STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1088

State of Minnesota,
Respondent,

vs.

Glen Alvin Johnson,
Appellant.

Filed July 22, 2024
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-22-25656

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

Mary F. Moriarty, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Hennepin County jury found Glen Johnson[1] guilty of first-degree assault based on evidence that he stabbed another man with a knife eight times. We conclude that the evidence is sufficient to prove that Johnson inflicted great bodily harm on the victim. We also conclude that the district court did not err in its jury instruction on self-defense, that the prosecutor did not engage in misconduct when cross-examining Johnson, and that the district court did not err by entering a single conviction on multiple adjudications of guilt. Therefore, we affirm.

FACTS

Late in the evening of December 20, 2022, J.B. was at home in the city of Minneapolis. Also present was K.T., a female friend with whom J.B. had had an on-again-off-again relationship and who had been living in J.B.'s house for one or two months. Another friend, D.O., who did not live in the house, was watching YouTube videos in the first-floor living room.

K.T. previously had made plans to see Johnson that evening. Johnson arrived at J.B.'s house to pick up K.T. while she and J.B. were engaging in sexual conduct in an upstairs bedroom. Johnson texted and called K.T. while waiting in his car. He eventually grew impatient and called K.T.'s cell phone again. K.T. answered. What happened next

[1]Our case caption indicates that appellant's middle name is Alvin, which conforms to the district court's sentencing order and the notice of appeal. *See* Minn. R. Civ. App. P. 143.01. At trial, however, Johnson testified that his middle name is Alec.

was disputed at trial, but this much is clear: Johnson got out of his vehicle, J.B. went outside, Johnson and J.B. engaged in a physical altercation, and Johnson stabbed J.B. eight times.

The state charged Johnson with first-degree assault, in violation of Minn. Stat. § 609.221, subd. 1 (2022), and second-degree assault, in violation of Minn. Stat. § 609.222, subd. 1 (2022). Before trial, Johnson gave notice of his intent to assert the defense of self-defense.

The case was tried to a jury on six days in March 2023. The state called ten witnesses in its case-in-chief: J.B., D.O., the 911 dispatcher, five police officers, a forensic scientist, and the trauma surgeon who treated J.B.

J.B. testified as follows. While Johnson was on the phone with K.T., Johnson used confrontational and threatening language. J.B. heard Johnson get out of his car. J.B. went outside, while barefoot and in pajamas, to confront Johnson. He and Johnson argued near the front door to his house. He pushed Johnson to prevent him from entering the house. Johnson pulled out a knife and slashed him, cutting his face. Johnson put J.B. in a headlock and stabbed him multiple times. J.B. grabbed the knife blade, which caused cuts to his hands. After J.B. went "limp," Johnson stopped stabbing him and went back to his car. J.B. went inside his house, grabbed a baseball bat, went back outside, and swung at Johnson's car in an unsuccessful attempt to break a window. J.B. went back inside his house, asked D.O. to call for help, and collapsed.

D.O. testified at trial that he heard but did not see the altercation between J.B. and Johnson. But D.O. testified that he saw J.B. come back inside the house to retrieve a baseball bat before he went outside a second time and hit Johnson's car with the bat.

Johnson testified in his own defense as follows. J.B. initially came out of the house with a baseball bat. Upon seeing this, Johnson told J.B. that he had a knife. J.B. ran toward Johnson and grabbed him by the collar. J.B. slipped, and both men fell to the ground. The bat was pinned under J.B. Johnson "stuck him a couple times" with the knife. When Johnson let J.B. get up, J.B. tried to hit him with the bat. Johnson responded by cutting J.B. across the face with the knife. When Johnson let J.B. get up a second time, J.B. walked toward his house. Johnson got in his car and drove away while J.B. beat the car with the bat.

The jury found Johnson guilty on both counts. The district court imposed a sentence of 103 months of imprisonment. Johnson appeals.

DECISION

I. Sufficiency of Evidence

Johnson first argues that the evidence is insufficient to support his conviction of first-degree assault on the ground that J.B. did not suffer great bodily harm.

In analyzing an argument that the evidence is insufficient to support a conviction, this court ordinarily undertakes "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that "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) (quotation omitted). We will not overturn a 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 the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

A person is guilty of first-degree assault if he "assaults another and inflicts great bodily harm." Minn. Stat. § 609.221, subd. 1. The term "great bodily harm" is defined by statute to mean any of four different types of injuries: "bodily injury [1] which creates a high probability of death, or [2] which causes serious permanent disfigurement, or [3] which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or [4] other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2022); *see also State v. Moore*, 699 N.W.2d 733, 738 (Minn. 2005) (inserting numerals to identify alternative means of proof).

