

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1021**

State of Minnesota,
Respondent,

vs.

Scott Alan Klund,
Appellant.

**Filed April 8, 2019
Affirmed
Reilly, Judge**

Ramsey County District Court
File No. 62-CR-16-3427

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

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Bratvold, Judge; and
Kalitowski, Judge.*

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

UNPUBLISHED OPINION

REILLY, Judge

In this direct appeal that was stayed for postconviction proceedings, appellant argues that (1) the district court erred by denying his motion to strike a juror for cause; and (2) he was denied effective assistance of counsel because his attorney requested the incorrect jury instruction. We affirm.

FACTS

In May 2016, police officers responded to an emergency call of gunshots fired in an apartment unit belonging to appellant Scott Alan Klund. Officers entered the apartment and found a male victim, R.G., in the bathroom. R.G. told the officers that appellant shot him. Officers also found a deceased female victim, C.R., in the living room. Officers collected a “large military style rifle” from the bedroom, a folding knife from the bathroom counter, 29 spent cartridges from the apartment hallway floor, and one spent shell casing from the bedroom floor. Officers arrested appellant.

The state charged appellant with second-degree intentional murder of C.R. and attempted second-degree intentional murder of R.G. The state later amended the complaint to charge appellant with attempted premeditated first-degree murder of R.G., attempted second-degree murder of R.G., second-degree murder of C.R., and a lesser-included offense of first-degree manslaughter of C.R. Following trial, the jury found appellant guilty of the attempted second-degree murder of R.G. and of the second-degree murder of C.R., and acquitted appellant of the remaining two charges. The district court sentenced appellant to 130.5 months for the attempted second-degree murder of R.G. and to 261

months for the second-degree murder of C.R. and ordered the sentences to be served consecutively, for a total of 391.5 months. Appellant filed a direct appeal, which this court stayed to permit appellant to file a petition for postconviction relief raising ineffective assistance of counsel, which the district court denied. The appeal was reinstated and appellant was allowed to raise issues from both the judgment and the postconviction denial.

D E C I S I O N

I. Standard of Review

When a defendant files a direct appeal and then moves to stay the appeal to pursue postconviction relief, “we review the postconviction court’s decisions using the same standard that we apply on direct appeal.” *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). “We review legal issues de novo, but on factual issues our review is limited to whether there is sufficient evidence in the record to sustain the postconviction court’s findings.” *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015) (quotation omitted).

II. Juror Bias

Appellant argues that the district court erred by refusing to strike a juror for cause. The United States Constitution provides that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State” in all criminal proceedings. U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. The right to an impartial jury also derives from a defendant’s right to due process of law. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642 (1961). Juror bias violates a defendant’s constitutional rights because “the impartiality of the adjudicator goes to the very integrity of the legal system.” *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015) (quotation omitted). A biased juror is generally

subject to removal for cause when a prospective juror’s “state of mind . . . satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the challenging party.” Minn. R. Crim. P. 26.02, subd. 5(1)1. On appeal, we review a district court’s decision to seat a juror for abuse of discretion. *Fraga*, 864 N.W.2d at 623.

Before voir dire, the prospective jurors completed a jury questionnaire designed to obtain information regarding each person’s qualifications to sit as a juror. The questionnaire asked whether the prospective juror “had any particularly good or bad experiences with law enforcement officers,” and whether the juror would tend to give the testimony of police officers more or less credibility than the testimony of other witnesses. In response, juror JT wrote that he had “mostly good” experiences with law enforcement officers, and indicated that he would give the testimony of police officers more or less credibility than that of other witnesses. During oral questioning, both the district court and the attorneys asked JT a series of follow-up questions based on his answers to the jury questionnaire.

The district court engaged in the following exchange:

THE COURT: Okay. You understand that—well, let me ask it to you this way: Do you think—if a police officer testifies, will you give their testimony more credibility or less credibility just because they’re a police officer?

PROSPECTIVE JUROR: I would hope I would be able to give them the same credibility.

THE COURT: Okay. Is there any reason you wouldn’t be able to do that?

PROSPECTIVE JUROR: No.

THE COURT: Okay. So if you're instructed to treat police officers, expert witnesses, lay witnesses, the same using the witness evaluation factors that I give you in the instructions, will you do that?

PROSPECTIVE JUROR: Yes.

Defense counsel then inquired:

DEFENSE COUNSEL: And you wouldn't hold the testimony of any officer in this case above that of others simply because they're a police officer?

