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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0315**

State of Minnesota,
Respondent,

vs.

Dejonte Antwon Davis,
Appellant.

**Filed January 8, 2018
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-15-6646

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of second-degree intentional murder, assigning plain error to the district court's jury instruction and the prosecutor's closing remarks regarding the law of self-defense. He argues that the cumulative effect of the errors affected his substantial rights and that reversal is necessary to ensure the fairness and integrity of the proceedings. We affirm.

FACTS

Respondent State of Minnesota charged appellant Deonte Davis with second-degree intentional murder under Minn. Stat. § 609.19, subd. 1(1) (2014), after Davis fatally shot R.U. outside of a Minneapolis bar on March 7, 2015. A grand jury later indicted Davis on a charge of first-degree murder. At his jury trial, Davis claimed to have acted in self-defense, testifying that he shot R.U. because R.U. threatened his life in the bar. Davis testified that R.U. confronted him outside of the bar and that he believed R.U. was going to pull a gun out of his pocket. So, Davis pulled out a gun and fired at R.U. Davis testified that he chased R.U. and continued shooting because he did not want to give R.U. a chance to get behind anything to shoot back. Davis explained that his "purpose and intent was to make sure that there wasn't going to be any return fire." However, Davis testified that he did not intend to kill R.U.

One witness testified that he heard R.U. ask Davis, "[W]hat are you going to do with that?" after Davis displayed his gun and that Davis did not verbally respond before shooting. Another witness testified that R.U. ran from Davis toward a parked car, where

R.U. fell to the ground. Three witnesses testified that Davis walked away from R.U. and then returned to fire more shots at him as he lay on the ground.

As to his self-defense claim, Davis requested two jury instructions: one regarding the general law of self-defense and the other regarding justifiable taking of a life. The district court declined to give a general self-defense instruction. Instead, it instructed the jury regarding justifiable taking of a life, stating, in relevant part, “In order for the taking of [R.U.’s] life to be justified under the defense of self-defense, four conditions must be met. First, Mr. Davis’s act must have been in belief that it was necessary to avert death or great bodily harm.” Davis did not object to the jury instruction.

The jury found Davis guilty of second-degree intentional murder and not guilty of premeditated first-degree murder. The district court entered judgment of conviction and sentenced Davis to serve a 366-month prison term. Davis appeals.

D E C I S I O N

I.

Davis contends that the district court erred in instructing the jury regarding the law of self-defense. Jury instructions must accurately state the law in a manner that can be understood by the jury. *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). “[Appellate courts] review a district court’s decision to give a requested jury instruction for an abuse of discretion.” *State v. Koppi*, 798 N.W.2d 358, 361 (Minn. 2011). Under the invited-error doctrine, a party cannot assert an error on appeal that he invited or that could have been prevented in the district court. *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). The invited-error doctrine does not apply, however, if an error satisfies the plain-error test. *Id.*

“The plain-error test gives [appellate courts] discretion to review unobjected-to errors if: (1) there is error, (2) the error is plain, and (3) the error affects substantial rights.” *Id.*

“An error is plain if it was clear or obvious,” and an error is clear or obvious if the error “contravenes case law, a rule or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). “An erroneous jury instruction affects a defendant’s substantial rights if the error was prejudicial and affected the outcome of the case.” *State v. Huber*, 877 N.W.2d 519, 525 (Minn. 2016). “An error in instructing the jury is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury’s verdict.” *Id.* (quotation omitted). The defendant has the burden of proving that an error was prejudicial, and it is a “heavy burden.” *Id.* If the first three prongs of the plain-error test are satisfied, a reviewing court corrects the error only if it “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 522 (quotations omitted).

Minn. Stat. § 609.06, subd. 1 (2014), sets forth the general law of self-defense and provides, in relevant part, that “reasonable force may be used upon or toward the person of another without the other’s consent when the following circumstances exist or the actor reasonably believes them to exist: . . . (3) when used by any person in resisting . . . an offense against the person.” Caselaw instructs that the elements of general self-defense are

(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 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. Devens, 852 N.W.2d 255, 258 (Minn. 2014) (quotation omitted).

Minn. Stat. § 609.065 (2014), sets forth the law regarding justifiable taking of a life. It provides that “[t]he intentional taking of the life of another is not authorized by section 609.06, except when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death.” Minn. Stat. § 609.065. The use of deadly force is justified under sections 609.06 and 609.065 if the following factors are satisfied:

- (1) The killing must have been done in the belief that it was necessary to avert death or grievous bodily harm.
- (2) The judgment of the defendant as to the gravity of the peril to which he was exposed must have been reasonable under the circumstances.
- (3) The defendant’s election to kill must have been such as a reasonable man would have made in light of the danger to be apprehended.

