

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1678**

State of Minnesota,
Respondent,

vs.

Terry Lorenzo Brown, Jr.,
Appellant.

**Filed March 17, 2025
Affirmed
Connolly, Judge**

Ramsey County District Court
File No. 62-CR-21-5804

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

John Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and
Wheelock, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges his conviction of one count of second-degree murder, four counts of attempted second-degree murder, and one count of unlawful possession of a firearm, arguing that: (1) the state failed to disprove beyond a reasonable doubt that

appellant was not acting in self-defense or defense of others; (2) the prosecutor committed misconduct by misstating the law of self-defense in closing argument; (3) appellant was deprived of a fair trial because (a) he relied to his detriment on the district court's pretrial order stating that appellant had no duty to retreat, and (b) he received ineffective assistance of counsel because of his counsel's mistake in the law; (4) the district court erred in instructing the jury on the defense of others and in refusing to clarify the instruction when the jury questioned it; (5) the district court abused its discretion in denying appellant's request to plead guilty to unlawful firearm possession; and (6) the cumulative effect of these errors deprived appellant of a fair trial. We affirm but decline to address the merits of appellant's ineffective-assistance-of-counsel claim, preserving it for review in a postconviction proceeding.

FACTS

During the summer of 2021 in St. Paul, appellant Terry Brown, Jeffrey Hoffman, and Allen Walker feuded verbally and violently with Devondre Phillips, whose cousin was appellant's girlfriend. Phillips left St. Paul, but returned on October 10, 2021. He went from the airport to a bar, where he purchased a gun from a friend he met in the parking lot, then entered the bar. Soon afterwards, appellant, Hoffman, and Walker, who were also carrying guns, entered the bar, which was crowded with other patrons.

Phillips and appellant each left the bar independently, then returned, and appellant rejoined the Hoffman and Walker. When appellant, Hoffman, and Walker each approached Phillips from different directions, Phillips fired at Hoffman. About four seconds later, Phillips and appellant began to exchange gunfire, which continued after they had both been

hit. Phillips fired ten shots, and appellant fired eight. Five people were hit by bullets from appellant's gun, and one of them died.¹

Appellant was charged with one count of second-degree murder, eleven counts of attempted second-degree murder, and one count of unlawful possession of a firearm. He moved to dismiss, relying in part on *State v. Gardner*, 104 N.W. 971 (Minn. 1905), for the proposition that “[t]here is no duty to retreat from a gun” and in part on the finding of another district court that Phillips had been the initial aggressor. Appellant's motion was granted with respect to counts 2, 3, 6, 9, 10, 11, and 12 because the bullets involved in those counts were fired from Phillips' gun; his motion was denied with respect to counts 1, 4, 5, 7, and 8 because those bullets came from appellant's gun, and the district court, accepting appellant's reliance on *Gardner*, determined that whether appellant's response of shooting back at Phillips was reasonable under the circumstances was a question for the factfinder.

Following the trial, at which appellant chose not to testify, a jury found appellant guilty of the five counts relating to murder mentioned above as well as the count of unlawful possession of a firearm. His motion for a new trial was denied, and he was sentenced to 441 months on the second-degree murder count, with four 220-month sentences on the attempted second-degree murder counts and a 60-month sentence on the unlawful possession of a firearm count to run concurrently. He now challenges his

¹ Phillips was subsequently convicted of eight counts of attempted second-degree murder; his conviction has been affirmed. *State v. Phillips*, No. A23-1415, 2024 WL 4481914 (Minn. App. Oct. 14, 2024), *rev. denied* (Minn. Jan. 29, 2025).

convictions relating to murder, arguing that (1) the state failed to disprove any element of his self-defense claim, (2) the prosecutor committed misconduct with his erroneous statements about the law of self-defense, (3) appellant was prejudiced by his reliance on the district court's pretrial order and by his counsel's advice, (4) the district court erred in instructing the jury on appellant's duty to retreat, (5) the district court erred in denying appellant's request to enter a partial guilty plea to the charge of ineligible possession of a firearm, and (6) the cumulative effect of these errors entitled appellant to a new trial.

DECISION

I. Self-defense Claim

A valid claim of self-defense requires the existence of four elements: (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he was in imminent danger of death or great bodily harm; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger. Although the defendant must come forward with evidence to support his claim, it is the State that bears the ultimate burden of disproving self-defense. To meet its burden, however, the State need only disprove beyond a reasonable doubt at least one of the elements of self-defense.

