STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0623

Antonio Xavier Daniels, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 12, 2018
Affirmed
Kirk, Judge

Hennepin County District Court
File No. 27-CR-13-27736

Melvin R. Welch, Welch Law Firm, LLC, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

KIRK, Judge

Following a jury trial, appellant Antonio Xavier Daniels was found guilty of second-degree unintentional felony murder and second-degree manslaughter. Because we conclude

that the postconviction court did not err or otherwise abuse its discretion in denying appellant's petition for postconviction relief, we affirm.

FACTS

At around 3:30 a.m. on August 22, 2013, appellant and three acquaintances, D.T., Q.S., and S.J., got in a fight with a group of four people in a Days Inn parking lot in Brooklyn Center. Minutes earlier, security cameras at a nearby Denny's restaurant captured appellant and his acquaintances exiting the restaurant and approaching a silver sedan and an SUV that had parked in the restaurant parking lot. R.E., the driver of the sedan, testified that one person from appellant's group approached his vehicle, and the others approached the SUV. R.E. described their behavior as loud, drunk, and hostile. R.E. backed his car out of its parking spot because he was concerned about a confrontation and did not want to get blocked in.

Appellant and his group left Denny's and walked a short distance to the Days Inn, where S.J. had rented a room. R.E. testified that he saw someone in the group make gunshot-like gestures and noises as he walked away. In his testimony, Q.S. denied this, but the surveillance video captured appellant making a gesture in the direction of the vehicles. A power outage at the restaurant occurred after the gesture and the security cameras turned off.

R.E. testified that he next called two acquaintances, R.G. and the decedent, M.M., and told them that he "had a few words with some guys." R.G., M.M., and a third acquaintance, J.B., drove to Denny's in a gold minivan to meet R.E. At that time, appellant and his group were standing outside the Days Inn smoking cigarettes. In quick succession, the sedan and minivan sped toward the Days Inn and abruptly stopped in front of appellant and his group. R.E. and his three acquaintances exited their vehicles and approached appellant and his group.

The witness accounts vary as to what happened next. S.J. testified that he saw appellant holding the handle of a firearm in appellant's pocket, and that he heard appellant say something to the effect of either "[t]hese fools don't know who they are messing with" or "I got this," "[h]ang back," and not to worry. Appellant denied that he made such a statement, but admitted that he was carrying a .22-caliber revolver in his pocket. S.J. did not see anyone else with a firearm.

Appellant testified that R.E. exited the sedan, held his waistline as if he had a firearm, and said something like "[y]ou better be holding." Q.S. testified that R.E. acted like he had a firearm by placing his hand in his back pocket, but that he did not see a firearm and did not hear anyone say that they had a firearm. The state's witnesses testified that no one other than appellant had a firearm. R.E. denied acting like he had a firearm. R.E. testified that he approached appellant's group and asked them what their problem was, to which someone replied, "[A]in't no problem, n----r. I just asked you for a light." The witnesses all testified that the two groups "squared up" to fight each other.

S.J. testified that the groups began fighting within five seconds of the three individuals exiting the minivan. R.E. admitted that the fighting started when someone called him a name, and he swung and struck the person in front of him, knocking him down. The witnesses testified that "everybody started swinging," and that members of appellant's group were struck and fell, and that D.T. was knocked unconscious.

Appellant testified that R.E. drew his attention, and then someone attacked him from his blind side in what he described as an ambush. Appellant testified that when he was struck, he fell down and was knocked back toward a tree next to the door of the Days Inn. When

appellant got to his feet, his eye was throbbing, he saw white, and his vision was impaired. Q.S. observed appellant bleeding from his eye. A police detective confirmed that a photo of appellant taken after his arrest showed a red mark in one of his eyes.

