STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1415

State of Minnesota,
Respondent,

vs.

Devondre Trevon Phillips,
Appellant.

Filed October 14, 2024
Affirmed
Kirk, Judge*

Ramsey County District Court
File No. 62-CR-21-5805

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 Appellant Public Defender, St. Paul, Minnesota; and

Paul J. Maravigli, Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Segal, Chief Judge; and Kirk, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

KIRK, Judge

Appellant challenges his convictions of multiple counts of attempted second-degree murder, arguing that the state failed to disprove any of the elements of self-defense and that the prosecutor erred by misstating the law and eliciting improper testimony. Because the state disproved the no-reasonable-possibility-of-retreat element of self-defense and because we see no prosecutorial error, we affirm.

FACTS

During the spring and summer of 2021, an antipathy developed between a group composed of Terry Brown, Jeffrey Hoffman, and Allen Walker (the group) and appellant Devondre Trevon Phillips, whose cousin, V.J., was then Brown's girlfriend. In April, Brown threatened appellant because appellant had talked to V.J. In late June or early July, Brown tried to hit appellant with a car, damaging the car appellant was driving. On June 26, in a restaurant, the group all pointed guns at appellant, and one pressed a gun into his side. On June 27, the group called appellant on FaceTime,[1] holding guns and threatening to kill him. Later that day, when appellant was driving, he saw the group in another car, and someone in that car fired three shots, one of which hit appellant's car. Over the summer, appellant received at last ten FaceTime contacts from the group, all threatening to kill him when they caught him. On July 3, appellant was again driving in St. Paul when

[1] FaceTime is an application created by Apple, Inc., that allows users of Apple devices to place video calls to other Apple-device users.

he heard shots and saw sparks on the hood of his car; this preceded a Facebook message from Hoffman telling appellant, who had ducked down in his car, to come out of the car.

Appellant left St. Paul to return to Nevada, where he lived, but returned on October 10. The nephew who picked him up at the airport about 10:00 p.m. wanted to go out for a drink. But they first went to pick up money a friend owed appellant and to pick up three of the nephew's friends. They then drove to the Truck Park bar (the bar), and appellant recognized a friend in the parking lot. The friend told appellant that the group was looking for him and intended to kill him; when appellant said he was not armed, the friend sold him a loaded gun.

About an hour after he left the airport, appellant entered the bar with a gun, shortly after 11:00 p.m. Brown and Hoffman entered the bar around 11:35, with Walker entering shortly thereafter. Surveillance videos from the bar showed that, soon afterwards, appellant walked past Brown and Hoffman and came very close to them. Hoffman particularly would have been hard to miss, since he stood six feet three inches and weighed over 300 pounds, but appellant testified that he did not see any of the group until almost 12:15 a.m., about a half hour later. During that time, appellant left the bar to have a cigarette and then returned.

As appellant was talking with V. J. and another woman, the group began to approach him. He backed towards a wall and into an area where he could be approached only from the left. When Hoffman approached, appellant fired at him. Immediately thereafter, Brown transferred his phone from his left hand to his right, took his gun in his left hand, and began firing at appellant.

The lead investigator (LI) in the case examined the videos from the surveillance cameras in the bar. As the videos were being played for the jury, LI testified that Brown's gun was still pointed at the ground when he fired his first shot; the bullet hit someone in the ankle, then bounced up and made a hole in a soda machine. The hole was not yet visible in the video when appellant shot Hoffman, which indicated that Brown had fired after appellant. Forensic evidence indicated that appellant fired ten bullets and Brown fired eight; one of Brown's bullets killed a bar patron. Twelve people were wounded in the gunfire exchange.

Appellant was charged with attempted second-degree murder of eight people. At the jury trial, five of the eight named victims, LI, four other police officers, two forensic scientists, and appellant testified. Appellant argued that he was acting in self-defense, and the jury was instructed that a defendant claiming self-defense "has a duty to retreat or avoid the danger if reasonably possible."[2] During deliberations, the jury asked a question about when the duty to retreat arises. The jury found appellant guilty on all charges. He challenges his convictions, arguing that he was acting in self-defense and that the prosecutor committed errors.