State v. Radke, 821 N.W.2d 316, 324 (Minn. 2012) (citations omitted). "The degree of force used in self-defense must not exceed that which appears to be necessary to a reasonable person under similar circumstances." *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). In self-defense situations, "even absent a duty to retreat, the key inquiry will still be into the reasonableness of the use of force and the level of force under the specific circumstances of each case." *State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001). A self-defense claim requires that the claimant have used "only the level of force reasonably

necessary to prevent the bodily harm feared.” *State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014). “It is a general rule that the legal excuse of self-defense is available only to those who act honestly and in good faith.” *State v. Johnson*, 152 N.W.2d 529, 532 (Minn. 1967). Factors to consider in determining whether the force used was reasonable include the “age and size of victim and defendant, victim’s reputation for violence, previous threats and/or altercations between victim and defendant; defendant’s aggression, if any; victim’s provocation, if any.” *State v. Soukup*, 656 N.W.2d 424, 429 (Minn. App. 2003), *rev. denied* (Minn. Apr. 29, 2003).

This court reviews “the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach their verdict.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court must also “assume the jury believed the state’s witnesses and disbelieved any evidence to the contrary,” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011), and defer to the credibility decisions of the fact-finder. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992).

While Minnesota caselaw has not addressed the reasonableness of repeatedly firing a gun into a crowd, South Dakota caselaw recently did so.

Our cases support that shooting into a crowd shows a lack of regard for human life. Further, when a defendant claims justifiable homicide because he was threatened with serious bodily injury, the responding force becomes limited to that which is reasonable in the circumstances, and as the threat of harm dissipates, so does the reasonableness of the force used. It is for the jury to decide if homicide was justified.

State v. Smith, 993 N.W.2d 576, 592-93 (S.D. 2023).² Appellant’s decision to empty the eight bullets in his gun into the group of bar patrons who had the misfortune to be in the same direction as Phillips, at whom appellant was firing, supported a jury determination that appellant’s acts were not reasonable.

The jury heard the lead investigator’s explanations of the surveillance videos of the shooting, watched the videos, and heard testimony from victims and witnesses who were in the bar and in the crossfire. Both the videos and the witnesses’ testimony were direct evidence. See *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (witness testimony), *State v. Blevins*, 10 N.W.3d 29, 40 (Minn. 2024) (surveillance videos). Therefore, appellate review of the determination that appellant’s acts were not reasonable on that evidence is limited to “a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to [allow] the jurors to reach the verdict they did.” *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). The evidence of the victims’ testimony and the videos, viewed in the light most favorable to appellant’s conviction, was sufficient to allow the jury to reach its verdict.

Because we conclude that the state proved that the use of force was unreasonable under the circumstances, we do not address the other elements of self-defense.

II. Prosecutorial Misconduct

This court reviews objected-to prosecutorial misconduct to “determine whether [it] is harmless beyond a reasonable doubt.” *State v. Dobbins*, 725 N.W.2d 492, 506 (Minn.

² While not binding in Minnesota, this case is persuasive in its analysis of a very similar situation.

2006) (quotation omitted). Appellant argues that the prosecutor implied that appellant was not acting reasonably, honestly, and in good faith by arguing that appellant: (1) took a gun he was not allowed to possess into the bar; (2) walked into rather than avoided deadly conflict; (3) joined two others against a single opponent; (4) was part of creating the dangerous situation, not trying to avoid it; and (5) was not a “good guy” because none of the four—Phillips or the group—were good guys. The prosecutor explained in closing argument that the duty to retreat was not really an issue here, saying that it “tie[d] into a different concept . . . the reasonableness of [appellant’s] actions. It tie[d] into acting honestly and in good faith.”

In his brief, appellant quotes extensively from the prosecutor’s closing argument. He argues that the prosecutor “struck directly at the only issue in this case—whether [appellant’s] acts in self-defense and defense of others [were] reasonable.” In light of appellant’s statement that the only issue in the case was the reasonableness of his own acts, appellant could not have expected the prosecutor to give a closing argument that did not mention reasonableness and did not assert that appellant’s acts were not reasonable under the circumstances, i.e., shooting in a crowded bar. “The State has a right to vigorously argue its case, including during closing arguments. Prosecutors need not be colorless and may argue that the evidence does not support particular defenses.” *State v. Davis*, 982 N.W.2d 716, 726 (Minn. 2022) (quotations and citation omitted). The jury implicitly determined that appellant’s acts were not reasonable, and appellant does not claim there is a lack of evidence to support that determination.

