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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0808**

State of Minnesota,
Respondent,

vs.

Phoebus Phaeton Apollo,
Appellant.

**Filed May 7, 2018
Affirmed
Reyes, Judge**

Ramsey County District Court
File No. 62-CR-16-5705

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

John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul,
Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Reilly, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

REYES, Judge

Appellant challenges his conviction of felony domestic assault, arguing that the
district court (1) committed reversible error by instructing the jury that appellant had a duty

to retreat if reasonably possible before acting in self-defense and (2) abused its discretion by denying discovery of the victim's medical records after applying an improper evidentiary standard for *in camera* review of the records.¹ We affirm.

FACTS

The following facts were established at the jury trial held on January 26 and 27, 2017. Appellant Phoebus Phaeton Apollo and L.L. began dating in 2016. During their relationship, appellant and L.L. were homeless and stayed in shelters. L.L. left appellant a few times because of his controlling behavior, but later returned to the relationship.

On August 1, 2016, appellant and L.L. rented a room at a motel in St. Paul to celebrate their anniversary, where they spent the night. The next morning, appellant paid to rent the room for a second night. They began having sex that morning, but L.L. told appellant to stop because he was being too rough and went to use the bathroom. Appellant followed L.L., called her names, and then shoved her. L.L. shoved him back. Appellant swung at L.L. but missed. Appellant and L.L. then began punching each other.

Appellant and L.L. stopped fighting and briefly separated. L.L. then told appellant that she was leaving him. In response, appellant approached L.L., punched her in the face and on the head, and told her that he was going to knock her out.

¹ We have reviewed appellant's supplemental pro se brief and cannot discern any legal arguments, nor does appellant cite any caselaw or other authorities. Accordingly, we decline to respond. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.") (quotation omitted).

The fighting continued, and at some point L.L. grabbed a box cutter. Appellant positioned himself in front of the doorway to prevent L.L. from exiting the motel room. When she attempted to use the door to leave, appellant lunged at her and she slashed at him twice with the box cutter, cutting appellant's hand and arm. Appellant then removed the phone from the wall and continued to fight L.L. The motel manager heard the commotion and knocked on the room door. Appellant opened the door. L.L. told the manager, "Call 911." The manager then called the police.

The responding police officers entered the motel room and arrested appellant. The officers found L.L. in the room naked and crying. They observed a large laceration, along with bleeding and bruising, inside L.L.'s lower lip. Appellant sustained lacerations on his finger and on his right forearm, which were treated after his arrest.

Respondent State of Minnesota charged appellant with one count of felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2016), due to his prior convictions of qualified domestic-violence-related offenses. Appellant moved for discovery of L.L.'s medical records that would reveal the existence and extent of L.L.'s "flashbacks," which would be the basis of his defense theory that appellant acted in self-defense in response to L.L.'s violent reaction from a flashback that day. The district court reviewed L.L.'s medical records *in camera*, determined that they did not contain material information, and denied appellant's request for disclosure.

The jury found appellant guilty of the charged offense. The district court convicted and sentenced appellant to 33 months in prison. This appeal follows.

DECISION

I. The district court did not commit reversible error in its jury instruction on self-defense.

Appellant argues that the district court committed reversible error by instructing the jury that appellant's claim of self-defense "includes the duty to retreat or avoid the danger if reasonably possible" because the rented motel room was his home or dwelling in which there is no duty to retreat. Appellant's argument lacks merit.

The district court has broad discretion to craft jury instructions. *State v. Devens*, 852 N.W.2d 255, 257 (Minn. 2014). "But a jury instruction is erroneous if it materially misstates the law." *Id.* Generally, a defendant's failure to object to jury instructions at trial constitutes a waiver of his right to challenge them on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). However, we may review unobjected-to jury instructions for plain error. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001); see Minn. R. Crim. P. 31.02. Because appellant did not object to the district court's jury instructions on self-defense at trial, we will review for plain error.

Under the plain-error test, appellant must show (1) an error, (2) that is plain, and (3) that affects the defendant's substantial rights. *Crowsbreast*, 629 N.W.2d at 437. "An error is plain if it is clear or obvious under current law . . . , [meaning] it contravenes case law, rule, or a standard of conduct." *State v. Hollins*, 765 N.W.2d 125, 133 (Minn. App. 2009) (citation and quotation omitted). An alleged error contravenes caselaw only if the issue has been "conclusively resolved." *Id.* (quoting *State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008)). If all prongs of the three-prong test are met, "we may correct the error only

if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Crowsbreast*, 629 N.W.2d at 437. (quotation omitted). If any prong is not met, we need not analyze the other prongs. *See id.* at 438.

In certain circumstances, a person may use reasonable force when acting in self-defense. Minn. Stat. § 609.06, subd. 1(2) (2016); *see State v. Radke*, 821 N.W.2d 316, 324 (Minn. 2012) (identifying the required elements of a valid self-defense claim). In general, the law requires that a person “retreat if reasonably possible when acting in self-defense.” *State v. Glowacki*, 630 N.W.2d 392, 399 (Minn. 2001). However, in Minnesota, “[t]here is no duty to retreat from one’s own home when acting in self-defense in the home, regardless of whether the aggressor is a co-resident” *Id.* at 393.

