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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0072**

State of Minnesota,
Respondent,

vs.

Dontae Deshaun White,
Appellant.

**Filed November 7, 2022
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-20-10743

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

Michael O. Freeman, Hennepin County Attorney, Peter R. Marker, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

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

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his conviction for second-degree intentional murder, arguing that the evidence was insufficient to support the jury's finding of guilt, that the prosecutor

engaged in misconduct during closing arguments, and that the district court abused its discretion by denying appellant's motion for a downward durational departure. We affirm.

FACTS

In 2020, when most bars and clubs were closed because of COVID-19, K.B. and his roommate began throwing weekly "quarantine parties" at their house, which featured strippers, drinking, smoking, gambling, and music. On April 17, 2020, K.B. and his roommate hosted one such party. K.B.'s girlfriend, S.K., was present at the party. Most attendees were invited via social media or text message, and up to 100 people attended the party. Partygoers were charged an admission fee at the door and were frisked for weapons by either K.B. or his roommate. K.B. and his roommate were visibly armed during the party.

Appellant Dontae Deshaun White and his older brother G.S. were at the party celebrating G.S.'s birthday. White managed to sneak a gun into the party despite being frisked for weapons before he entered. He did so by hiding the gun in his underwear. K.B. was uneasy with G.S. and his friends being at the party, and he asked them to leave. G.S. refused and an argument ensued between K.B. and G.S. White observed G.S. with a confused look on his face from the other side of the room and walked towards him. From his position next to G.S., White shot and killed K.B.

White fled to Chicago, where he was eventually located. Respondent State of Minnesota charged White with one count of second-degree murder and one count of prohibited person in possession of a firearm. The charges were tried to a jury. At trial, White argued that he shot K.B. in self-defense. Specifically, White testified that he shot

K.B. because he saw K.B. raise a firearm at G.S. G.S. similarly testified that K.B. pointed a firearm at him. The jury rejected White's self-defense claim and found him guilty as charged.

The district court entered a judgment of conviction for second-degree intentional murder. White moved for a downward durational sentencing departure. White argued that his conduct was less serious than typical and that his judgment was clouded by trauma that he had experienced as a child. The district court denied his request and sentenced him to serve a prison term of 307 months.

White appeals.

DECISION

I.

White contends that the evidence was insufficient to sustain the jury's finding of guilt. At trial, White did not dispute that he shot and killed K.B. Instead, he claimed that he acted in defense of himself and G.S. On appeal, White argues that the state failed to prove, beyond a reasonable doubt, that his act of shooting and killing K.B. was not legally justified under Minnesota's self-defense laws.

Minnesota law permits the use of reasonable force against another if it is "used . . . in resisting or aiding another to resist an offense against the person." Minn. Stat. § 609.06, subd. 1(3) (2018). But a person may not use deadly force in defense of self or another unless it is "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 (2018). A defendant bears the burden of producing evidence to support a claim of self-

defense. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). If the defendant meets that burden—as White did in this case—the state must disprove one or more of the self-defense elements beyond a reasonable doubt. *Id.*

Traditionally, when considering a challenge to the sufficiency of the evidence, we carefully analyze the record to determine whether the evidence, viewed in the light most favorable to the conviction, was sufficient to permit the fact-finder to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume the fact-finder believed the state’s witnesses and disbelieved any contrary evidence. *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). We defer to the fact-finder’s credibility determinations and will not reweigh the evidence on appeal. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009); *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002). We will not disturb a guilty verdict if the fact-finder, acting with due regard for the presumption of innocence and requirement of proof beyond a reasonable doubt, could have reasonably concluded that the state proved the defendant’s guilt. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

If the state relied on circumstantial evidence to prove an element of an offense, we apply a heightened standard of review. *See State v. Harris*, 895 N.W.2d 592, 601-03 (Minn. 2017) (applying circumstantial-evidence standard to individual element of criminal offense that was proved by circumstantial evidence). Circumstantial evidence is “evidence from which the [fact-finder] can infer whether the facts in dispute existed or did not exist.” *Id.* at 599 (quotation omitted). “In contrast, direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* (quotations omitted). “A state of mind generally is proved

circumstantially, by inference from words and acts of the actor both before and after the incident.” *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000).

White asks this court to apply the circumstantial-evidence standard of review. The state counters that it disproved White’s self-defense claim with direct evidence. We need not resolve that dispute because, as explained below, White’s challenge to the sufficiency of the evidence fails under the heightened circumstantial-evidence standard of review.