III. District Court's Pretrial Order and Appellant's Counsel's Advice

A. District court's pretrial order

Prior to trial, appellant moved to dismiss the charges on the ground that, because the state had argued in prosecuting Phillips, who exchanged shots with appellant in the bar, that Phillips did not have a right to assert self-defense because he fired the first shot, the state could not argue now that appellant, who did not fire the first shot, also did not have a right to self-defense. For this argument, appellant relied on *Gardner*, 104 N.W. at 971.

The doctrine of “retreat to the wall” had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use and to the type of firearms. It would be good sense for the law to require, in many cases, an attempt to escape from a hand to hand encounter with fists, clubs, and even knives, as a condition of justification for killing in self-defense; while it would be rank folly to so require when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to kill or do great bodily harm. What might be a reasonable chance for escape in the one situation might in the other be certain death. Self-defense has not, by statute nor by judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction.

Gardner, 104 N.W. at 975. In the memorandum to its order denying appellant's motion to dismiss, the district court “agree[d] that *Gardner* stands [for the view] that [appellant] had no duty to retreat from Mr. Phillips's gun, once Mr. Phillips started shooting at [appellant].”³ The district court went on to cite CRIMJIG 6.12 for the propositions that:

³ Although appellant relied on *Gardner* for this proposition when moving for dismissal, he says on appeal that “the errors in this case began pretrial, with the district court's mistaken belief . . . that there is no duty to retreat from an aggressor with a gun.” But the source of the district court's “mistaken belief” was the citation in appellant's motion.

The person may use all force and means that the person reasonably believes to be necessary and that would appear to a reasonable person, in similar circumstances, to be necessary to prevent death or great bodily harm that appears to be imminent. The kind and degree of force a person may lawfully use in self-defense is limited by what a reasonable person in the same situation would believe to be necessary. Any use of force beyond that is unreasonable.

“[T]he legal excuse of self-defense is available only to those who act honestly and in good faith.” *Johnson*, 152 N.W.2d at 533; *see also* 10 Minnesota Practice, CRIMJIG 6.12 (2004) (“The legal excuse of defense of self or others is available only to those who act honestly and in good faith. A person may use force in defense of self or others only if the person was not the aggressor and did not provoke the offense.”)

The district court then applied these criteria to the present case:

Here, [appellant] fired back at Mr. Phillips in the crowded . . . [b]ar and continued to shoot bullets even when he was on the floor, all while patrons attempted to get out of the way of the hail of bullets. Whether it was indeed reasonable for [appellant] to fire back at Mr. Phillips in such a crowded space is a question for the factfinder. Therefore, the court finds that there is probable cause that [appellant] provoked the confrontation[,] thus negating defense of self or others, when he, Mr. Hoffman, and Mr. Walker surrounded Mr. Phillips armed with guns knowing that Mr. Phillips likely had a gun as well; and it is a question for the factfinder whether the response of shooting back at Mr. Phillips was reasonable under the circumstances.

The district court denied appellant’s motion to dismiss.

On the first day of the trial, the district court stated that “regarding the duty to retreat, we’ve already discussed that and I already wrote it in my order that I agree that there’s no duty to retreat to -- from a gun, so that’s not an issue.” At the end of the trial, the district

court instructed the jury that “[t]he defendant has a duty to retreat or avoid the danger if reasonably possible. The duty to retreat only begins at the time the offense against the person is committed or the person reasonably believed that it was.” But the district court also instructed the jury that: (1) “[t]he kind and degree of force a [defendant] may lawfully use in [self-defense] is limited by what a reasonable person in the same situation would believe to be necessary. Any use of force beyond that is [unreasonable]”; (2) “[t]he legal excuse of [self-defense] . . . is available only to those who act honestly and in good faith”; and (3) “the rule of self-defense does not authorize one to seek revenge or to take into his own hands the punishment of an offender.”

Finally, in denying appellant’s motion for a new trial, the district court acknowledged its change in position on the duty to retreat and rejected the possibility of appellant being damaged by the change. “The defense has failed to show how the Court having changed its ruling on the duty-to-retreat jury instruction has resulted in any prejudice to [appellant]. This was not a duty-to-retreat case and never was. He was not convicted on duty to retreat. . . . [T]he jury instruction essentially nullified any duty to retreat as it would apply in this case.”

