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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1217**

State of Minnesota,
Respondent,

vs.

Eugene Foster Cole,
Appellant.

**Filed May 28, 2019
Reversed and remanded
Reilly, Judge**

Clearwater County District Court
File No. 15-CR-17-363

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Alan G. Rogalla, Clearwater County Attorney, Heather L. Labat, Assistant County Attorney, Bagley, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Reilly, Judge; and Klaphake, Judge.*

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

UNPUBLISHED OPINION

REILLY, Judge

On direct appeal from judgment of conviction for domestic assault, appellant argues that the district court erred by instructing the jury that he had a duty to retreat from his home in order to assert a self-defense claim. Because the district court's jury instruction was erroneous, we reverse and remand.

FACTS

In September 2017, police officers responded to a report of a domestic assault in a home shared by J.C. and appellant Eugene Foster Cole. J.C. told the officer that the couple got into an argument and appellant "held [her] down" with his forearm when she tried to make an emergency call. Officers observed red marks and bruising on J.C.'s neck and arm and a cut on her right hand. The state charged appellant with felony attempted domestic assault by strangulation, gross misdemeanor interference with an emergency call, and misdemeanor domestic assault, bodily harm. The matter proceeded to trial. Following the close of testimony, the district court instructed the jury on the charges and on appellant's self-defense claim and submitted the case to the jury. The jury found appellant guilty of misdemeanor domestic assault and acquitted him of the remaining two charges. This appeal follows.

DECISION

Appellant challenges the district court's self-defense instruction. "Generally, a party waives the right to appeal a jury instruction by failing to object to it at trial." *State v. Glowacki*, 630 N.W.2d 392, 398 (Minn. 2001). Here, appellant did not object to the district

court's self-defense instruction at trial. Because appellant did not raise a timely objection, our review on appeal is limited to whether the jury instructions constituted plain error. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Under a plain-error analysis, the appellant must show: (1) an error; (2) that was plain; and (3) that affected appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three prongs of the plain-error test are satisfied, we may correct the error if it seriously affects the fairness and integrity of the judicial proceedings. *Id.*

We determine that the first two prongs of the *Griller* plain-error test are satisfied because there was an error, and the error was plain. In its self-defense instruction to the jury,¹ the district court stated, "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." This instruction was plainly erroneous. Minnesota caselaw is clear that "[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." *Glowacki*, 630 N.W.2d at 402. Thus, a self-defense jury instruction containing duty-to-retreat language is a plain error if the defendant was in his home. *Baird*, 654 N.W.2d at 113. Here, it is undisputed that appellant and J.C. were in their shared home when the dispute arose. We therefore determine that the district court's instruction was plainly erroneous.

Under the third prong, an error affects a defendant's substantial rights "if the error was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. An

¹ We note that the record shows that neither the state nor appellant submitted proposed jury instructions to the district court.

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.” *Id.* (quotation omitted). Appellant claims that the erroneous self-defense instruction confused and misled the jury because the jury heard conflicting accounts at trial from the witnesses.

We agree. The parties provided conflicting accounts of the events at trial. J.C. testified that the couple got into an argument and she attempted to pick up her phone to make an emergency call. J.C. stated that appellant grabbed her phone, dropped it on the floor, and “started stomping on it with the heel of his foot.” J.C. testified that she slipped and fell “face first” on the floor while reaching for her phone, and appellant “ended up falling right on top” of her. J.C. stated that appellant put his arm around her neck and pulled her, “cutting off [her] airway.” Appellant’s testimony differed from J.C.’s account. Appellant stated that the couple got into an argument, during which J.C. “tackled” him, causing him to fall on the floor. Appellant testified that he “spun” around in an effort to get J.C. off of him, although he denied strangling J.C. or grabbing her phone.

Given this record and the fact that the jury acquitted appellant of the two more serious charges, it is difficult to determine whether the jury rejected appellant’s version of events, or whether it accepted his version but determined he was nevertheless guilty of domestic assault because he remained in the home. Our decision in *Baird* is instructive. In that case, the defendant and his roommate got into an argument and the roommate approached the defendant holding a screwdriver. 654 N.W.2d at 108. The defendant hit his roommate in the face and pulled his arm. *Id.* The Minnesota Supreme Court ruled that the district court’s plainly erroneous jury instruction affected the defendant’s substantial

rights because “it is simply impossible to determine whether the jury rejected [the defendant]’s version of the facts or whether it accepted his version but concluded that he was guilty nevertheless because he failed to retreat.” *Id.* at 114. The *Baird* court reversed the defendant’s conviction and remanded for a new trial. *Id.* The same reasoning applies here. Because there is a reasonable likelihood that the plainly-erroneous instruction had a significant effect on the jury’s verdict, we determine that the third *Griller* prong is satisfied.

Having determined that the district court’s jury instructions constituted plain error affecting appellant’s substantial rights, we turn to consider whether a new trial is necessary to ensure fairness and the integrity of judicial proceedings. *Griller*, 583 N.W.2d at 740. “Fairness requires that [the defendant] be given an opportunity to present his account of the facts to a jury under the proper instructions.” *State v. Watkins*, 820 N.W.2d 264, 269 (Minn. App. 2012) (emphasis omitted) (citing *Baird*, 654 N.W.2d at 114). And “[t]he fairness and integrity of the judicial proceedings are called into question by the erroneous instructions and the verdict based on those instructions” when the jury may not have properly considered disputed elements of the crime. *Id.* (quotation omitted). Here, it is possible that the district court’s erroneous jury instruction compromised the jury’s ability to weigh the competing evidence and properly consider appellant’s claim of self-defense. We therefore conclude that appellant is entitled to reversal of his conviction and we remand for further proceedings consistent with this opinion.

Reversed and remanded.