Minnesota courts employ a two-step process when reviewing convictions based on circumstantial evidence. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). First, the reviewing court identifies the circumstances proved. *Id.* In doing so, the court views the evidence in the light most favorable to the verdict. *See State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012) (stating that the supreme court had considered the evidence “in the light most favorable to the verdict” when determining the circumstances proved). The court defers to the fact-finder’s acceptance or rejection of evidence as indicated by its verdict, and to its credibility determinations. *Andersen*, 784 N.W.2d at 329; *see also State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008) (stating that juries are “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”).

Next, we “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt.” *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (quotation omitted). We do not defer to the fact-finder’s choice between reasonable inferences. *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). “To successfully challenge a conviction based upon circumstantial evidence, a defendant

must point to evidence in the record that is consistent with a rational theory other than guilt.” *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

White’s hypothesis of innocence is based on his assertion that he shot K.B. because he saw K.B. point a handgun at his brother G.S. White argues that “[w]hen [he] saw [K.B.] point a gun at his brother, [he] believed both he and his brother were about to be shot, so he made the split-second decision to shoot first.” Although White and G.S. testified that K.B. pointed a gun at G.S., two eyewitnesses for the state—S.K. and G.W.—testified that K.B. did *not* display his firearm before White shot him.

S.K. testified that K.B. was holding her hand during the confrontation with G.S. and that K.B. had his head turned to speak to her when he was shot multiple times from the area where G.S. was standing. S.K. saw only flashes as K.B.’s hand slipped from hers. She testified that she initially believed that K.B. had let go of her hand to run away from the gunfire. S.K. testified that she heard over 30 shots, and once the shooting stopped, she turned on the lights and saw blood splatters and K.B. on the floor. S.K. testified that she was positive that K.B. never raised his gun at G.S., that K.B. did not threaten G.S., and that K.B. was turned towards her when he was shot. S.K. testified that everyone ran out of the room right after the shooting, but she stayed with K.B. until the police arrived.

G.W. testified that he had seen K.B. with a gun shortly before the shooting, but that K.B. had handed that gun to another person before the dispute with G.S. G.W. testified that the shooter began firing shots while walking towards K.B. G.W. testified that there was a pause in the shooting, at which point someone turned the lights on, and G.W. saw

K.B. on the floor. G.W. testified he then observed the shooter fire additional shots at K.B.'s body while he was on the ground.

A forensic pathologist testified that K.B. died from multiple gunshot wounds, including one that entered the back right part of his head and exited through the other side of his head. K.B. sustained two gunshots to his right hip and one gunshot to the right side of his lower back, which exited through his thigh. A bullet was recovered from K.B.'s right buttocks, and a gunshot to his right arm fractured his humerus. K.B.'s wounds appeared to have a back-to-front trajectory except for one gunshot wound to K.B.'s head, which entered through the right side of his chin and exited through the left side of his face, possibly grazing his left shoulder upon exit. K.B. also sustained graze wounds on his right ring and middle fingers. All told, the medical examiner identified at least seven distinct entry wounds on K.B.'s body, which predominantly had a right-to-left, up-to-down, back-to-front trajectory.

At trial, White testified that he twice snuck a gun into the party, even though he was frisked for weapons at the door, and he acknowledged that he was ineligible to possess a firearm. White testified that he saw G.S. looking confused and shocked from across the room and maneuvered through the party to see what was going on. White claimed that K.B. raised his gun and pointed it at G.S. White testified that he pulled his gun out and started firing. He acknowledged that there were eight rounds in his gun and that he may have fired all eight rounds.

When determining the circumstances proved, we view the evidence in the light most consistent with the verdict and assume the jury believed the state's witnesses. *Taylor*, 650

N.W.2d at 206. Moreover, if a defendant’s trial testimony “conflicts with the State’s evidence that supports the verdict . . . we do not consider [the defendant’s] testimony when identifying the circumstances proved.” *State v. Hawes*, 801 N.W.2d 659, 670-71 (Minn. 2011).

Given the testimony of S.K. and G.W., the circumstances proved are that K.B. did *not* point his firearm at G.S. before White began shooting at K.B. Because the circumstances proved are inconsistent with White’s hypothesis of innocence, we conclude that the state proved beyond a reasonable doubt that White did not act in self-defense. We therefore do not disturb the verdict.

II.

White next contends that the prosecutor engaged in misconduct at trial. Specifically, White argues that the prosecutor “inflame[ed] the jury’s passions and prejudices against him” by comparing him to Ted Bundy during closing arguments. White did not object to the prosecutor’s remarks at trial.