PROSPECTIVE JUROR: I don't think so.

DEFENSE COUNSEL: You don't think so?

PROSPECTIVE JUROR: It's hard to say, circumstances, you know.

DEFENSE COUNSEL: And this is the time to be honest . . . ?

PROSPECTIVE JUROR: Right.

DEFENSE COUNSEL: So do you—I mean, will you impute more credibility to someone simply because they're a police officer?

PROSPECTIVE JUROR: I would hope not.

DEFENSE COUNSEL: Okay. You can't say for certain?

PROSPECTIVE JUROR: I can't say for certain.

DEFENSE COUNSEL: And why can't you say for certain?

PROSPECTIVE JUROR: I don't know. I guess, I just support law enforcement, you know, what they have to deal with.

The prosecutor also questioned the juror:

PROSECUTOR: . . . You understand, sir, that in this court, in any court of law, every witness is entitled to the same degree of deference, correct?

PROSPECTIVE JUROR: Yes.

PROSECUTOR: Yes?

PROSPECTIVE JUROR: I agree with that, yes.

PROSECUTOR: Such that no particular class or kind of witness should be believed more than any other, correct?

PROSPECTIVE JUROR: Correct.

PROSECUTOR: And that would include any police officer, right?

PROSPECTIVE JUROR: Correct.

Following voir dire, the defense sought to dismiss the juror for cause because his statements suggested he could not remain impartial. The district court denied the request and, on appeal, appellant argues that the district court's decision was erroneous. A district court follows a two-step process in considering juror bias. *Fraga*, 864 N.W.2d at 623. The court first determines whether the juror expressed actual bias. *Id.* Second, the district court determines whether the juror was properly rehabilitated. *Id.* "A reviewing court should give deference to the district court's ruling on challenges for cause because the district court is in the best position to observe and judge the demeanor of the prospective juror." *State v. Prtine*, 784 N.W.2d 303, 310 (Minn. 2010) (quotation omitted); see also *State v. Logan*, 535 N.W.2d 320, 323 (Minn. 1995) (stating that district court's decision is entitled to "special deference" because it is "essentially one of credibility, and therefore largely one of demeanor") (quotation omitted).

We agree with appellant that the juror displayed actual bias in favor of the police during voir dire, satisfying the first prong of the two-part *Fraga* test. However, appellant

has not satisfied the second prong of the *Fraga* test because we cannot say that the district court erred in determining that the juror was properly rehabilitated. A juror is rehabilitated if the juror “states unequivocally that he or she will follow the district court’s instructions and will set aside any preconceived notions and fairly evaluate the evidence.” *Prtine*, 784 N.W.2d at 310. Here, after defense counsel raised a challenge to the juror, the court engaged in the following exchange:

THE COURT: . . . [T]he questionnaire asked, and I asked this morning, all attorneys asked you, and I just want to make sure, will you treat the police either better or worse just ‘cause they’re police officers, or will you treat them like any other witness?

PROSPECTIVE JUROR: I will treat them like any other witness.

The district court denied appellant’s request to strike the juror for cause, reasoning that the juror “made it very clear that he wouldn’t treat police officers any different than any other witness.” We discern no error in the district court’s determination. While the juror’s answers were initially equivocal, he ultimately stated in his own words that he would treat police officers “like any other witness.” Thus, while appellant satisfied the first prong of the *Fraga* test by showing that the juror expressed actual bias, he cannot satisfy the second prong of the test because the record supports a determination that the district court rehabilitated the juror and the district court did not abuse its discretion when it denied appellant’s motion to strike this juror for cause.

III. Ineffective Assistance of Counsel

Appellant argues that his attorney's request for the incorrect defense-of-dwelling jury instruction deprived him of his Sixth Amendment right to effective assistance of counsel. The postconviction court determined that appellant was not entitled to relief on ineffective-assistance grounds because although counsel's failure to consider and request the proper defense-of-dwelling instruction was "objectively unreasonable," appellant could not show that he suffered prejudice.