Appellant testified that after he got to his feet he saw "some guys rushing me. . . . Then I fired a shot." Appellant admitted that he "pointed [the revolver] at the group of people that was rushing me" but maintained that he did not intend to kill anyone. Appellant testified that he fired "because they [were] coming right here real quick and . . . my eye was impaired," and that "I had to stop the attack. I had to stop these guys from . . . stomping us to death." Appellant further testified that he fired the revolver because he knew he could not beat all of the attackers by himself, that his friends were already down, that the attackers were overpowering and too aggressive. He also testified that he was scared for his well-being, that R.E. had acted like he had a firearm, and that he had no other option and no safe escape route. Appellant testified that he did not give a warning prior to firing because there was no time to communicate, that he did not think before firing, and that "[i]t was more of a sudden thing to do just to stop them in their tracks."

R.E., R.G., and J.B. testified that they saw a person, later identified as appellant, fire a handgun from behind a tree or shrubbery before they ran for cover. J.B. testified that he saw appellant point a handgun at M.M. R.E. heard one gunshot and saw M.M. react like he had been hit, and then saw M.M. run toward the Super 8 hotel. Other witnesses testified to hearing multiple gunshots.

Appellant admitted to firing three shots but said that he did not see anyone get hit. Appellant testified that he fired his second shot into the air as a "scare tactic," and that when

he reached D.T., who was on the ground, he saw the sedan circling back, so "I fired another warning shot."

A guest at a Super 8 hotel, who was not involved in the altercation, testified that at around 3:30 in the morning he heard the sounds of fighting and profanity. From his room window, the guest saw a flash and heard a gunshot from the area of the nearby Days Inn, then saw people scatter and run. The guest saw two people running toward the Super 8, one of them bleeding. He estimated that the second gunshot followed the first by five to six seconds, and that he heard at least four gunshots that sounded like they came from the same small-caliber pistol.

Following the shooting, appellant discarded his firearm behind a garbage can at the Days Inn. He and his group briefly entered the hotel, before fleeing the scene on foot. R.E., R.G., and J.B. remained at the scene with M.M., who was unconscious and lying in the vestibule of the Super 8 hotel covered in blood. Police arrived and M.M. was pronounced dead. R.E., R.G., and J.B. were detained and later interviewed. The Hennepin County Medical Examiner's Office determined that M.M.'s death was caused by gunshot wound. The examining physician could not determine the distance from which M.M. was shot.

The responding officers discovered the .22-caliber revolver behind the garbage can outside of the Days Inn. The revolver contained three live rounds and three rounds that had been fired. The officers swabbed the revolver for DNA. Forensic testing revealed that the predominate DNA profile taken from the revolver matched appellant's DNA. A forensic scientist also determined that bullet fragments found in M.M.'s body were consistent with a .22-caliber bullet. The officers did not find any weapons on M.M., R.E., R.G., or J.B.

Appellant was charged with second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2012). Following a jury trial on the charges, the district court granted appellant's request to provide a jury instruction on second-degree manslaughter, Minn. Stat. § 609.205(1) (2012), and the state's request for an instruction on second-degree felony murder, Minn. Stat. § 609.19, subd. 2(1) (2012). The district court also granted appellant's requested instruction on self-defense. The jury acquitted appellant of second-degree intentional murder, but found that he was guilty of second-degree felony murder and second-degree manslaughter. Appellant filed a petition for postconviction relief, which the postconviction court denied. This appeal follows.

D E C I S I O N

Appellant challenges the denial of his petition for postconviction relief, arguing that his conviction should be reversed, or in the alternative, that he receive a new trial because (1) his right to a speedy trial was violated, (2) he received ineffective assistance of counsel, (3) the prosecutor committed misconduct, (4) the jury verdict is legally inconsistent, and (5) the evidence is insufficient to support his conviction for second-degree felony murder.

"We review the denial of a petition for postconviction relief for an abuse of discretion." *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). "We will not reverse the denial of postconviction relief unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Reed v. State*, 793 N.W.2d 725, 730 (Minn. 2010). "We review legal issues de novo, but on factual issues our review is limited to whether there is sufficient evidence in

the record to sustain the postconviction court's findings." *Matakis*, 862 N.W.2d at 36 (quotation omitted).