State v. Edwards, 717 N.W.2d 405, 413 (Minn. 2006) (quotation omitted).

Davis argues that the district court erred by providing an instruction regarding justifiable taking of a life because he claimed that he did not intend to kill R.U. Davis’s argument finds support in caselaw. This court recently held that “[i]t is error for a district court to use . . . [a] justifiable-taking-of-life jury instruction[] when the defendant asserts self-defense and claims the resulting death was accidental.” *State v. Pollard*, 900 N.W.2d 175, 176 (Minn. App. 2017).

Pollard did not set forth a new rule of law. “The Minnesota Supreme Court has repeatedly stated that it is error to provide the justifiable-taking-of-life instruction, instead of the general self-defense instruction, when the defendant asserts self-defense but claims

that the death was not the intended result.” *Id.* at 179. “[E]ven where death has resulted from a defendant’s action, the judge should use [the general instruction] if the defendant’s theory does not include a concession that there was an intent to kill.” *Id.* (alteration in original) (quoting *State v. Sanders*, 376 N.W.2d 196, 201 (Minn. 1985)).

Thus, “established Minnesota Supreme Court precedent clearly mandat[es] that the general self-defense instruction be given in cases where the defendant claims the death was an unintended or accidental consequence of actions taken in defense of self.” *Id.* at 180. If a defendant does not claim an intent to kill, “an instruction based on Minn. Stat. § 609.065 [is] inappropriate as it require[s] the jury to find that [the defendant] feared great bodily harm or death. This is a greater fear-of-harm requirement than that required under Minn. Stat. § 609.06, subd. 1(3),” which is the law that applies if a person acted in self-defense but did not intend to cause death. *Id.* In sum, an instruction regarding justifiable taking of a life in the absence of an admitted intent to kill is erroneous because it misstates the law of self-defense. *Id.* at 180-81. Because caselaw clearly establishes that an instruction regarding justifiable taking of a life should not be used if a defendant claims self-defense but denies an intent to kill, Davis has shown error that is plain.

Davis must also show that the error affected his substantial rights. As to this factor, Davis argues, “The erroneous instruction . . . improperly focused the jury on the reasonableness of Davis’s belief that killing was necessary to avert death or great bodily harm” and that it was easier for the state to disprove that he acted in self-defense because the instruction erroneously “imposed a higher-than-required burden on [him]: fear of death or great bodily harm vs. fear of bodily harm.”

However, Davis acknowledges that “[g]iven that the jury found [him] guilty of an intentional killing, the erroneous jury instruction, standing alone, might not be sufficient to warrant a new trial,” citing *Carridine*, 812 N.W.2d at 144. Carridine was charged with first-degree premeditated murder. *Carridine*, 812 N.W.2d at 134. He claimed that he acted in self-defense and that the killing was unintentional. *Id.* The district court instructed the jury regarding justifiable taking of a life, and the jury found Carridine guilty of first-degree premeditated murder. *Id.* at 134, 143. The supreme court concluded that the district court’s self-defense instruction was erroneous because Carridine claimed the killing was unintentional. *Id.* at 144. But the supreme court rejected Carridine’s assertion that the instruction affected his substantial rights, reasoning that because the jury found him guilty of first-degree premeditated murder, it necessarily rejected his assertion that he did not intend to kill the victim, which was a “factual predicate” to his jury-instruction challenge. *Id.*

In this case, the jury found Davis guilty of second-degree intentional murder. If a killing is intentional, the killing is not excused under Minn. Stat. § 609.06 (the general law of self-defense) unless the elements of Minn. Stat. § 609.065 (justifiable taking of a life) are met. *See* Minn. Stat. § 609.065. Thus, the district court’s decision to instruct the jury regarding justifiable taking of a life under section 609.065, and not the general law of self-defense under section 609.06, was inconsequential. As in *Carridine*, failure to give a general self-defense instruction did not affect Davis’s substantial rights because the jury rejected an integral component of his general self-defense theory: that the killing was unintentional. Essentially, the district court erred by instructing the jury regarding

justifiable taking of a life, but the jury's verdict rendered the instruction appropriate in the end.

In sum, because the killing was intentional, Davis's actions could not be justified under the general law of self-defense. The failure to give a general self-defense instruction therefore did not affect Davis's substantial rights.