If a defendant fails to object to alleged prosecutorial misconduct during trial, we review the alleged misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under that standard, the defendant bears the burden of establishing error that is plain. *Id.* “An error is plain if it is clear or obvious; usually this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct.” *State v. Bustos*, 861 N.W.2d 655, 660-61 (Minn. 2015) (quotation omitted). In cases of unobjected-to misconduct, if the defendant establishes an error that is plain, the burden shifts to the state to prove that there is no reasonable likelihood that the absence of

the misconduct would have significantly affected the jury's verdict. *Ramey*, 721 N.W.2d at 302. Even if the error affected the defendant's substantial rights, this court will not address the error unless doing so is necessary to ensure fairness and the integrity of the judicial proceedings. *See id.* (stating that if the first three plain-error prongs are met, then "the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings").

The prosecutor's reference to Ted Bundy came during his rebuttal to White's closing argument. The prosecutor stated:

You might have a reasonable doubt if you look at the defendant and think, he didn't come across as somebody who would just shoot somebody for no reason, like if it wasn't self-defense. That's not a reasonable doubt. I mean, you should consider his manner and how he appeared when he testified for sure, I mean, when you look at his credibility. But looking at him and thinking, oh, he's dressed nice today, he was soft-spoken when he testified, he doesn't look like somebody who would do this isn't reasonable doubt. Ever heard of Ted Bundy?

The state notes that the prosecutor's reference was made in response to White's closing argument, in which his attorney argued that White "does not come off like a cold-blooded killer to me. He comes off as a young man who was put in the position where he can shoot or be shot." The state acknowledges that the prosecutor's reference to Ted Bundy was error and likely plain. But the state argues that the alleged misconduct did not have a significant impact on the verdict.

A prosecutor "must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995); *accord State v. Mayhorn*,

720 N.W.2d 776, 786-87 (Minn. 2006). Inflaming the passions of the jury is a larger concern where credibility is a central issue. *Porter*, 526 N.W.2d at 363. The Minnesota Supreme Court has held that comparing a defendant to another notorious defendant impermissibly appeals to the jury's passions and prejudices. *State v. Thompson*, 578 N.W.2d 734, 743 (Minn. 1998). We therefore agree that the prosecutor erred and that the error was plain. The burden now shifts to the state to prove that White's substantial rights were not affected by that error.

To determine whether there is a reasonable likelihood that alleged misconduct significantly affect the verdict, we consider "the pervasiveness of improper suggestions and the strength of evidence against the defendant." *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017) (quotation omitted). In this case, White testified that he shot and killed K.B. The only disputed issue is whether he was justified in doing so. As to that issue, the jury heard and observed White describe his state of mind and the alleged events that prompted him to shoot K.B. The jury also heard from eyewitnesses who refuted White's claim that he shot K.B. because K.B. raised a gun at G.S. during an argument. In sum, the evidence against White was strong. In addition, the prosecutor's reference to Ted Bundy came at the end of a long closing argument and was made, however unartfully, in response to defense counsel's statement that White's demeanor on the stand did not suggest he was a "cold-blooded killer."

In context, it seems that the reference to Ted Bundy—though inappropriate—was offered to show that a person's appearance may not be a good indicator of what he is capable of doing. Given that limited context and the strength of the evidence against White,

the state has met its burden to show that there is no reasonable likelihood that the alleged misconduct significantly affected the verdict.¹ Ultimately, though the prosecutor’s statement was error that is plain, White is not entitled to relief under the modified plain-error standard.

III.

Finally, White contends that the district court abused its discretion by denying his motion for a downward durational departure.

The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Stat. § 244.09, subd. 5 (2018). The guidelines seek to “maintain uniformity, proportionality, rationality, and predictability in sentencing.” *Id.* “Consequently, departures from the guidelines are discouraged and are intended to apply to a small number of cases.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016).

A district court may depart from the presumptive sentence only when there are “identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (Supp. 2019). A durational departure must be based on factors that reflect the seriousness of the offense. *Solberg*, 882 N.W.2d at 623. “A downward

¹Moreover, White fails to address the fourth prong of the plain-error standard: Whether it is necessary to address the error to ensure the fairness and the integrity of the judicial proceedings. As to that prong, the Minnesota Supreme Court recently explained that “appellate courts have a limited discretionary power to grant relief based on an unobjected-to error, which may be exercised only when a plain error affected a particular defendant’s substantial rights *and* a failure to correct the error would have an impact beyond the current case by causing the public to seriously question the fairness and integrity of our judicial system.” *Pulczynski v. State*, 972 N.W.2d 347, 356 (Minn. 2022). White does not argue that it is necessary to correct the alleged prosecutorial misconduct for that purpose.

durational departure is justified only if the defendant's conduct was significantly less serious than that typically involved in the commission of the offense." *Id.* at 624 (quotation omitted).