I. The postconviction court did not abuse its discretion in holding that appellant's right to a speedy trial was not violated.

Appellant argues that because he initially demanded a speedy trial on September 26, 2013, but his trial did not begin until February 23, 2015, nearly 17 months later, his right to a speedy trial was denied, and his conviction must be reversed.

A criminal defendant is entitled to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. In Minnesota, the trial must begin within 60 days of a defendant's trial demand unless the district court finds good cause for the delay. Minn. R. Crim. P. 11.09(b); *State v. DeRosier*, 695 N.W.2d 97, 108-09 (Minn. 2005).

To determine whether a delay violated a defendant's right to a speedy trial, courts consider: "(1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his or her right to a speedy trial; and (4) whether the delay prejudiced the defendant." *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017) (quotation omitted). The four *Barker* factors are interrelated and must be considered together, along with any other relevant circumstances. *Id*. at 628.

a. *Length of the delay*

In Minnesota, under the first factor, a delay of more than 60 days from the date the defendant demanded a speedy trial raises a presumption that a violation has occurred and triggers review of the remaining factors. *State v. Windish*, 590 N.W.2d 311, 315-16 (Minn. 1999). Here, appellant initially demanded a speedy trial on September 26, 2013, then waived

his demand at the same hearing and agreed to a January 13, 2014 trial date. After a number of delays, appellant's trial began on February 23, 2015. This represents a 17-month delay and triggers our review of the remaining factors.

b. *Reasons for delay*

Under the second factor, "the key question is whether the government or the criminal defendant is more to blame for the delay." *Osorio*, 891 N.W.2d at 628 (quotation omitted). Different reasons are weighted differently: a deliberate delay by the government is weighted heavily against it, while a neutral reason, such as negligence, is weighted less heavily against it. *Id*. If the overall reason for the delay "is the result of the defendant's actions . . . there is no speedy trial violation." *Id.* at 628-29 (quotation omitted).

Here, a number of delays contributed to the overall delay. At the September 26, 2013 hearing, the defense and the state noted outstanding discovery issues, and appellant made a speedy trial demand. The district court then conferred with appellant to determine whether he wished to assert his right to a speedy trial with the understanding that the court may find good cause to delay the trial due to the outstanding evidentiary issues, or whether he wished to waive his speedy demand and reserve a January 2014 trial date. Appellant elected to waive his demand and agreed to the January trial date, which was outside of the speedy trial timeframe. This delay was not the fault of either party, but weighs slightly against the state because "the ultimate responsibility for such [neutral] circumstances must rest with the government rather than with the defendant." *Id*. at 628.

On January 13, 2014, rather than beginning appellant's trial, the district court heard argument on a discovery motion appellant filed in December 2013. Appellant's counsel also

indicated that he planned to file additional motions, and appellant confirmed that he had requested a continuance for that reason. The parties scheduled a January 24, 2014 hearing on appellant's new motions. At the January 24 hearing, appellant confirmed that he planned to file additional motions. The district court scheduled another motion hearing for February 24, 2014. These delays are attributable to appellant.

The next hearing occurred on March 4, 2014. The state and appellant's counsel agreed to continue the trial date from April 21 to September 29, 2014, because the state needed to replace one of its trial attorneys and September 29 was the first date when all of the attorneys were available. Appellant voiced his displeasure with the delay, and stated that he had been ready to ask for a firm trial date, but that he respected the reason the state's attorney was unavailable. Appellant agreed to the September 29 trial date and did not reassert his speedy trial demand. Because this six-month delay is not attributable to appellant, and because the delay was due to the unintentional unavailability of a state's attorney, this delay weighs slightly against the state.