II.

Davis also contends that the prosecutor engaged in misconduct during closing arguments, depriving him of a fair trial. Because Davis did not object to the alleged misconduct, we use a modified plain-error standard. *Ramey*, 721 N.W.2d at 302. The burden is "on the nonobjecting defendant to demonstrate both that error occurred and that the error was plain." *Id.* The burden then shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have a significant effect on the jury's verdict. *Id.*

A prosecutor's misstatement of law can constitute misconduct. *See, e.g., State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (concluding that "the prosecutor engaged in misconduct when he misstated the state's burden of proof and when he misstated the law on the issue of abandonment"). Davis argues the prosecutor misstated the law of self-defense by telling "the jury that the killing was justified only if [R.U.] actually had a gun." During closing argument, the prosecutor argued that self-defense required "an actual threat in front of you." During rebuttal, the prosecutor again argued that self-defense requires an actual threat: "You need to be certain you are threatened. You need to be certain that there is a threat to you in the immediate future capable of causing death or almost death."

The law of self-defense requires a reasonable belief regarding the existence of a threat, and not its actual existence. See Minn. Stat. § 609.06, subd. 1 (“[R]easonable force may be used . . . when the following circumstances exist or the *actor reasonably believes them to exist.*” (emphasis added)); Minn. Stat. § 609.065 (stating that an intentional taking of a life is not justified unless “necessary in resisting or preventing an offense which the *actor reasonably believes* exposes the actor or another to great bodily harm or death” (emphasis added)). Thus, the challenged remarks did not accurately describe the law of self-defense. However, any resulting misconduct does not warrant relief unless it had a significant effect on the jury’s verdict.

When assessing prosecutorial misconduct during a closing argument, we “look to the closing argument as a whole, rather than to selected phrases and remarks.” *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009) (quotation omitted). The state argues that the prosecutor’s conduct was not prejudicial because “[t]he closing argument, viewed as a whole, properly stated the self-defense instructions.”¹ Although the prosecutor misstated the law of self-defense at some points during her closing argument, she correctly stated it at other points in the argument. For example, in discussing the elements of self-defense, the prosecutor said the state had to prove “that the defendant did not actually *subjectively believe* that his conduct was necessary to avert that great bodily harm.” (Emphasis added.)

¹ The state relies, in part, on a PowerPoint presentation that the prosecutor used in her closing argument. This court granted, over Davis’s objection, the state’s request to supplement the record to include a copy of the PowerPoint presentation. Davis petitioned for further review of this court’s ruling, and the supreme court denied his petition. Ultimately, we did not find it necessary to rely on the PowerPoint presentation in assessing Davis’s claim of prosecutorial misconduct and therefore have not done so.

The prosecutor discussed whether Davis was “subjectively afraid” and “believed it was necessary” to fire his gun. The prosecutor further argued that Davis “did not actually subjectively believe that the conduct was necessary to avert death or great bodily harm.”

This court recently stated that minor errors in long closing arguments are less likely to be prejudicial. *State v. Ivy*, 902 N.W.2d 652, 663 (Minn. App. 2017) (concluding there was no prejudice when misconduct “involved a couple of short statements in a closing argument, the transcript of which is more than 50 pages long”), *review denied* (Minn. Dec. 19, 2017). This court also indicated that when the evidence against a defendant is strong, prosecutorial error is less likely to be prejudicial, stating, “Based on the overwhelming evidence of [the defendant’s] guilt that was presented at trial, we conclude that the challenged isolated statements in the lengthy closing argument [were] not prejudicial.” *Id.* at 664.

Here, the misstatements of law amounted to a few lines in a closing argument that accounted for approximately 42 pages of transcript. In addition, the evidence of guilt was strong. Davis’s own testimony establishes that he shot R.U. based on a verbal threat. Even if R.U. approached Davis in a confrontational manner, Davis admitted that he did not see a gun. And three witnesses testified that Davis walked away from R.U. and then returned to fire more shots at him as he lay on the ground. This evidence strongly supports the jury’s rejection of Davis’s self-defense claim.

Moreover, a prosecutor’s misstatement of law is less likely to play a substantial part in influencing a jury to convict if the district court correctly instructed the jury and defense counsel argued against the misstatement. *See State v. Trimble*, 371 N.W.2d 921, 926-27

(Minn. App. 1985) (concluding that “the prosecutor’s misstatement of the standard [did] not require reversal because the [district] court fully instructed the jury on [the] presumption of innocence and [the defendant] argued at length against the prosecutor’s . . . theory”), *review denied* (Minn. Oct. 11, 1985).

