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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1341
A24-1489**

State of Minnesota,
Respondent (A24-1341),
Appellant (A24-1489),

vs.

Gary Duane Egolf Jensen,
Appellant (A24-1341),
Respondent (A24-1489).

**Filed August 17, 2026
Affirmed in part, reversed in part, and remanded
Ross, Judge**

St. Louis County District Court
File No. 69VI-CR-22-1412

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

Kimberly J. Maki, St. Louis County Attorney, Aaron P. Welch, Assistant County Attorney,
Virginia, Minnesota (for State of Minnesota)

Craig E. Cascarano, Minneapolis, Minnesota (for Gary Duane Egolf Jensen)

Considered and decided by Cochran, Presiding Judge; Ross, Judge; and Schmidt,
Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

Gary Jensen fired his handgun repeatedly toward his former girlfriend and a group
of her friends who were gathering her belongings outside the home she shared with Jensen.

At trial on charges of two counts of attempted second-degree intentional murder, four counts of second-degree assault with a dangerous weapon, and two related assault charges, Jensen unsuccessfully requested a self-defense jury instruction. After the district court received the jury's guilty verdict on seven charges, it departed downward from the presumptive sentence based on its finding that Jensen had no "true intent" to kill anyone. Jensen unsuccessfully petitioned for postconviction relief on his theory that his attorney had ineffectively represented him during plea bargaining and at trial. This opinion addresses Jensen's and the state's separate appeals. We affirm Jensen's convictions because his role as the initial aggressor and his unreasonably high level of force precluded a self-defense instruction and because his ineffective-assistance-of-counsel arguments lack merit. But we reverse and remand for resentencing because the jury's judicially accepted verdict indicating that Jensen intended to kill two victims foreclosed the district court's later departure-related finding that he intended to kill no one.

FACTS

St. Louis County deputies went to the home of Gary Jensen on a December 2022 evening after receiving a report that Jensen fired gunshots at two pickup trucks fleeing from his residence. The investigating deputies learned from Jensen and the occupants of the pickups that Jensen had recently ended his engagement with his girlfriend and that she had enlisted three male friends to help her collect her belongings from the residence. We will call the girlfriend "Jane," a name we have randomly chosen in the interest of her privacy. Deputies also learned that a heated confrontation ensued, followed by Jensen's retrieving a handgun from inside the home, pointing the gun at one of Jane's friends, and then firing

multiple shots at the pickups both before Jane and the three men entered them and while they fled away. Multiple bullets penetrated the trucks, and one shattered a pickup's rear window. The deputies collected ten .40 caliber shell casings from near the front door of the residence.

The state charged Jensen with two counts of attempted second-degree intentional murder under Minnesota Statutes section 609.19, subdivision 1(1) (2022), four counts of second-degree assault with a dangerous weapon under section 609.222, subdivision 1 (2022), one count of domestic assault involving firearms under section 609.2242, subdivision 3(c) (2022), and one count of fifth-degree assault under section 609.224, subdivision 1(2) (2022). Jensen notified the district court that he intended to claim self-defense at trial and requested a voluntary-intoxication instruction. The district court addressed Jensen's self-defense assertion and inquired as to the status of plea negotiations at a pretrial hearing. The district court deferred ruling on whether it would issue a self-defense instruction until after the close of evidence. The state put its final plea offer on the record, disclosing that it would dismiss all remaining charges if Jensen pleaded guilty to the four second-degree assault charges. Jensen confirmed that he understood the offer and rejected it.

The jury and district court at Jensen's trial heard evidence of the following summarized facts, which we present in the light most favorable to Jensen's assertion of self-defense. *See State v. Johnson*, 719 N.W.2d 619, 631 (Minn. 2006).

Jensen and Jane broke off their engagement and argued at a bar before the shooting. Later at his home, Jensen began piling Jane's possessions on the snow outside. He sent her

a text message, informing her to retrieve them. Jane's response indicated that she might ask for a law-enforcement escort, and Jensen replied, "You better bring law to get your shit." He added, "I'll kill you."