The Sixth Amendment guarantees a defendant the effective assistance of counsel. *State v. Wright*, 719 N.W.2d 910, 919 (Minn. 2006) (citation omitted). Ineffective-assistance-of-counsel claims are reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2070 (1984)). Appellant must show "(1) that his counsel's representation 'fell below an objective standard of reasonableness'; and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (quoting *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068). "The objective standard of reasonableness is defined as representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Vang*, 847 N.W.2d 248, 266-67 (Minn. 2014) (quotations omitted). Trial counsel's performance is presumed reasonable. *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007). To show actual prejudice, appellant must prove that his "claim is meritorious and

that there is a reasonable probability that the verdict would have been different” absent these errors. *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 2583 (1986).

a. Objective Standard of Reasonableness

We agree with appellant that his counsel’s representation fell below an objective standard of reasonableness. The state charged appellant with the attempted first-degree and second-degree intentional murder of R.G., and the second-degree intentional murder of C.R. Minnesota law permits the use of “reasonable force . . . upon or toward the person of another” in certain situations. Minn. Stat. § 609.06, subd. 1 (2018). “Reasonable force” does not include intentional killing, unless the force is used in defense of self or in defense of dwelling. Minn. Stat. § 609.065 (2018). Minnesota law “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.” *State v. Pollard*, 900 N.W.2d 175, 180 (Minn. App. 2017); *see also State v. Carridine*, 812 N.W.2d 130, 143-44 (Minn. 2012) (concluding that the justifiable-taking-of-life instruction was given in error when the defendant’s defense was that the death was unintended).

Here, appellant testified that he did not intend to kill the victims. However, appellant’s counsel requested the justifiable-taking-of-life instruction, instead of the general self-defense instruction. The district court gave the instruction requested by defense counsel. Caselaw instructs 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.” *Pollard*, 900 N.W.2d at 179 (citations omitted). Based on *Pollard*, we agree that defense counsel’s performance fell

below an objective standard of reasonableness and appellant satisfied the first prong of the *Strickland* test.

b. Prejudice

We next consider whether defense counsel's error affected appellant's substantial rights. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. To satisfy this prong, appellant must show that the error was prejudicial and affected the outcome of the case. *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005). An error is prejudicial if there is a "reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998) (quotation omitted). An appellant claiming that an erroneous instruction affected his substantial rights bears a "heavy burden of proving that there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict." *State v. Kelley*, 855 N.W.2d 269, 283 (Minn. 2014) (quotation omitted).

Appellant has not satisfied his heavy burden of proof here. "An erroneous jury instruction will not ordinarily have a significant effect on the jury's verdict if there is considerable evidence of the defendant's guilt." *Id.* at 283-84. The record contains considerable evidence of appellant's guilt. The district court conducted a jury trial for two weeks, and the jury heard testimony from several witnesses, including the responding police officers, medical personnel, forensic experts, R.G., and appellant. R.G. and appellant both testified that appellant turned toward C.R. and shot her while she was unarmed. Appellant stated that he fired multiple shots at C.R. to "stop her from moving." R.G. testified that appellant then fired "round after round after round" into the bathroom

door at R.G., who was hiding in a bathtub. Appellant stated that he was trying to “clear” his apartment by firing a rifle at R.G. and C.R. Appellant then called 911 and told the dispatcher that R.G. had sustained multiple gunshot wounds. The emergency dispatcher asked, “Who shot him?” Appellant responded, “I did.”

The postconviction court reasoned that once the jury found that appellant intended to kill the victims, the basis for arguing that the wrong instruction was given vanished. We agree. In *Carridine*, the supreme court concluded that the district court’s self-defense instruction was erroneous because the defendant claimed that he was acting in self-defense and the shooting death of a bar patron was unintentional. 812 N.W.2d at 134, 144. However, the supreme court rejected the defendant’s assertion that the erroneous instruction affected his substantial rights because the jury, by finding defendant guilty of murder, had necessarily rejected his assertion that he did not intend to kill the victim. *Id.* at 144. The same reasoning applies here. The jury rejected appellant’s assertion that he did not intend to kill C.R. or R.G. By returning a guilty verdict for the attempted second-degree murder of R.G. and the second-degree murder of C.R., the jury rejected an integral component of a general defense-of-dwelling defense. *See id.* Thus, we conclude that defense counsel’s failure to request a general self-defense instruction did not prejudice appellant.

We note, further, that the jury convicted appellant of the attempted second-degree murder of R.G. and the second-degree murder C.R., but acquitted appellant of the remaining charges. This mixed verdict suggests that the jury carefully considered the evidence presented in reaching its verdict. The jury also made certain credibility

determinations in weighing R.G.’s testimony against the conflicting testimony presented by appellant. We defer to the jury, which is “generally in the best position to weigh the credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony.” *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011) (quotation omitted).

In sum, we conclude that although the jury instruction was erroneous, this error did not have a significant effect on the verdict, and we affirm.

Affirmed.