[2]The giving of this instruction indicates that the district court determined that appellant made a prima facie case of self-defense, including that he had not violated the duty to retreat. A defendant must make a prima facie showing to be entitled to an instruction on an affirmative defense. *See, e.g., State v. Voorhees*, 596 N.W.2d 241, 250 (Minn. 1999). If the self-defense instruction is given when a prima facie case has not been made, the jury may acquit on the basis that an instruction should never have been given.

DECISION

An appellate court "must 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) (quotation omitted). An appellate court must defer to a jury's credibility determinations. *State v. Barshaw*, 879 N.W.2d 356, 366 (Minn. 2016). An appellate court "will not overturn a verdict if, giving due regard to the presumption of innocence and to the prosecution's burden of proving guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty of the charged offense[s]." *State v. Cruz*, 997 N.W.2d 537, 551 (Minn. 2023) (quotation omitted). If the defendant makes a prima facie showing of self-defense, the state must disprove at least one element beyond a reasonable doubt. *State v. Radke*, 821 N.W.2d 316, 324 (Minn. 2012).

I. Duty to Retreat

One element of a prima facie claim of self-defense is that the defendant had no reasonable possibility of retreat to avoid the danger. *Id.* Because the jury reasonably could have found that the state disproved the no-reasonable-possibility-of-retreat element, appellant's self-defense claim failed.

Appellant argues that he had no possibility of retreating after he saw the group in the bar. This argument is contingent on appellant's claim that he saw the group only a few seconds before the shooting. He testified that, although the video "does show me go right past them, . . . I didn't know that [they were there] until after I seen the video." But just before appellant purchased a gun and entered the bar, he had been told that the group was looking for him with the intent of killing him. His claim that he did not notice the group

come into the bar and did not know the group was in the bar with him could have caused the jury, which had seen the video of appellant passing close to the group in the bar, to question the claim. Appellant's argument that he had no possibility of retreating to avoid the danger also ignores both his failure to avoid a potentially dangerous confrontation by not entering a crowded bar with a gun and his decision to return to the bar after leaving to have a cigarette.

Appellant argues further that "[t]here is . . . no legal authority for the premise that [he] was required to leave the bar before any imminent or immediate danger . . . presented itself." But the Minnesota Supreme Court provided validation for that very premise in *State v. Devens*, 852 N.W.2d 255, 259 (Minn. 2014), in which the court explicitly declined to extend the right of those in their homes not to retreat before acting in self-defense because such an extension "might encourage, rather than discourage, unnecessary and potentially deadly confrontations." And the legal authority for this premise is not new; the Minnesota Supreme Court in 1865 stated that "[w]here the party has not retreated from or attempted to shun the combat, but has . . . unnecessarily entered into it, his act is not one of self-defense." *State v. Shippey*, 10 Minn. 223, 232, 10 Gil. 178, 184 (1865).

Here, appellant's duty to retreat arose when he was told that the group was armed and was looking for him with the intent of killing him. But rather than leaving the bar for somewhere the group was not likely to be, thus "shun[ning] combat", *see id.*, and avoiding a potentially deadly confrontation, appellant chose to buy a loaded gun and enter the bar with it. Appellant thus created, rather than avoided, a potentially dangerous situation, endangering not only himself, but everyone else in the bar.

The Minnesota Supreme Court recently addressed the law on the duty to retreat, holding that the view that people not in their own homes have an inherent right to "stand their ground" when it is reasonably possible for them to retreat is "in direct conflict with well-established law." *State v. Blevins*, 10 N.W.3d 29, 36 (Minn. 2024). "In Minnesota, a person does not have an inherent right to stand their ground, and the public policy interests underlying the judicially created duty to retreat when reasonably possible include avoiding *potentially* deadly confrontations." *Id*. at 38. Thus, *Blevins* both confirms the jury instruction that a self-defense claimant has a duty to avoid the danger if reasonably possible and undercuts appellant's view that he had no duty to leave the bar until he was confronted with immediate or imminent danger. *See Id.*

Blevins states further that "the fact-finder must . . . decide whether a person had a reasonable opportunity to retreat under the circumstances." *Id.* Although the jurors had been instructed on the duty to retreat, they asked during their deliberations when the duty to retreat begins. From this question, we infer that the jury regarded the duty to retreat as significant if not dispositive; from its verdict, we infer that the jury determined that appellant had a duty to retreat and violated it. Because in this case "the jury could reasonably have found the defendant guilty of the charged offense[s]," *Cruz*, 997 N.W.2d at 551, we will not overturn the jury's verdict.