Jane went to the house with three male friends in a pickup truck. When they arrived, Jane backed her own pickup out of the garage. The four began loading Jane's things into the trucks. Jensen went outside the house and began tossing more of Jane's belongings out from the garage. In doing so, he struck Jane with a hose. One of Jane's friends confronted and chest-bumped Jensen, and Jensen hit him in the face. Another one grabbed Jensen and said something like, "Do I need to take you down like I did the last time?" He wrestled Jensen deeper into the garage, where Jensen fell. Jensen got up and entered the house. The group returned to loading the trucks.

Inside the house, Jensen put on a hooded sweatshirt, got and loaded his .40 caliber pistol, and placed the gun in his sweatshirt pocket. After being inside for up to ten minutes, Jensen reemerged from the house onto the front porch. He told the group, which was about five feet from him and near the trucks, that they needed to leave. One answered that they had not finished collecting Jane's belongings.

One of the men reached toward his pocket, and Jensen drew his handgun and fired at the back tire of Jane's truck. One of the men rushed toward Jensen, stopping about a foot from him. He yelled at Jensen repeatedly, "Shoot me!" Jensen aimed the pistol over the man's shoulder and told him that he would shoot him in the gut. The man replied, "You better kill me or I'm going to kill you." Jensen then fired rounds at the man's truck tire. One of the men testified that one of the shots "[a]lmost hit [him] in the foot." Jane and one

of the men entered Jane's truck, and the two other men entered the other one. They started to drive away. Jensen then fired his pistol's remaining bullets. His shots hit one of the trucks, and one bullet shattered its back window.

A law-enforcement investigator testified for the state. While Jensen cross-examined the investigator, he introduced a photograph of the damaged truck with ballistic straws in place indicating the bullets' flight paths. When Jensen asked the investigator about the trajectory of the bullets, the investigator said that he lacked the trajectory-analysis training necessary to answer. The state objected to Jensen's trajectory questions, and the district court sustained the objection, adding that Jensen could argue about the trajectory of the bullets to the extent the photo "speak[s] for itself." Jensen also tried to cross-examine the investigator about Jensen's alcohol concentration, but the state successfully objected similarly on the ground of a lack of foundation.

Jensen testified, describing himself as having been "tired," "in shock," and "disoriented," after the shooting, but he did not describe himself as intoxicated. He denied intending to kill Jane or any of her friends.

Jensen renewed his request for a self-defense instruction at the close of the evidence. The district court said that it would allow the instruction only as applied to the charge of fifth-degree assault, which rested on Jensen's having struck one of the men inside the garage. The state then asked the district court to dismiss that charge, which it did.

The prosecutor argued in closing that the jury could infer that Jensen intended to kill two of the men in part from the testimony that one of them saw Jensen aim at the truck as they drove away. The jury found Jensen guilty on all seven remaining counts.

Jensen moved the district court for a downward dispositional or durational departure from the presumptive executed prison sentence of 203 months. The district court denied Jensen's motion for a dispositional departure but granted the motion for a durational departure, finding "that the offense itself was less than what would normally be in an attempted second-degree murder" and implying that, if Jensen's "true intent was . . . to commit murder," he likely would have shot them before they got into the truck, since "he had a gun out with all four of them standing right there." The district court also reasoned that a defendant could be charged with attempted second-degree murder "if somebody puts five bullets in somebody and they survived." It sentenced Jensen to serve 90 months in prison.

Jensen both appealed directly and petitioned for postconviction relief. We stayed his direct appeal pending the postconviction proceedings. Jensen's postconviction petition asserted that the district court had erroneously refused to issue a self-defense instruction and that he received ineffective assistance of counsel before trial in plea negotiations and during trial in his attorney's failure to retain expert ballistics and intoxication witnesses. The postconviction court granted Jensen an evidentiary hearing only regarding his attorney's allegedly deficient plea-bargaining performance.