In this case, Davis’s attorney argued against the misstatement during his closing argument, telling the jury, “Mr. Davis doesn’t need to see a weapon, that’s not what the law is. The law is, was it reasonable under the totality of those circumstances, for Mr. Davis to believe that . . . the death threat was very real.” And the district court correctly instructed the jury regarding the necessary state of mind stating, “the judgment of Mr. Davis, as to the gravity of the peril to which he was exposed must [have] been reasonable under the circumstances” and “Mr. Davis’s election to defend must have been such that as a reasonable person would have made in light of the danger perceived and existence of any alternative way of avoiding the peril.” The district court also instructed the jury, “If an attorney’s argument contains any statement of the law that differs from the law that I give you, you should disregard that statement.” We “presume that jurors follow the [district] court’s instructions.” *State v. Martin*, 614 N.W.2d 214, 227 (Minn. 2000).

In sum, the misstatements constituted a small portion of the state’s closing argument, the evidence of guilt was strong, defense counsel countered the misstatement, and the district court correctly instructed the jury regarding the necessary state of mind. Under the circumstances, the state has met its burden to show that the prosecutor’s misstatements of law did not affect Davis’s substantial rights.

III.

Davis contends that the cumulative effect of the instructional error and misstatement of law in the prosecutor's closing argument affected his substantial rights.

[I]n *rare* cases, . . . the cumulative effect of trial errors can deprive a defendant of his constitutional right to a fair trial when the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury.

State v. Davis, 820 N.W.2d 525, 538 (Minn. 2012) (emphasis added) (quotation omitted).

In a "close case," an appellate court "may be inclined to grant . . . a new trial based on the cumulative effects of errors that do not individually require a new trial." *Id.* at 539. But the supreme court has refused to reverse based on cumulative error when there is significant evidence of guilt and the errors are not prejudicial. *Id.*; *see also State v. Fraga*, 898 N.W.2d 263, 279 (Minn. 2017) (holding that, because the evidence of guilt was strong, the alleged errors did not deny the defendant a fair trial).

If more than one plain error is established, an appellate court considers whether the errors cumulatively affected the defendant's substantial rights. *State v. Bustos*, 861 N.W.2d 655, 663 (Minn. 2015). In *Bustos*, the supreme court concluded that two plain errors, "the restriction on defense counsel's closing argument and the improper definition of domestic abuse in the jury instruction, taken cumulatively, affected Bustos's substantial rights" because it was reasonably likely that the errors had a significant effect on the verdict. *Id.* The supreme court reasoned:

Both errors related to the jury's determination of the same element: whether Bustos engaged in a past pattern of domestic abuse. The restriction on closing argument deprived

defense counsel of the opportunity to argue that the State failed to prove at least two prior incidents of domestic abuse beyond a reasonable doubt, and the improper definition of “domestic abuse” erroneously broadened the scope of predicate offenses that satisfy the element.

Id. The supreme court granted a new trial in *Bustos*, concluding that “failure to correct the erroneous limitation on defense counsel’s final argument during Bustos’s trial, in combination with the improper jury instruction on the definition of domestic abuse, seriously affected the fairness, integrity or public reputation of the judicial proceedings.” *Id.* at 665.

Davis argues that both of the errors in this case went directly to the disputed issue: “whether [his] conduct was a justified act of self-defense.” But unlike the errors in *Bustos*, the errors in this case do not relate to the jury’s determination of the same element of an offense. The district court’s instructional error concerns the proper self-defense theory and the attendant threat that Davis had to perceive to justify his use of force: fear of bodily harm or fear of great bodily harm or death. The prosecutorial error concerns whether the threat actually had to exist or whether Davis merely needed to reasonably believe that it existed. In sum, although both errors in this case relate to Davis’s self-defense claim, they relate to different aspects of the claim, and they are not interrelated like the errors in *Bustos*.

Once again, because the jury found Davis guilty of intentional murder and thereby rejected a necessary element of his general self-defense claim—that the killing was unintentional—the district court’s failure to provide a general self-defense instruction did not affect the verdict. And as we explained in section II of this opinion, the prosecutor’s

isolated misstatements regarding the law of self-defense did not impact the verdict for several reasons, including that the evidence of guilt was strong. In sum, this is not a rare, close case in which the errors were not separately prejudicial but together produced a biased jury. Because the third part of the plain-error test is not satisfied, Davis is not entitled to relief.

Affirmed.