On September 29, the district court began appellant's trial. However, appellant requested a continuance, which the district court denied. On October 1, the state learned that three of its key witnesses were indicted on unrelated federal narcotics charges. The state and appellant's counsel mutually requested a continuance to seek discovery of the federal evidence related to the witnesses. However, appellant withdrew his continuance request and indicated that he was ready for trial. After speaking with his attorney and the district court, appellant again changed his mind and indicated that he was in favor of a continuance. The district court granted the continuance and scheduled a new trial date for February 23, 2015.

This delay weighs against neither the state nor appellant because it was caused by a joint request for a continuance.

Appellant's trial began on February 23, 2015. In sum, two of these pretrial delays weigh slightly against the state, two weigh against appellant, and the final delay weighs against neither the state nor appellant. Because both parties equally contributed to the 17-month delay, we conclude that this factor does not weigh against either party.

c. *Assertion of right to speedy trial*

Under the third factor, "[a] defendant's assertion of the right to a speedy trial need not be formal or technical, and it is determined by the circumstances." *State v. Hahn*, 799 N.W.2d 25, 32 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). "[The reviewing] court must assess 'the frequency and intensity of a defendant's assertion of a speedy trial demand—including the import of defense decisions to seek delays.'" *Id*. (quoting *Windish*, 590 N.W.2d at 318).

Here, appellant did assert his right to a speedy trial on September 26, 2013, before waiving it and agreeing to the January 13, 2014 trial date. At subsequent hearings, appellant ultimately agreed to each continuance. Furthermore, appellant never reasserted a speedy trial demand. We conclude that there is sufficient evidence in the record to support the postconviction court's conclusion that appellant did not reassert his right to a speedy trial after waiving his initial demand on September 26, 2013.

d. *Prejudice*

For the final factor, we look to three indicators of prejudice: (1) oppressive pretrial incarceration; (2) anxiety and concern suffered by the accused while awaiting trial; and most

importantly, (3) impairment of the defense. *Windish*, 590 N.W.2d at 318. A defendant need not "affirmatively prove prejudice; rather, prejudice may be suggested by likely harm to a defendant's case." *Id*.

Here, appellant was incarcerated for the duration of the 17-month delay, during which he voiced his anxiety over the length of his incarceration and maintained his innocence. However, the record is devoid of any evidence that appellant's defense was impaired. The record also shows that appellant contributed to the length of the trial delay. We conclude that there is sufficient evidence in the record to support the postconviction court's conclusion that appellant did not suffer prejudice as a result of the delay.

In light of all of the *Barker* factors, we conclude that the record supports the postconviction court's conclusion that the state did not violate appellant's right to a speedy trial.

II. The postconviction court did not err in denying appellant's petition based on his ineffective-assistance-of-counsel claim.

"We review the denial of postconviction relief based on a claim of ineffective assistance of counsel de novo because such a claim involves a mixed question of law and fact." *Hawes v. State*, 826 N.W.2d 775, 782 (Minn. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2070 (1984)). To prevail on a claim of ineffective assistance of counsel, an appellant "must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (citing *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at

2064). "[A]n attorney acts within the objective standard of reasonableness when he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). "Under the prejudice prong . . . , a defendant must show by a preponderance of the evidence that his counsel's error, whether or not professionally unreasonable, so prejudiced the defendant at trial that a different outcome would have resulted but for the error." *Id*. Both prongs need not be analyzed if one is determinative. *Id.*

a. *Motion for acquittal*

Appellant first argues that his attorney should have moved to dismiss the charges or requested a *Florence* hearing when, on the first day of trial, the state "announced new evidence" showing that appellant acted in self-defense and that the state's witnesses were the first aggressors. Here, as the state correctly points out, the trial transcript shows that the state did not announce new evidence; rather, it made a plea offer to appellant. Statements made in connection with a plea offer are not admissible evidence. *State v. Robledo-Kinney*, 615 N.W.2d 25, 30 (Minn. 2000) (citing Minn. R. Evid. 410; Minn. R. Crim. P. 15.06). The state referenced appellant's self-defense claim and other evidence that potentially showed that appellant was not the first aggressor with the caveat that it "would not concede this at trial, [but was] conceding it for the sake of this plea." Appellant received the state's plea offer, consulted his counsel, and rejected it, stating, "My decision is I want to go to trial." We conclude that appellant has not demonstrated that his counsel's response to the state's plea

offer fell below an objective standard of reasonableness. Under the first *Strickland* prong, this argument fails.