Appellant now argues that he is “entitled to a new trial based on his detrimental reliance on the [district] court’s [pretrial] order stating there was no duty to retreat from a gun” because “the [district] court’s reversal on this critical aspect of the defense deprived [appellant] of his due process right to a fair trial and his right to fundamental fairness . . . [b]ecause [he] relied on the [district] court’s stated position when he declined the plea offer and opted instead to go to trial.”

Appellant argues that the district court abused discretion in stating that appellant had no duty to retreat from Phillips's gun when addressing the pretrial motion to dismiss and at the opening of the trial, but later instructing the jury that appellant's self-defense claim required that he have no possibility of retreat: in short, he argues that the district court did not have the right to change its position on appellant's duty to retreat. But appellant cites no Minnesota caselaw prohibiting a district court judge from changing a position between a pretrial motion and a jury instruction at the end of a trial. Moreover, the rules of criminal procedure neither permit nor preclude a district court's alteration of a position during trial. *State v. Franson*, 921 N.W.2d 783, 786 n. 1 (Minn. App. 2018), *rev. denied* (Minn. Feb. 27, 2019); *see also State v. Papadakis*, 643 N.W.2d 349, 356-57 (Minn. App. 2002) (a district court has authority to reconsider its own rulings). On this record we cannot ascertain that appellant was prejudiced by the district court's change in position.

B. Appellant's counsel's advice

A criminal defendant raising an ineffective-assistance-of-counsel claim must show that “(1) his trial counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Jones*, 977 N.W.2d 177, 193 (Minn. 2022) (citation omitted); *see also Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). Appellant, who has different counsel on appeal, argues in the alternative that ineffective assistance of counsel entitles him to a new trial because his trial counsel (1) unreasonably advised him and (2) misinformed the district court that *Gardner* removes the duty to retreat when a gun is involved. “[T]here is a strong

presumption that counsel’s performance was reasonable.” *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

Under *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976), ineffective-assistance-of-counsel claims that can be determined on the basis of the trial record “will not be considered upon a subsequent petition for postconviction relief.” But when the evaluation of an ineffective-assistance-of-counsel claim “requires additional factfinding,” such as when the evaluating court “needs to hear testimony from the defendant [and] his or her trial attorney,” the claim “is properly raised in a petition for postconviction relief, even though it was known at the time of direct appeal.” *Robinson v. State*, 567 N.W.2d 491, 495 (Minn. 1997); *see also State v. Jackson*, 726 N.W.2d 454, 463 (Minn. 2007) (denying defendant’s claims about counsel that required consideration of facts not in the trial record without prejudice to the defendant’s right to raise the claims in a postconviction proceeding).

In this case, we conclude the record is not complete. The district court did not consider the credibility of the affidavits, and there is no record relating to the testimony of appellant or his counsel. We therefore preserve appellant’s right to pursue this claim in a separate post-conviction proceeding.

IV. Jury Instructions

Appellant argues that the district court committed plain error in instructing the jury that both those claiming self-defense and those claiming defense of others have a duty to retreat if possible. This is true: at the time of trial, this court had not released *State v. Valdez*, which holds that there is no duty to retreat for those claiming defense of others. 997 N.W.2d 557, 563 (Minn. App. 2023), *aff’d*, 12 N.W.3d 19 (Minn. 2024). “Under the

plain-error doctrine, the law in existence at the time of appellate review, not the law in existence at the time of the district court's error, is applied to determine whether an error is plain." *State v. Kelley*, 855 N.W.2d 269, 272 (Minn. 2014). But, "[because t]he plainly erroneous jury instruction did not affect appellant's substantial rights . . . , appellant is not entitled to a new trial." *Id.*

Thus, the district court's duty-to-retreat instruction, which included both self-defense and defense of others, was not then, but is now, erroneous. *See id.* But, as appellant concedes, the only issue in this case is the reasonableness of appellant's acts. Appellant never claimed to have been acting in defense of others,⁴ and the jury was plainly and repeatedly instructed that this was not a duty-to-retreat case. Common sense also dictates that it is unreasonable for an individual who is being fired at in a crowded bar filled with innocent bystanders to be allowed to return fire. This is not the wild west.