Jensen testified at the postconviction hearing that his trial attorney never showed him a February 1, 2024 email from the state offering him a plea deal. He also testified that his trial attorney had not informed him of a plea offer the state made the day before his trial. He said that if his attorney had fully informed him of either offer, he would have taken it. He also testified that he usually communicated with his attorney by text or phone and

that his attorney told him he could beat the attempted-murder charges at trial “without question.”

Jensen’s trial attorney offered testimony that conflicted with Jensen’s. He testified that he did not remember informing Jensen of the February 1 offer but was confident that he did so and that he fully explained the state’s final offer to him. The attorney said that he likely told Jensen that he was confident that the state could not prove the attempted-murder charges and added that he “would never promise an outcome of a client.” The district court also received into evidence screenshots of a text exchange between Jensen and his trial attorney. The exchange included messages from Jensen’s attorney to Jensen detailing the February 1 plea offer and Jensen’s message flatly rejecting the offer as not “even remotely acceptable.” The district court denied Jensen’s petition for postconviction relief, finding Jensen’s testimony not credible and his trial attorney’s testimony credible. It specifically credited the attorney’s testimony that he told Jensen only that he was “confident” that the state could not prove the attempted-murder charges. And it found that the attorney had adequately communicated the state’s plea offers to Jensen and sufficiently counseled him through Jensen’s decision to reject the offers.

We now address Jensen’s appeal and the state’s separate appeal challenging the district court’s downward sentencing departure.

DECISION

Jensen raises three arguments challenging his convictions. He argues that the district court abused its discretion by refusing to grant him a self-defense instruction on six of the seven remaining counts at trial, by refusing to grant him a postconviction evidentiary

hearing on his ineffective-assistance claim as it pertained to hiring experts, and by denying him postconviction relief on his ineffective-assistance claim related to plea bargaining. The state advances its separate appeal by contending that the district court abused its discretion by granting a downward durational sentencing departure. Only the state's argument merits reversal.

I

Jensen argues that the district court should have issued a self-defense instruction on the two attempted-second-degree-murder and four second-degree-assault charges. We review the district court's decision not to issue a self-defense instruction for an abuse of discretion. *Johnson*, 719 N.W.2d at 629. A defendant is entitled to a self-defense instruction if he satisfies his burden of producing evidence on which a reasonable juror could find that he acted in self-defense. *State v. Baker*, 13 N.W.3d 401, 409 (Minn. 2024). This requires the defendant to show, among other elements, that he was not the initial aggressor and that he used a reasonable degree of force in self-defense. *Id.* at 409–10; *State v. Basting*, 572 N.W.2d 281, 285 (Minn. 1997). If a defendant meets his burden of production and the district court still refuses to issue a self-defense instruction, the district court abuses its discretion. *Johnson*, 719 N.W.2d at 629. We conclude that the district court did not abuse its discretion for the following reasons.

The district court acted within its discretion by refusing to issue the self-defense instruction because Jensen failed to make a sufficient showing on two essential elements. Jensen's first deficiency was his failure to provide evidence that he was not the initial aggressor. The evidence indicated instead that he was the initial aggressor involving the

shooting. The supreme court has held that a defendant was the initial aggressor when he brought a gun to a confrontation and drew it. *State v. Gray*, 456 N.W.2d 251, 258 (Minn. 1990). Jensen armed himself with a loaded handgun inside the safety of his house and resurfaced outside, drew the gun, and fired it in the direction of Jane and her three friends while none of them posed a dangerous threat to him. We accept the version of events that Jensen presented, including his having seen one of the men “reaching for something.” But Jensen acted as the initial aggressor by being the first (and only) one to introduce deadly force into a tense but nondeadly disagreement. We are not persuaded otherwise by Jensen’s argument that one of the men posed an imminent threat by charging and shouting at him. By that point, Jensen had already begun shooting. Jensen’s failure to show that he was not the initial aggressor is sufficient for us to affirm the district court’s decision not to issue the requested self-defense instruction.