b. *Decision to not call D.T. to testify at trial*

Appellant next argues that his counsel should have subpoenaed D.T. to testify at trial because he was present throughout the altercation and could have provided exculpatory evidence. Here, the record does not reveal the reason that appellant's counsel did not call D.T. to testify at trial. The record does reveal that D.T. was willing to testify and would have testified that: (1) R.E. grabbed his waist while approaching appellant and his group and shouted, "I've got mine on me!"; (2) that D.T. saw something shiny beneath R.E.'s hand, which he believed to be a chrome pistol; (3) that D.T. was scared for his life; and (4) that D.T. was struck in the head and lost consciousness. D.T.'s anticipated testimony may have bolstered appellant's self-defense claim, specifically, as to whether R.E.'s words or actions would have reasonably led appellant to believe that R.E. threatened the use of a firearm, and whether appellant acted reasonably in the defense of others. In addition, D.T.'s anticipated testimony is not entirely cumulative with that of other trial witnesses.

Trial counsel receive a strong presumption of competency when acting at trial and wide latitude to determine the best strategy. *Doppler*, 590 N.W.2d at 633. Strategic decisions on what evidence to present and which witnesses to call lie within the proper discretion of trial counsel and are not reviewed for competency. *Id.* Generally, appellate courts do not second-guess a trial decision to not call prospective witnesses. *See State v. Nicks*, 831 N.W.2d 493, 506 (2013).

In light of the relevant information to which D.T. could have testified, we are troubled that the record contains no explanation of appellant's counsel's decision not to call him as a trial witness. However, the decision to call or not to call a witness lies well within the strategic discretion of trial counsel and we do not second-guess the competency of such decisions. We conclude that appellant has not demonstrated that his counsel's decision not to call D.T. as a witness fell below an objective standard of reasonableness. Because the first *Strickland* prong is dispositive, this argument fails.

c. *Admission of evidence of prior criminal conduct by the state's witnesses*

Appellant claims that his attorney failed to use evidence of a criminal conspiracy between the state's witnesses to impeach their credibility.

Here, in December 2014, the federal government provided evidence related to federal charges against three of the state's witnesses to the parties. Appellant alleges that R.E. and R.G. were part of a criminal enterprise, but he does not identify any specific evidence in the appellate record with which the state's witnesses should have been impeached. Moreover, appellant's attorney impeached R.E. and R.G., and two other state witnesses who were present at the altercation, J.B. and S.J., with evidence of their prior inconsistent statements to law enforcement. The district court also granted appellant's attorney's motion to impeach both R.G. and S.J. with other evidence of prior felony convictions. Because appellant did not identify specific evidence in the appellate record to demonstrate how the impeachment of witnesses who had already been impeached at trial could have reasonably led to a different outcome at trial, appellant has not met his burden to demonstrate prejudice. Because the second *Strickland* prong is dispositive, this argument fails.

d. *Late discovery*

Appellant contends that his trial attorney failed to challenge late discovery disclosures by the state. Specifically, appellant alleges that the state failed to provide timely discovery of R.E. and R.G.'s involvement in a criminal conspiracy. However, the record shows that the state did not learn of the federal indictments against R.E. and R.G. until October 1, 2014. After learning of the indictments, the state immediately sought to obtain relevant evidence from the federal government and to provide it to appellant. Appellant has not demonstrated that his counsel's performance was deficient in this instance. On the basis of the first *Strickland* prong, this argument fails.