In this case, the evidence relevant to J.B.'s injuries was provided primarily by the trauma surgeon who treated J.B. and testified as follows. J.B. sustained injuries to his face, chest, back, hands, and abdomen, including "numerous deep lacerations going all the way through muscle down to bone." The knife punctured the left lower lobe of J.B.'s lung, which caused the lung to collapse and blood to accumulate in the chest cavity. J.B. likely will have a permanent scar on his face as a result of "a severe facial laceration that went through his nose, upper lip, and lower lip." The joints in J.B.'s hands were cut to the bone, which "can lead to permanent inability to move the fingers." In addition to the lacerations, J.B. sustained a broken rib and a broken finger.

This evidence satisfies multiple parts of the definition of great bodily harm. The first part of the definition—"bodily injury which creates a high probability of death"—is satisfied by the surgeon's testimony that J.B.'s injuries were "life-threatening." *See State v. Gerald*, 486 N.W.2d 799, 802 (Minn. App. 1992) (reasoning that evidence of "life-threatening" injury is sufficient to prove "high probability of death"). The surgeon explained that the puncture to J.B.'s lung "can cause serious injury or death" because "air collapses the lung to the point that it can't expand" or "it starts to cause the heart itself not to be able to fill every time it beats." This case is unlike *State v. Dye*, 871 N.W.2d 916 (Minn. App. 2015), in which medical professionals initially treated the victim's injuries as if they were life-threatening but later determined the path of a bullet and learned that it did not hit any major organs. *Id.* at 921. In this case, however, Johnson's knife did puncture J.B.'s lung, and the lung did collapse. The surgeon's testimony allowed the jury to find that J.B. sustained injuries that created a high probability of death.

The second part of the definition—"bodily injury . . . which causes serious permanent disfigurement"—is satisfied by the surgeon's testimony that J.B. had "a severe facial laceration that went through his nose, upper lip, and lower lip" and that J.B. likely would have a permanent scar on his face. Johnson contends that the scar is "not significant enough to constitute 'serious permanent disfigurement'" because it is not "graphic or gruesome." Johnson cites no authority for the proposition that serious permanent disfigurement must be graphic or gruesome. Our caselaw indicates that there is no such requirement. *See, e.g.*, *State v. McDaniel*, 534 N.W.2d 290, 293 (Minn. App. 1995), *rev. denied* (Minn. Sept. 20, 1995). The photographic evidence shows that J.B. has a relatively

long and conspicuous scar that runs diagonally across his nose and extends to his lips. His scar is unlike the victim's scars in *Gerald*, which were smaller and located on the back of the victim's neck and in his ear. 486 N.W.2d at 802. J.B.'s scar is large enough and conspicuous enough to allow the jury to find serious permanent disfigurement.

The third part of the definition—"bodily injury . . . which causes a permanent or protracted loss or impairment of the function of any bodily member or organ"—is satisfied by the surgeon's testimony that the deep cuts in J.B.'s hands "can lead to permanent inability to move the fingers." In addition, J.B. testified that he cannot close his hands and that, at the time of trial, he had not yet returned to the job he held at the time of the incident.

Thus, the evidence is sufficient to support the jury's finding that Johnson inflicted great bodily harm on J.B.

II. Jury Instructions

Johnson next argues that the district court erred in its jury instruction concerning his defense of self-defense.

A district court must instruct a jury in a manner that "fairly and adequately explain[s] the law of the case." *State v. Peltier*, 874 N.W.2d 792, 797 (Minn. 2016). A district court errs if its jury instructions "confuse, mislead, or materially misstate the law." *State v. Vang*, 774 N.W.2d 566, 581 (Minn. 2009). Accordingly, an appellate court seeks to determine whether an instruction "accurately state[s] the law in a manner that can be understood by the jury." *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). A district court has "considerable latitude in selecting language for jury instructions." *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). This court applies an

abuse-of-discretion standard of review to a challenged jury instruction. *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019).

In this case, the district court included the following paragraph in its jury instruction on Johnson's defense of self-defense:

> The defendant in this matter asserts the defense of self. No crime is committed when a person uses reasonable force to resist an offense against the person, if such an offense was being committed or the person reasonably believed that it was. *An offense against a person means an offense of a physical nature with the potential to cause bodily harm.*

Johnson contends that the district court misstated the law in the third sentence of this instruction, which we have italicized. He contends that the district court should have instructed the jury that the phrase "an offense against the person" means "any act carrying the threat of bodily harm."