II. Prosecutorial Error[3]

Because the alleged errors were not objected to,

> we apply the modified plan-error test . . . under which the defendant has the burden to demonstrate that the misconduct constitutes (1) error, (2) that was plain. If the defendant is successful, the burden then shifts to the [s]tate to demonstrate that the error did not affect the defendant's substantial rights. 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. In addition, our analysis of the fairness, integrity, or public reputation of judicial proceedings does not focus on whether the alleged affected the outcome resulting in harm to the defendant in the particular case and instead concerns whether it would have wider ramifications affecting the public's trust in the fairness and integrity of our judicial system.

State v. Portillo, 998 N.W.2d 242, 248 (Minn. 2023) (quotations and citations omitted).

A. Jury Instruction on Duty to Retreat

Appellant argues that the prosecutor erred in telling the jury that appellant had a duty to retreat before he shot Hoffman because any duty to retreat did not begin until there was physical violence or imminent danger of physical violence. Paradoxically, by this argument, appellant's duty to retreat would not have begun until after he fired the first shot. Appellant cites no support for the view that the person who begins violence has no duty to retreat until after he has initiated it. He does, however, cite four cases that he says show

[3] As respondent points out, appellant uses the term "prosecutorial misconduct," rather than "prosecutorial error," and the two terms "are separate contentions." *State v. Epps*, 964 N.W.2d 419, 423 n. 4 (Minn. 2021). Misconduct "implies a deliberate violation of a rule or practice." *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *rev. denied* (Minn. Mar. 17, 2009). Because there is no evidence that the prosecutor here intentionally or deliberately violated a law or standard, we use the term "error."

that "the duty to retreat [arises] *after* a confrontation begins, or there is imminent danger, not before." The four cases are *State v. Edwards,* 717 N.W.2d 405 (Minn. 2006), *State v. Austin,* 332 N.W.2d 21 (Minn. 1983); *State v. Boyce,* 170 N.W.2d 104 (Minn. 1969), and *State v. Blevins*, No. A22-0432, 2023 WL 2125770 (Minn. App. Feb. 21, 2023), *aff'd* 10 N.W.3d 29 (Minn. July 31, 2024). None of them supports appellant's argument that there is no duty to retreat until violence is imminent or has already begun.

Therefore, the prosecutor did not err in instructing the jury that the obligation to retreat is not contingent on the presence of physical force.

B. Questioning of LI

Appellant's second argument is that the prosecutor erred in eliciting LI's opinion on whether appellant was acting in self-defense. But it is actually LI's language, not the prosecutor's, to which appellant objects. In the challenged testimony, LI was attempting to explain to the jury what was happening on the video—that appellant was trying to protect his back and stand so that he could be approached only from the left, since he shot with his right hand. He used the term "fatal funnel" to explain what he saw appellant doing by his movements. Appellant's attorney did not object to the use of the term at trial; in fact, he repeated it and challenged it several times in his own extensive cross-examination of LI. The prosecutor did not err in asking LI a question that resulted in the use of the term "fatal funnel" when LI answered it.

Even if it had been an error, the factors to be considered in determining whether prosecutorial error affected a jury's verdict are the strength of the evidence against the defendant, the pervasiveness of the erroneous conduct, and whether appellant had an

opportunity to rebut the erroneous evidence. *State v. Peltier,* 874 N.W.2d 792, 805-06. (Minn. 2016). The evidence against appellant, provided by some of his own testimony and by many witnesses as well as by LI, was considerable. The "fatal funnel" term was made far more pervasive by appellant's attorney's frequent references to it. Finally, appellant states in his brief that "the jury . . . did not adopt [LI's] unqualified opinions about a fatal funnel or ambush." If the prosecutor erred in asking the question that produced the phrase in LI's reply, the error was harmless.

The presence of the group in the bar that night presented a clear and present danger to appellant, who knew they intended to kill him. Based on the evidence and the arguments presented, the jury could have found that appellant failed to satisfy his duty to retreat either when he armed himself and entered the crowded bar knowing that the group might arrive there or when he failed to leave or seek help from the police or security when he first became aware that the group was in the bar.

Affirmed.