRIMJIG 7.06. An assault is the "intentional infliction of bodily harm upon another" or "an intentional attempt to inflict bodily harm upon another" or "an act done with intent to cause fear of immediate bodily harm or death in another." *Id.* The revival of the aggressor's right of self-defense requires the person who began the assault that led to the necessity of self-defense to: (1) decline to carry out the assault, (2) honestly try to escape, and (3) clearly and fairly inform the adversary of the desire for peace. CRIMJIG 7.07. The issue here revolves around the evidence of who initiated the assault. If the evidence showed unequivocally that the victim initiated the assault, appellant was entitled to have the jury instructed only on self-defense. But if there was evidence that appellant initiated

the assault, the district court did not commit plain error in giving the self-defense-revival instruction.

According to the victim, appellant initiated the assault. R.D. testified that he and appellant went to a bar together. When R.D. was ready to leave, he offered appellant's girlfriend money for a ride to the motel where he was staying. Shortly thereafter, appellant approached R.D. and asked if he offered appellant's girlfriend money in exchange for sex. R.D. denied the allegation. Appellant continued to ask R.D. if he propositioned appellant's girlfriend until R.D. responded: "Yeah. Yeah. I say [sic] it." Appellant was about to leave when he heard R.D.'s admission. Appellant turned around and pushed R.D. to the ground. Appellant had a bottle in his hand, and although R.D. was not sure if appellant struck him with the bottle, R.D. received a gash on his head. R.D. also suffered a broken ankle.

According to appellant, R.D. initiated the assault. Appellant testified that R.D. denied the allegation before confessing: "Well, anyway, yeah, I done it. Now what?" R.D.'s demeanor changed and he "jumped up" from his barstool at appellant. Appellant pushed R.D. because he believed that he was in "great danger" because R.D. is larger than appellant and has a propensity for violence. Appellant and R.D. simultaneously swung at each other. Appellant hit a bottle out of the hand of a woman standing nearby before he hit R.D.'s forehead. Appellant punched R.D. a second time and R.D. fell. When R.D. attempted to get up, appellant put his foot on him.

The jury was to determine whether appellant initiated the assault when he pushed R.D. or if R.D. initiated the assault when he jumped off his barstool toward appellant.

The district court instructed the jury that if it believed that R.D. initiated the assault, appellant was entitled to self-defense. But if the jury believed that appellant initiated the assault, he was still entitled to self-defense if he declined to carry out the assault, tried to escape, and informed R.D. that he desired peace.

While appellant claims that he was using self-defense against R.D.'s "jump at him," the record supports the district court's decision to instruct the jury on the self-defense-revival instruction because there is ample evidence that appellant initiated the assault. On cross-examination, appellant was asked who initiated the physical contact; appellant replied: "Once [R.D.] jumped up and came [in] my direction, I pushed him." The prosecutor asked: "But at that point [R.D.] hadn't done anything to you, correct?" Appellant replied, "No more than just come my way, like he had something on his mind to attack me." Further, one witness testified that he saw appellant strike R.D. over the head with a bottle. He saw R.D. fall to the ground, and appellant stand over R.D. This witness did not see R.D. do anything to appellant. Another witness testified that he saw appellant grab a bottle and hit the victim on the head. The victim fell and appellant stood over him and kicked him a couple of times in the ribs. This witness testified that he did not see the victim do anything to appellant. The district court appropriately instructed the jury that, if appellant initiated the assault, self-defense was still available to him if he declined to carry out the assault, honestly tried to escape, and clearly informed R.D. that he desired peace. Therefore, the district court did not commit plain error in instructing the jury.

Appellant also argues that R.D. was the aggressor by uttering "fighting words" in the form of: "This n****r has fell [sic] in love." But appellant did not argue this at trial. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that a reviewing court generally will not consider matters not argued and considered in the court below). In fact, appellant never stated during trial that he heard R.D.'s comment. On cross-examination, R.D. stated that after he told appellant: "Yeah, I say [sic] it," appellant started to walk away but turned around when he heard R.D. tell the guy sitting across from him: "This n****r has fell [sic] in love." Thus, even if these were considered "fighting words," appellant did not believe that they were fighting words because he never mentioned R.D.'s comment during trial. Additionally, we have held that self-defense in the context of disorderly conduct, which may include the use of "fighting words," is available only when the behavior forming the offense presents the threat of bodily harm. *State v. Soukup*, 656 N.W.2d 424, 429 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003). R.D.'s comment did not present the threat of bodily harm.

Affirmed.