Appellant also argues that the district court abused its discretion by failing to provide additional instructions when the jury asked if the presence of others has any effect on the kind and degree of force a person may use in self-defense and if the duty to retreat begins when an offense is committed against the self-defense claimant or when an offense is committed against a person who is with the self-defense claimant. But a district court is not required to provide further instructions under Minn. R. Crim P. 26.03, subd. 20(3) (providing that the court may both "give additional instructions" and "reread portions of the original instructions" as appropriate responses to a jury's questions). Here, the district

⁴ The state notes that the record does not reflect that appellant ever argued that he was acting in defense of others, and appellant does not refute this in his reply brief.

court referred the jury to the instructions already provided. When the instructions “provide[] the jury with the guidance necessary to resolve its confusion,” referring the jury to those instructions is not an abuse of discretion. *State v. Crims*, 540 N.W.2d 860, 864-65 (Minn. App. 1995).

Appellant relies on *State v. Shannon*, 514 N.W.2d 790, 792-93 (Minn. 1994), in which the supreme court reversed a conviction of unintentional felony murder and remanded for a new trial after (1) the prosecutor had misstated the law on heat-of-passion manslaughter; (2) defendant’s counsel had failed to object to the “improper, misleading, and confusing argument”; (3) the jury had asked what the word “same circumstances” in the argument meant; and (4) the district court said it could not elaborate further on the instructions it had already given. But *Shannon* is distinguishable: in that case, the prosecutor’s statement was “(a) . . . clearly inconsistent with what [the supreme court] said in [*State v.*] *Thunberg*, [492 N.W.2d 534, 537 (Minn. 1992)]” and “(b) . . . an improper argument urging the jurors to decide the case from their own perspective.” 514 N.W.2d at 792. *Thunberg* stated that a district court should use the words of the statute in instructing a jury on heat-of-passion manslaughter, i.e., provocation is judged from the perspective of a “person of ordinary self-control under like circumstances,” not the perspective of a “sober person of ordinary self-control under like circumstances.” *Thunberg*, 492 N.W.2d at 534. The *Shannon* jury asked the district court what “same circumstances” meant and if they should assume they were in the same situation as the defendant and “also under the same chemical influence,” thus indicating a lack of understanding of the law. *Shannon*, 514 N.W.2d at 792. Here, the prosecutor’s statement was consistent with what the prosecutor

had already said, and appellant agreed, was the main issue: the reasonableness of appellant's act.

The fact that the law changed after appellant's trial in regard to those claiming to have acted in defense of others did not affect appellant's substantial rights and does not require reversal. *See Kelley*, 855 N.W.2d at 274. The district court explained that, because the answers to the jury's questions were included in the instructions given, answering them in additional instructions would have "the danger of improperly highlighting or focusing on something that is not the law in this case." The district court's decision not to do so was not an abuse of discretion.

V. Partial Guilty Plea

The district court denied appellant's request to have a stipulated-fact trial and to waive the jury on the charge of being an ineligible person in possession of a firearm so he could prevent the jury from learning of his prior conviction. He relies on *State v. Berkleman*, 355 N.W.2d 394, 396 (Minn. 1984), which held that a defendant on a charge of aggravated DWI should have let the defendant stipulate to his prior DWI conviction, which was an essential element of the charge, and thus remove that issue from the jury, but that the error in not accepting the stipulation was not so prejudicial as to require reversal. But appellant's primary charge here was second-degree murder; being a felon in possession of a firearm was not an essential element of that offense, and the district court did not err in declining to accept the stipulation to prevent the jury from hearing about that offense.

In *State v. Fitch*, a defendant who had been charged with one count of first-degree murder of a peace officer in Dakota County and three counts of attempted first-degree

murder of a peace officer and one count of unauthorized possession of a firearm in Ramsey County attempted to sever the first-degree murder charge. 884 N.W.2d 367, 369, 372 (Minn. 2016). The evidence of the Dakota County and the Ramsey County cases would each have been admissible in the other county’s case or cases. *Id.* at 379. Because “joinder is not prejudicial if evidence of each offense would have been admissible *Spreigl* evidence in the trial of the other(s),” the defendant “was not prejudiced by the district court’s ruling on his severance motion” and “[was] not entitled to relief based on this claim.” *Id.* at 379-80. The same is true here.

VI. Cumulative Errors

Because none of the errors appellant identifies has been shown to be an error, appellant is not entitled to a new trial on the basis of cumulative error.

However, as previously stated, we preserve appellant’s right to pursue an ineffective-assistance-of-counsel claim in a separate postconviction proceeding.

Affirmed.