Johnson concedes that he did not assert an objection at trial that corresponds to his argument on appeal. The absence of an objection allows this court to review only for plain error. *See* Minn. R. Crim. P. 31.02. Under the plain-error test, an appellant is entitled to relief on an issue to which no objection was made at trial only if (1) there is an error, (2) the error is plain, and (3) the error affects the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three requirements are satisfied, the appellant also must satisfy a fourth requirement: that the error "seriously affects the fairness and integrity of the judicial proceedings." *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014).

The right to self-defense is codified in a statute that allows the use of reasonable force "upon or toward the person of another without the other's consent" in certain

circumstances. Minn. Stat. § 609.06, subd. 1 (2022). One such circumstance is "when used by any person in resisting or aiding another to resist an offense against the person." *Id.*, subd. 1(3). Consistent with the common law of self-defense, the term "offense against the person" is limited to "an offense carrying the threat of bodily harm" and does *not* include "an offense that does not carry the threat of bodily harm." *State v. Lampkin*, 994 N.W.2d 280, 288 (Minn. 2023).

Johnson contends that the district court's self-defense instruction improperly "limited the events that can trigger the right to act in self-defense to those of 'a physical nature.'" In other words, Johnson contends that, by instructing the jury that Johnson could use reasonable force against J.B. to defend himself against "an offense of a physical nature with the potential to cause bodily harm," the district court erred by excluding offenses of a *non-physical* nature that carry a threat of bodily harm.

The instruction given by the district court was appropriate given the circumstances of this case. Johnson testified that J.B. had the baseball bat in his hand when he emerged from his house for the first time and approached Johnson at "a very fast pace . . . with his bat, ready to swing." Johnson also testified that J.B. grabbed his collar. Johnson's claim of self-defense plainly was based on evidence of an offense of a physical nature. Johnson has not identified any evidence of an offense by J.B. that is *not* of a physical nature.

In *Lampkin*, the supreme court affirmed the district court's use of the word "assault" in lieu of "offense against the person" because the "only 'offense against the person' carrying the threat of bodily harm that Lampkin resisted was assault," because assault "is indeed an offense against the person carrying the threat of bodily harm," and "because

assault was a proper characterization for [the victim's] conduct toward Lampkin." 994 N.W.2d at 289-90. For similar reasons, the district court in this case did not err by using the phrase "an offense of a physical nature with the potential to cause bodily harm."

Thus, the district court did not err—let alone plainly err—in its jury instruction concerning Johnson's defense of self-defense.

III. Claim of Prosecutorial Misconduct

Johnson next argues that the prosecutor engaged in misconduct while cross-examining him by implying that he told K.T. what she should say to investigating police officers.

The right to due process of law includes the right to a fair trial, and the right to a fair trial includes the absence of prosecutorial misconduct. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005); *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *rev. denied* (Minn. June 19, 2007). "Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial." *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008) (quotation omitted). One way in which a prosecutor may deprive a defendant of a fair trial is by "mak[ing] insinuations on cross-examination that the prosecutor cannot back up with admissible evidence." *State v. Fallin*, 540 N.W.2d 518, 521 (Minn. 1995); *see also State v. Eaton*, 292 N.W.2d 260, 268 (Minn. 1980); *State v. Stofflet*, 281 N.W.2d 494, 496-97 (Minn. 1979). A prosecutor does not engage in misconduct if there is evidence in the record to support the questioning, *Eaton*, 292 N.W.2d at 268, or if "there is a factual predicate for the questions in that the prosecutor *is able* to produce extrinsic evidence to support the insinuating cross-examination," *Fallin*, 540 N.W.2d at 521.

Johnson contends that the prosecutor engaged in misconduct by asking a question, without evidentiary support, that insinuated that he spoke to K.T. and told her what to say to investigating officers. In response, the state contends that the prosecutor's questions were based on evidence, not merely insinuation, because K.T. gave a police officer a version of events that matched Johnson's version even though she had not seen the incident and because Johnson called K.T. twice only minutes before she spoke to the officer.

Johnson did not object at trial to the conduct that he now characterizes as misconduct. Accordingly, we apply the modified plain-error test. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail under that test, an appellant initially must establish that there is prosecutorial misconduct and that it is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the appellant establishes plain misconduct, the burden shifts to the state to show that the plain misconduct did not affect the appellant's substantial rights, *i.e.*, "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). "If these three prongs are satisfied, the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010).