III. The postconviction court did not err or otherwise abuse its discretion in denying appellant's petition based on his prosecutorial-misconduct claim.

Appellant argues that the prosecutor committed misconduct by (1) withholding discovery and (2) injecting improper emotion into the closing argument.

We will reverse a conviction due to prosecutorial misconduct "only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). When prosecutorial misconduct is alleged, our "standard of review depends on whether the defendant objected at trial." *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016). We review objected-to prosecutorial misconduct using a two-tiered harmless error test, in which we analyze both the seriousness of the misconduct and the prejudice to the defendant. *Id.* "[U]nusually serious prosecutorial misconduct is reviewed to determine whether the misconduct was harmless beyond a reasonable doubt." *Id*. (quotation omitted).

We review unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 297-99 (Minn. 2006). Under that standard, the defendant bears the burden to demonstrate that the prosecution committed an error that is plain because it "contravenes case law, a rule, or a standard of conduct." *Id.* at 302. If there is "(1) error, (2) that is plain, and (3) affects substantial rights[,] . . . the [appellate] court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* If the defendant succeeds, the burden shifts to the state to demonstrate that the misconduct did not affect the defendant's substantial rights. *Id.*

a. *Discovery*

Appellant claims that the state made untimely discovery disclosures that prejudiced his substantial rights.

First, appellant alleges that the state did not disclose over 500 pages of material relevant to the criminal conduct of its witnesses until December 18, 2014. Because appellant did not object at trial to this late discovery, we apply the unobjected-to prosecutorial misconduct standard of review.

Here, as noted above, the record shows that the state did not learn of the federal indictments until October 1, 2014. The state apprised the district court and appellant as soon as it learned of the indictments and immediately sought the relevant evidence from federal authorities. A mutually requested continuance of the trial date was granted to obtain and review the evidence, which was received in December. We conclude that the state did not commit an error.

Second, appellant alleges that the state failed to disclose a witness statement until September 29, 2014, the day of his trial. Because appellant objected at trial, we review the alleged misconduct using the two-tiered harmless error test.

Here, even assuming without deciding that the state committed unusually serious misconduct, we conclude that the alleged misconduct was harmless beyond a reasonable doubt. On September 29, appellant identified a statement made by R.G. that was summarized in a police report that was not accompanied by a transcript or audio recording. The state claimed that it did not have a written or audio record of the statement. Later that day, the state discovered an audio recording that had been misfiled under an incorrect case number. The state provided the recording and a transcript of the statement to appellant. The trial date was then continued for another reason until February 23, 2015, which allowed appellant ample time to review the statement. Any potential prejudice to appellant was remedied by the five-month continuance. We conclude that the postconviction court did not abuse its discretion in determining that the late discovery did not prejudice appellant.

b. *Improper emotion*

Appellant argues that the prosecutor improperly appealed to the passions of the jury during the state's closing argument by using the terms, "kill shot" and "blood bath," and by stating that M.M. was "fighting for his life . . . you see the desperation in [M.M.], who is choosing to live." Appellant did not object to the statements at trial.

"A prosecutor is not permitted to appeal to the passions of the jury during closing argument." *Nunn v. State*, 753 N.W.2d 657, 661-62 (Minn. 2008) (quotation omitted). However, a prosecutor has "considerable latitude" during a closing argument and need not

make a "colorless argument." *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). A prosecutor may present "all legitimate arguments on the evidence, . . . analyze and explain the evidence, and . . . present all proper inferences to be drawn" from the evidence. *Id.* A prosecutor may properly discuss what a victim suffered. *Nunn*, 753 N.W.2d at 663. "When reviewing alleged [prosecutorial] misconduct in closing statements, this court must look at the whole argument in context, not just selective phrases or remarks." *State v. McNeil*, 658 N.W.2d 228, 234 (Minn. App. 2003) (citing *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993)). When credibility is a central issue in a case, we pay special attention to statements that may prejudice or inflame the jury. *Id.* (citing *State v. Porter*, 526 N.W.2d 359, 363 (Minn.1995)).