And an alternative ground also requires affirming: Jensen failed to present evidence that the degree of force he used in the face of the alleged threat was reasonable. We may decide the degree-of-force issue as a matter of law when reasonable minds could not disagree. *State v. Glowacki*, 630 N.W.2d 392, 403 (Minn. 2001). Reasonable minds could not disagree as to whether Jensen’s use of deadly force was reasonable under the circumstances. The physical bout in the garage had ended about ten minutes before he used a deadly weapon in the quarrel. He unconvincingly emphasizes that he was standing only a “short distance between himself and the others.” Whether they were separated by five feet or fifty, his discharging the firearm was an excessive response to any reasonably

supported threat to himself. He was not entitled to the instruction, and the district court properly refused to issue it.

II

We are also unpersuaded by Jensen’s argument that the postconviction court erroneously denied him an evidentiary hearing on his assertion that his trial attorney provided ineffective assistance by not calling a ballistics or intoxication expert to testify. District courts need not grant a postconviction-relief petitioner an evidentiary hearing if “the petition and the files and records . . . conclusively show that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1 (2024). We review a postconviction-hearing denial for an abuse of discretion, which occurs if the district court acted arbitrarily or capriciously or based its decision on an erroneous view of the law or clearly erroneous factual findings. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). No abuse of discretion occurred here.

Jensen’s ineffective-assistance claim could succeed only if he established both that his trial counsel’s performance was objectively deficient and that the deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013). But matters of trial strategy do not constitute ineffective assistance of counsel. *Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010). “Decisions about which witnesses to call at trial . . . are questions of trial strategy.” *Leake v. State*, 737 N.W.2d 531, 539 (Minn. 2007). Jensen argues that failing to call these expert witnesses was not trial strategy because his attorney had already settled on the strategy of arguing that Jensen acted without the intent necessary to commit these crimes. Because that strategy

had already been determined, argues Jensen, his trial counsel failed to provide effective counsel because he incompetently executed this strategy in failing to call the witnesses necessary to advance it. Neither party cites any caselaw for or against the proposition. But we need not decide its merit because Jensen's arguments as to both expert witnesses fail on other grounds.

Jensen was not entitled to an evidentiary hearing on his attorney's failure to call an intoxication witness because his trial attorney's choice not to pursue a previously noticed intoxication defense was itself a matter of strategy. An attorney's choice to focus on a defense that he believes is more viable than another is one of trial strategy. *State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999). And Jensen's testimony about his condition ("tired," "in shock," "disoriented") without ever suggesting that he was intoxicated arguably would have made pursuing an intoxication defense untenable. The district court did not abuse its discretion by denying Jensen an evidentiary hearing on this ground.

Jensen also was not entitled to an evidentiary hearing on his attorney's failure to call a ballistics witness. Assuming without deciding that failing to secure a ballistics expert was necessary to elicit testimony about the direction of the bullets, there is no reasonable probability that failing to call a ballistics witness prejudiced Jensen's defense. The expert affidavit Jensen introduced during the postconviction proceedings indicates that a ballistics expert would have testified that the bullet that shattered the cab window of one of the pickup trucks must have ricocheted from the truck bed rather than been fired directly into the window. But Jensen's convictions did not depend on any assertion by the state that he intentionally fired directly at the window. The state had argued instead that the jury should

infer his intent to kill simply from the fact that he fired at an occupied truck. Whether the bullet that penetrated the window arrived there directly or instead after deflecting from a different part of the truck therefore would have no impact on the case presented to the jury. The district court properly denied Jensen an evidentiary hearing on this issue.