When cross-examining Johnson, the prosecutor sought to elicit evidence as to whether Johnson told or suggested to K.T. what she should say to law-enforcement officers, or that he had an opportunity to do so, in two telephone calls occurring shortly after the stabbing and shortly before K.T. spoke to the officer:

> PROSECUTOR: You're aware that the 911 call in this case was made at approximately 12:34 a.m., correct?
>
> JOHNSON: I'm not sure.
>
> PROSECUTOR: 12:34 a.m. would be before 12:35 when you called [K.T.] two separate times and the two of you talked, right?
>
> JOHNSON: There it is right there. I'm looking at it.
>
> PROSECUTOR: So you did make an outgoing call to [K.T.] after you stabbed [J.B.]?
>
> JOHNSON: I don't know what could be talked about in six seconds and 45 seconds. So, if I did make the phone call, maybe I just dialed it because she was the last one I was dialing. But I didn't talk with her.
>
> PROSECUTOR: In those 51 seconds, you certainly could have told her what to tell the police, right?
>
> JOHNSON: No, I couldn't tell her what to tell the police because I didn't even know what happened.

K.T. did not testify at trial. But in the defense case, Johnson called a police officer and introduced a video-recording captured by the officer's body-worn camera within 15 minutes of the incident. In that video-recording, K.T. told the officer that Johnson had stabbed J.B. in self-defense "because [J.B.] came out with a bat." K.T. also told the officer that she did not see the incident.

In closing argument, the prosecutor referred to K.T.'s statement to the officer in the body-cam video-recording. The prosecutor argued that K.T. "blurt[ed] out" that Johnson had acted in self-defense and that K.T. also said that she "didn't actually see anything." The prosecutor noted that K.T. made those statements only a few minutes after Johnson

had called her twice. The prosecutor also referred to evidence that J.B.'s blood was found in the place where the baseball bat had been stored, thus indicating that he grabbed the bat after he had been stabbed.

The prosecutor's questioning of Johnson is not an inappropriate form of cross-examination. Before the cross-examination, the state had introduced an exhibit consisting of a call log, which showed the two telephone calls that Johnson made to K.T. That exhibit was circumstantial evidence that Johnson might have told K.T. what to say to investigating police officers. In addition, the prosecutor had good reason to believe that Johnson would introduce the body-cam video-recording because, before trial, the district court overruled the state's objection to that evidence. Thus, the prosecutor's questions were justified both by evidence already in the record and evidence that was forthcoming. *See Fallin*, 540 N.W.2d at 521; *Eaton*, 292 N.W.2d at 268. After eliciting Johnson's testimony on the issue, the prosecutor fairly described the evidence in closing argument.

Thus, the prosecutor did not engage in misconduct, let alone plain misconduct.

IV. Lesser-Included Offense

Johnson last argues, in the alternative, that the district court erred by entering convictions on both count 1 and count 2.

Johnson relies on a statute that provides that a criminal defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2022). In determining whether an offense is an "included offense" under section 609.04, courts examine "the elements of the offense instead of the facts of the particular case." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). This court applies a *de novo*

standard of review to the application of section 609.04. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013).

Johnson contends that count 2 is "an included offense" because it is a "lesser degree of the same crime" charged in count 1 and because it is a "crime necessarily proved if the crime charged [in count 1] were proved." *See* Minn. Stat. § 609.04, subd. 1(1), (4). The state agrees that the charge in count 2 is a lesser-included offense of the charge in count 1 and that Johnson may not be convicted of both offenses. The state asserts that the appropriate disposition on count 2 is for the finding of guilt to remain intact but to remain unadjudicated. The state's suggested disposition is supported by this court's opinion in *State v. Walker*, 913 N.W.2d 463 (Minn. App. 2018), in which the appellant was convicted of both an offense and a lesser-included offense, and this court concluded that the conviction of the lesser-included offense should be vacated but that the finding of guilt should remain intact. *Id.* at 467-68.

The district court complied with section 609.04 and the applicable caselaw. The warrant of commitment reflects that a 103-month prison sentence was imposed on count 1 and then states, with respect to count 2, "No adjudication—lesser offense." We acknowledge that the district court and counsel used different language during the sentencing hearing. But the warrant of commitment is "conclusive evidence of whether an offense has been formally adjudicated." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007).

Thus, the district court did not err because it did not enter multiple convictions on an offense and an included offense in violation of section 609.04, subdivision 1.

Affirmed.