Here, the postconviction court determined that the prosecutor's statements were not improper and did not constitute plain error. To be sure, "kill shot" may connote an intention to kill, which relates to the credibility of appellant's testimony. However, "kill shot" also referenced the bullet striking M.M. in the chest, "center mass," and was relevant to appellant's aim and the manner in which M.M. was shot. "Blood bath" and the prosecutor's description of M.M.'s struggle related to the manner of M.M.'s death, in which M.M. lost a substantial amount of blood. The challenged statements are descriptive of the crime scene, the events that occurred, the manner of M.M.'s death, and are consistent with the evidence. The prosecutor made only one reference to M.M. fighting for his life, and used the terms "kill shot" and "blood bath" twice, respectively, within a closing argument that spanned 33 pages of transcript. Because the prosecutor had considerable latitude to explain the evidence,

present legitimate arguments, and draw out reasonable inferences, we conclude that the statements were not improper and do not constitute plain error.

IV. The postconviction court did not err in denying appellant's petition based on his inconsistent-verdict claim.

Appellant challenges the jury's verdict finding him guilty of both second-degree felony murder and second-degree manslaughter, arguing that the verdict is legally inconsistent because second-degree manslaughter requires some form of intent while second-degree felony murder is a crime committed "without the intent to effect the death of any person." Minn. Stat. § 609.19, subd. 2(1).

A verdict is legally inconsistent, and entitles the defendant to a new trial, "only when proof of the elements of one offense negates a necessary element of another offense." *State v. Christensen*, 901 N.W.2d 648, 651 (Minn. App. 2017) (quotation omitted). "An acquittal on one count and a finding of guilty on another count can be logically inconsistent, but cannot be legally inconsistent." *Id*. We review whether two jury verdicts are legally inconsistent de novo. *Id*. (citing *State v. Leake*, 699 N.W.2d 312, 325 (Minn. 2005)).

The district court instructed the jury to find appellant guilty of second-degree felony murder if the state proved beyond a reasonable doubt that appellant caused M.M.'s death while committing a second-degree assault. The assault instruction covered intentional action under assault-harm or assault-fear. The district court also instructed the jury to find appellant guilty of second-degree manslaughter if the state proved beyond a reasonable doubt that appellant caused M.M.'s death by culpable negligence.

Under Minnesota law, there are two types of assault: assault-fear and assault-harm. *See State v. Dorn*, 887 N.W.2d 826, 829 (Minn. 2016) (citing Minn. Stat. § 609.02, subd. 10 (2014)). Both types of assault require intentional action by the defendant. Assault-harm requires that a defendant had the general intent to perform a physical act that constitutes a battery. *Id*. at 830. Assault-fear requires that the defendant committed an act "with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.02, subd. 10(1) (2016).

A second-degree assault is a proper predicate felony for felony murder. *State v. Cole*, 542 N.W.2d 43, 53 (Minn. 1996). "The 'felony murder rule' allows one whose conduct brought about an unintended death in the commission of a felony to be found guilty of murder by imputing malice when there is no specific intent to kill." *Id*. at 51. "Lack of intent is not an element of second-degree felony murder." *Id*.

Second-degree manslaughter requires a mental state of culpable negligence. Minn. Stat. § 609.205(1). Culpable negligence for manslaughter is defined as "recklessness," which is "intentional conduct which the actor may not intend to be harmful but which an ordinary and reasonably prudent man would recognize as involving a strong probability of injury to others." *State v. Moore*, 458 N.W.2d 90, 94 (Minn. 1990). "Recklessness" and "intent" are not mutually exclusive mental states. *Cole*, 542 N.W.2d at 51. A person may be found guilty of both second-degree assault and of a crime requiring recklessness. *See id*.

