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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1126**

State of Minnesota,
Respondent,

vs.

Thomas Richard Agnew,
Appellant.

**Filed June 3, 2019
Affirmed
Ross, Judge**

Benton County District Court
File No. 05-CR-17-956

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Philip K. Miller, Benton County Attorney, Kathleen Lynne Reuter, Assistant County Attorney, Foley, Minnesota (for respondent)

Howard Bass, Bass Law Firm, PLLC, Burnsville, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Peterson, Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

Thomas Agnew brandished a handgun during an argument with an unarmed boater over the use of a public ramp, and he faced trial for second-degree assault with a dangerous weapon. The district court prohibited Agnew from presenting an expert witness to support his theory that he drew his gun in self-defense. The jury found Agnew guilty, and he appeals on the argument that the district court errantly precluded his expert witness from testifying. Because Agnew never tied the expert's reaction-time opinion about Agnew's risk to Agnew's own belief, because Agnew points to no evidence showing that he reasonably believed that the victim posed a dangerous threat regardless of reaction time, and because the victim testified that Agnew drew his gun at a distance too great to make the expert's reaction-time testimony persuasive, we hold that the district court did not abuse its discretion and that any error was harmless. We therefore affirm Agnew's conviction.

FACTS

Thomas Agnew docked his boat at a Little Rock Lake public ramp while J.J. was backing his boat down the ramp to launch from it. Then came the impasse and squabble.

J.J. sounded his horn and Agnew ignored it, mooring his boat. J.J. told Agnew that he was trying to use that side of the ramp. Agnew told him to use the other side. J.J. responded that he had already backed his trailer toward the spot and that he had the right of way. Neither budged.

Eventually J.J. noticed that Agnew was wearing a leg brace and made a comment about Agnew being handicapped. Agnew cursed at J.J., and J.J. moved his truck and then

got out and walked toward Agnew. By both their accounts, when J.J. was about 20 to 25 feet away from Agnew, Agnew pulled a handgun from a holster on his waist and, according to J.J., pointed it toward J.J. J.J. called Agnew “crazy,” and then he returned to his truck and telephoned the police. Agnew went into his own pickup truck, where he unloaded his gun and waited for police to arrive. According to J.J., after he called police he got out of his pickup and saw Agnew pull his gun out again when the two were about 45 yards apart.

The state charged Agnew with second-degree assault for brandishing the gun and putting J.J. in fear, under Minnesota Statutes, section 609.222, subdivision 1 (2016). Agnew intended to call Mark Bruley, Brooklyn Park’s deputy police chief, to testify as an expert witness to support his affirmative defense that he drew the gun to protect himself from his reasonable fear of J.J. Bruley prepared a report in which he opined that Agnew acted reasonably by drawing his gun. He said that Agnew would have less reaction time every step that J.J. walked toward him, so drawing the gun was justified because Agnew “cannot wait [to react], nor should he be expected to wait, until he is assaulted (possibly to the level of being unconscious and rendering himself completely vulnerable) or for [J.J.] to present a weapon.”

The state objected to the expert’s testifying based on his report. Agnew retreated at the hearing, stating that he was “not offering that report.” He argued instead that the “big picture concept” his expert could offer the jury was the distance from a perceived assailant at which a reasonable person must draw a firearm in order to use the firearm as a means of self-defense. He argued about the law-enforcement understanding of “the 21-foot rule” as “a concept that an assailant can travel 21 feet and attack a person physically before that

person could physically draw a firearm and use it,” meaning that “a person must therefore make a decision very early [whether] to use a firearm.”

The district court granted the state’s motion to exclude the expert’s testimony. Agnew proceeded to trial without an expert witness, but during cross-examination of Rice Police Chief Ross Hamann, he did draw out the reaction-time theory and introduced the concept of “the 21-foot rule.” When he asked the chief, “And so if an assailant is going to charge you, a trained person, you have been trained that they can cover about 21 feet before you can unholster and use a firearm, right?,” the chief answered, “As long as I believe that person had a weapon, yes, that does play into it.”

The jury found Agnew guilty of second-degree assault. The district court convicted him and issued a stayed sentence of 36 months in prison under probationary conditions.

Agnew appeals.

D E C I S I O N

Agnew argues that the district court improperly prohibited his expert from testifying at trial. We review the district court’s decision to exclude expert testimony for an abuse of discretion. *State v. Ritt*, 599 N.W.2d 802, 810–11 (Minn. 1999). Although Agnew characterizes the alleged trial error as one implicating his due-process rights, he has not developed the argument. He argues that the district court misapplied the helpful-to-the-jury requirement of Minnesota Rule of Evidence 702, but he does not explain how applying the rule violated any constitutional right. We will therefore review only the district court’s application of the rule.

The district court acted within its discretion by deciding that the expert testimony would not help the jury. To conclude that Agnew acted in self-defense, the jury would have had to conclude that he was not the aggressor, that he actually and honestly believed he was in imminent danger of great bodily harm, that the belief was reasonable, and that there was no reasonable possibility for him to retreat. *See State v. Nystrom*, 596 N.W.2d 256, 260 (Minn. 1999). A district court may prohibit an expert's testimony supporting a defendant's self-defense theory if the defendant fails to offer evidence tying the expert's testimony to the defendant's belief at the time that he allegedly acted in self-defense. *Id.* Agnew argued that Bruley could comment on principles of self-defense and specifically the so-called "21-foot rule." According to argument and trial testimony, under that reaction-time "rule," a person risks not having sufficient time to react and fire his gun to defend against a charging attacker without first drawing the gun before the attacker has rushed within 21 feet.

There are three flaws in Agnew's challenge to the district court's decision to prevent his expert witness from testifying about this reaction-time theory. First, Agnew never presented any proffer of evidence tying the expert's opinion about Agnew's supposed risk of harm to Agnew's own belief. Bruley's report does not mention any "21-foot rule," and the district court first heard of it during argument when Agnew's attorney mentioned it. Second, relying on any reaction-time rule to justify drawing a firearm as reasonable self-defense implies that one first had a *reasonable* belief that his potential attacker was armed with a deadly weapon or otherwise posed an imminent danger of great bodily harm. Agnew points to no circumstance or evidence showing that he reasonably believed that J.J.

posed such a threat at any distance. And third, J.J. testified that Agnew twice drew his gun and pointed it at him, once when they were 20 to 25 feet apart but then again when they were 45 yards apart, making the 21-foot rule at least partially inconsequential. Given the district court's broad discretion in evidentiary decisions, we will not reverse because the decision does not reflect an abuse of discretion and because, even if it did, any error was harmless.

Affirmed.