III

We also conclude that the postconviction court acted within its discretion by rejecting Jensen's ineffective-assistance claim relating to plea bargaining. We doubt that Jensen's trial attorney's performance fell below constitutional standards based on the testimonial and documentary evidence of the attorney's communication with Jensen about the plea offers—all credited as true by the postconviction court. But we affirm the district court based on the clear lack of prejudice. We will not disturb the fact finder's credibility assessments absent clear error, *Andersen v. State*, 940 N.W.2d 172, 177 (Minn. 2020), and the postconviction court heard but found not credible Jensen's testimony that he would have taken the supposedly undisclosed plea offers had he received them. The postconviction court had ample reason to reject his testimony. Jensen's assertion that he had never seen the February 1 offer fell to the documented text exchange showing that he had both received and rejected the offer. The district court acted within its discretion by denying postconviction relief on ineffective-assistance grounds for lack of prejudice.

IV

The state argues in its separate appeal that the district court abused its discretion by departing durationally downward from the presumptive sentence. We review the appropriateness of a district court's sentencing departure grounds *de novo*. *Dillon v. State*,

781 N.W.2d 588, 595 (Minn. App. 2010), *rev. denied* (Minn. July 20, 2010). A downward durational departure is justified if the defendant’s conduct was “significantly less serious” than the conduct typifying his offense. *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985). If the district court’s reasons for departing downward were invalid, we will reverse unless it is clear the district court would have departed downward for a valid reason supported by the record. *State v. Rund*, 896 N.W.2d 527, 532–33 (Minn. 2017). Our *de novo* review leads us to reverse Jensen’s sentence as the result of an improper departure.

The first material flaw in the district court’s departure decision is that it departed downward without finding that Jensen’s conduct was *significantly* less serious than the conduct involved in a typical attempted intentional second-degree murder. It found only “that the offense itself was less than what would normally” constitute this crime. This shortcoming alone justifies reversing. *See Mattson*, 376 N.W.2d at 415. But more substantive reasons require the same result.

The district court’s stated factual basis for departing cannot stand under the jury’s opposing and judicially undisturbed finding of guilt. The charges of attempted second-degree intentional murder under the terms of the controlling statute could result in the guilty verdict only if the jury found that Jensen acted with the “intent to effect the death of” the occupants in the pickup truck into which he fired the shots. *See* Minn. Stat. § 609.19, subd. 1(1). And the district court correspondingly instructed the jury that, to enter a guilty verdict, they must find that he “acted with the intent to kill” the occupants. The jury’s guilty verdicts therefore establish that Jensen in fact fired the shots intending to kill both men. Although the district court had the authority to enter a judgment of acquittal *sua sponte* at

the close of the evidence if the record lacked evidence to support the allegation that Jensen committed the elements of the charged offense, Minn. R. Crim. P. 26.03, subd. 18(1)(a), it instead later entered a judgment of conviction based on the jury's verdict. The district court cannot both base Jensen's convictions on the found fact that he intended to kill the two men and base the sentencing departure on the contradictory fact that he did not. In other words, its entry of conviction on the two charges foreclosed its finding that Jensen "[did not act] in the state of mind that his true intent was . . . to commit murder." *See Rund*, 896 N.W.2d at 533–34 (requiring reversal when the record contains insufficient evidence to justify the sentencing departure). Because the district court's no-intent finding at sentencing cannot be reconciled with the undisturbed jury finding that Jensen intended to kill, it abused its discretion by relying on that finding to depart.

Jensen argues that his departure could be supported on the alternative ground that his conduct did not result in any injuries. We disagree for two reasons. First, Jensen's reasoning inappropriately shifts the focus from his conduct to its results. *See Mattson*, 376 N.W.2d at 415 (explaining that durational-departure grounds must concern the offender's conduct). And second, we do not agree that *State v. Anderson*—a nonprecedential opinion that Jensen maintains is persuasive authority for us to focus on results rather than conduct—includes any persuasive reasoning justifying our reliance on it for that proposition. No. A10-0470, 2011 WL 1743737, at *6 (Minn. App. May 9, 2011), *rev. denied* (Minn. July 19, 2011). We reverse Jensen's sentence and remand for the district court to impose the presumptive sentence.

Affirmed in part, reversed in part, and remanded.