Here, neither felony murder nor second-degree manslaughter required that the jury find that appellant specifically intended to cause M.M.'s death. Because the mental states for second-degree felony assault and second-degree manslaughter are not mutually exclusive and

the necessary elements of the crimes do not negate each other, we conclude that the postconviction court did not err in determining that the jury's verdict finding appellant guilty of both felony murder and second-degree manslaughter is not legally inconsistent.

V. The postconviction court did not abuse its discretion in denying appellant's petition based on his sufficiency-of-the-evidence claim.

Appellant argues that the state did not present sufficient evidence to prove beyond a reasonable doubt that he committed felony murder because the evidence shows that he acted in self-defense to defend himself and his friends.[1]

In reviewing a challenge to the sufficiency of the evidence, we conduct "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We review the record "assuming the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "And we will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that [appellant]

[1] Appellant also alleges that his acquittal of second-degree intentional murder demonstrates that the jury accepted his affirmative defense of self-defense, and on that basis the jury should have acquitted him of all charges. However, appellant's acquittal for second-degree intentional murder demonstrates only that the jury did not find sufficient evidence to prove beyond a reasonable doubt that appellant acted with intent to cause M.M.'s death. The district court instructed the jury that appellant committed no crime if it found that he acted reasonably to defend himself or others from a threat of death or great bodily harm. The jury's guilty verdicts evince that the jury did not accept appellant's claim of self-defense.

was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100. We do not re-weigh the evidence. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009).

Felony murder requires that the state prove beyond a reasonable doubt that the defendant caused the death of a person "while committing or attempting to commit a felony." Minn. Stat. § 609.19, subd. 2(1). Second-degree assault is a proper predicate felony for felony murder. *Cole*, 542 N.W.2d at 53. An assault with a dangerous weapon is a second-degree assault. Minn. Stat. § 609.222 (2016).

A defendant must put forward evidence to support his claim of self-defense, but the state bears the burden of disproving self-defense. *State v. Radke*, 821 N.W.2d 316, 324 (Minn. 2012). The state meets its burden if it "disprove[s] beyond a reasonable doubt at least one of the elements of self-defense." *Id*.

> 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.

Id.; *see also State v. Richardson*, 670 N.W.2d 267, 278 (Minn. 2003) (noting that defense-of-others parallels self-defense).

At trial, appellant admitted that he carried a .22-caliber revolver and intentionally fired it without warning into a group of people that included M.M. Forensic results matched bullet fragments found inside M.M.'s body to a .22-caliber bullet. Multiple witnesses testified that they saw appellant shoot M.M. Appellant admitted that he discarded the revolver where the police later discovered a .22-caliber revolver containing three spent cartridges. DNA that

predominately matched appellant was discovered on the revolver. This evidence is sufficient to permit the jury to conclude that appellant committed an assault with a deadly weapon that resulted in M.M.'s death, which constitutes felony murder.

Appellant contends that the evidence shows that he acted in self-defense of himself and others. There was evidence presented at trial that depicted R.E. and his group as the initial aggressors and that appellant's group was suffering a severe beating. There was also evidence presented that R.E. acted like he had a firearm. Appellant also testified that he was scared, that his friends were already knocked down, that his eye was injured and his vision was impaired, and that he fired the revolver to stop the attackers because he had no other choice.

However, the state presented contrary evidence that appellant postured with his revolver before the fight, that appellant did not use reasonable force, and that appellant made false statements to the police about his role in M.M.'s death. Further, other witnesses testified that no one other than appellant had a weapon and that no one else acted as if he had a firearm. There was also evidence that appellant fired from behind a tree or shrubbery. Appellant's credibility was also impeached on cross-examination by his admission that he lied to the police after his arrest.

We conclude that the record, when viewed in the light most favorable to the verdict, contains sufficient evidence to permit the jurors to find beyond a reasonable doubt that appellant did not act in self-defense. The postconviction court did not abuse its discretion in denying appellant's petition for postconviction relief.

Affirmed.