Appellant argues that the evidence shows that the motel room was his home under the reasoning of *State v. Devens*, which appellant contends established a framework for determining whether a particular location qualifies as a person’s home for self-defense. In *Devens*, the Minnesota Supreme Court declined to extend the castle doctrine, which refers to the concept that a person need not retreat from his home before acting in self-defense, to the hallway outside the defendant’s apartment “[b]ecause [the defendant] did not exercise exclusive . . . possession and control over the [area].” 852 N.W.2d at 258 n.4, 259.

We observe that appellant is arguing that the district court should have applied the reasoning of *Devens* sua sponte, despite appellant never raising this argument to the district court and despite *Devens* not addressing whether a motel room may qualify as a home for self-defense. On appeal, our review of unobjected-to jury instructions is limited to plain

error. Because appellant concedes no Minnesota case holds that a temporary motel room may qualify as one's home for self-defense, the issue has not been "conclusively resolved," and we decline appellant's invitation to go beyond the scope of our review. *See Hollins*, 765 N.W.2d at 133; *see also State v. Kelley*, 832 N.W.2d 447, 456 (Minn. App. 2013), *aff'd on other grounds*, 855 N.W.2d 269 (Minn. 2014) (noting this court's role as "an error-correcting court"). Therefore, the alleged error is not plain because it is neither clear nor obvious under existing law. *See Hollins*, 765 N.W.2d at 133.

Because appellant has not met his burden of proving plain error, we conclude that the district court did not commit reversible error by instructing the jury that appellant had a duty to retreat if reasonably possible before acting in self-defense.

II. The district court did not abuse its discretion in determining, after *in camera* review, that the medical records did not contain any material information.

Appellant argues that the district court abused its discretion by applying an improper evidentiary standard for *in camera* review of L.L.'s medical records and in determining that the records did not contain any material information. Specifically, appellant argues that the district court erred in reviewing the records under an "exculpatory standard" rather than a "relevancy standard." We disagree.

The district court has "wide discretion in its discovery and evidentiary rulings." *State v. Wildenberg*, 573 N.W.2d 692, 696 (Minn. 1998). However, the defendant's Sixth Amendment right to confront witnesses "operates as a limit on that discretion." *State v. Evans*, 756 N.W.2d 854, 871 (Minn. 2008). "On appeal, we review the limits placed by

the district court on the release and use of protected records for an abuse of discretion.” *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012).

“A crime victim’s past medical records are generally protected from disclosure by the physician-patient privilege.” *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn. 1984); see Minn. Stat. § 595.02, subd. 1(d), (g) (2016). “However, the medical privilege . . . sometimes must give way to the defendant’s right to confront his accusers.” *Id.*

“When a criminal defendant requests [protected] records . . . the district court may screen the confidential records *in camera* to balance the right of the defendant to prepare and present a defense against the rights of victims and witnesses to privacy.” *Hokanson*, 821 N.W.2d at 349 (applying *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987)). To obtain *in camera* review of protected information, the defendant must make a “plausible showing that the information sought would be both material and favorable to his defense.” *Id.* (quotation omitted). When conducting *in camera* review, the district court is tasked with reviewing the protected information for “all relevant evidence that might help [the defendant’s] defense.” *Paradee*, 403 N.W.2d at 642.

Here, the district court reviewed L.L.’s medical records “*in camera* for all relevant evidence that might help [the] defense,” and found that “the documents reviewed are neither probative nor exculpatory.” Although *Paradee* does not mention “exculpatory” evidence, the term generally refers to evidence “that tends to negate or reduce the defendant’s guilt.” See Minn. R. Crim. P. 9.01, subd. 1(6). In other words, exculpatory evidence is relevant evidence that might help the defense. The terminology used by the district court is not inconsistent with the *Paradee* framework, and we conclude that the

district court did not apply an improper evidentiary standard when conducting *in camera* review of the medical records. Moreover, even if we were to conclude that the district court improperly reviewed for exculpatory evidence, because the district court also found that the documents were not probative, any error was not prejudicial. See Minn. R. Evid. 401 (defining relevant evidence as evidence probative of a material fact); *Wildenberg*, 573 N.W.2d at 698 (reviewing district court’s exclusion of evidence following *in camera* review for prejudicial error).

Appellant’s reliance on *State v. Hummel* does not compel a different conclusion. 483 N.W.2d 68 (Minn. 2012). In *Hummel*, the Minnesota Supreme Court considered whether the district court, in denying *in camera* review of protected records, misinterpreted caselaw and Minn. R. Crim. P. 9.03(6) “as requiring an offer of proof that the material sought was relevant and contained exculpatory information.” *Id.* at 72. The supreme court concluded that the district court erred by relying on Rule 9.03(6), and not, as appellant suggests, that it erred by reviewing for exculpatory information. *Id.* at 72 n.2. Moreover, *Hummel* addressed the sufficiency of a party’s showing to establish the need for *in camera* review, not the district court’s evidentiary standard when conducting *in camera* review. See *id.*

We have obtained the medical records reviewed by the district court. Based on our independent review of the medical records, we conclude that the district court did not abuse its discretion in determining that the records did not contain relevant evidence that might help appellant’s defense and denying appellant access to the records.

Affirmed.