A district court has broad discretion to depart from a presumptive sentence if substantial and compelling circumstances are present, and we generally will not interfere with an exercise of that discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Only in a "rare" case will we reverse the district court's refusal to depart from a presumptive sentence. *Id.* When exercising sentencing discretion, the district court "must consider circumstances supporting a downward durational departure from the presumptive sentence," and a district court errs if it fails to consider "[l]egitimate" and "significant" reasons for a departure. *State v. Curtiss*, 353 N.W.2d 262, 262-64 (Minn. App. 1984). "Consideration of compelling circumstances is central to the scheme of the sentencing guidelines, and the practice will avoid sentencing that is either mechanical or callous." *Id.* at 264. "Although the [district] court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence." *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

The presumptive sentence for White's offense was a prison term of 307 to 427 months. White moved for a downward durational departure and requested a 144-month prison sentence. The state argued for a sentence at the high end of the presumptive sentencing range because White shot K.B. in K.B.'s home and snuck a weapon into the party despite K.B.'s obvious attempt to exclude weapons.

At sentencing, the district court stated it had reviewed all relevant material. The district court denied White's motion for a downward departure and explained its decision as follows:

I start by respecting the jury's verdict. . . . I listened to everything that was presented to me. And I understand it was one of the most difficult decisions any jury ever has to make.

But it is their decision to make to determine whether or not there is a legal justification for what you did. And they said that there was not. So I'm not going to give you durational departure. I know that that was asked for. But I don't think that given the circumstances of the jury finding that you were guilty of second-degree murder that I am in a place where I am at all willing to do a downward durational departure.

But what [the defense attorney] says is in my mind true and that is that you were not there going out looking for somebody to kill.

. . . .

I'm going to go to the bottom of the range because you made a bad mistake. It was not legally justifiable.

But there was -- something happened. You made the incredibly bad choice to say I'm going to step in and fire my gun at whatever . . . you thought, not justifiable, but it was motivated by something that wasn't about evil and malice and hurting somebody just for the sake of having the ability to do that.

The district court sentenced White to serve 307 months in prison. White argues that the district court erred because his conduct was less serious than typical and that "his judgment at the time was significantly affected by the trauma he suffered as a child." White also argues that his sentence was not proportionate to those received by similarly situated offenders, based on data that he presented to the district court at the time of sentencing.

Finally, White argues that the district court “decided not to depart from the presumptive range simply because the jury rejected [his] self-defense claim” and “abused its discretion by refusing to grant a downward durational departure in deference to the jury’s verdict rather than because [his] culpability was commensurate with a typical second-degree murder.”

The district court’s deference to the jury’s rejection of White’s self-defense claim must be considered in the context of the entire sentencing record, which shows that the district court considered White’s arguments in support of a departure before determining that the circumstances justified a sentence at the low-end of the presumptive range, but not a downward durational departure. This is not a case in which the district court failed to exercise its discretion or engaged in impermissible mechanical or callous sentencing. *See Curtiss*, 353 N.W.2d at 264 (remanding for reconsideration of defendant’s departure motion because the district court failed to exercise its discretion).

In addition, White’s argument that his offense was less serious than a typical second-degree intentional murder is at odds with the record. As the record shows, White twice snuck a loaded firearm, which he was not eligible to possess, into the party. He shot K.B. multiple times, firing eight bullets at close range, at a house party where up to 100 other people were present. K.B. sustained at least seven distinct gunshot wounds: two to his head, one to his arm, three to his buttock and hip area, and one to his lower back. On this record, the district court did not abuse its discretion by imposing a sentence within the presumptive range under the Minnesota Sentencing Guidelines. In fact, similar circumstances have justified upward durational departures in other cases. *See State v.*

Edwards, 774 N.W.2d 596, 600, 607 (Minn. 2009) (upholding upward departure where defendant fired seven times at or towards a group of nine people); *State v. Kisch*, 346 N.W.2d 130, 133 (Minn. 1984) (upholding upward departure because murder was “not just an unintentional killing resulting from a single blow but was one resulting from multiple brutal blows”); *State v. Vogelpohl*, 326 N.W.2d 635, 636 (Minn. 1982) (upholding upward departure where victim was hit on the head eight times with two hammers); *State v. Dircks*, 412 N.W.2d 765, 768 (Minn. App. 1987) (“The manner of use of a single deadly weapon, or two similar instruments, has been held sufficient to establish particular cruelty and to justify a double or less-than-double departure.”), *rev. denied* (Minn. Nov. 24, 1987).

In sum, the district court’s imposition of a presumptive sentence was not an abuse of discretion.

Affirmed.