STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1011

State of Minnesota,
Respondent,

vs.

Afeez Adebisi Ogundero,
Appellant.

Filed June 2, 2025
Affirmed
Reyes, Judge

Lyon County District Court
File No. 42-CR-23-778

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

Abby Wikelius, Lyon County Attorney, Julianna F. Passe, Assistant County Attorney, Marshall, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bond, Presiding Judge; Reyes, Judge; and Klaphake, Judge.*

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

NONPRECEDENTIAL OPINION

REYES, Judge

In this direct appeal from his conviction of second-degree assault, appellant argues that the district court abused its discretion by denying his motions for (1) a *Schwartz* hearing[1] and (2) a downward dispositional departure. In a self-represented brief, appellant argues that: (1) the prosecutor committed misconduct by making inflammatory statements in closing argument; (2) the state failed to establish evidence of specific intent; and (3) inconsistences and omissions in the jury instructions deprived him of a fair trial. We affirm.

FACTS

In August 2023, a 13-year-old girl was cleaning the foyer of an apartment building in Marshall, Minnesota. As she was cleaning, appellant Afeez Adebisi Ogundero entered the room, quickly approached her, pointed a gun at her, and, according to the girl, said, "Gimme all your money." The girl turned around and appellant, having initially thought that the girl was someone else, apologized and asked if she was okay. A surveillance video without audio captured the incident.

Law enforcement spoke with appellant following the incident. He informed them that, on the day of the incident, he gave a friend a ride to the apartment building and, upon arriving at the building, he saw a person in the foyer who he believed was his friend and

[1] The term "*Schwartz* hearing" takes its name from *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301, 303 (1960). A *Schwartz* hearing gives "a party an opportunity to impeach a verdict due to juror misconduct or bias." *State v. Chauvin*, 989 N.W.2d 1, 22 (Minn. 2023) (quotation omitted), *rev. denied* (Minn. July 18, 2023).

decided to scare her. He grabbed what he initially stated was a "BB gun," approached his "friend," pointed the gun at her, and said, "Empty your pockets." Appellant realized that the individual he pointed the gun at was not his friend. An investigation revealed, and appellant subsequently admitted, that he used a firearm rather than a BB gun.

Respondent State of Minnesota charged appellant with second-degree assault with a dangerous weapon, fifth-degree assault, and threats of violence in violation of Minn. Stat. §§ 609.222, subd. 1, 609.713, subd. 1, 609.224, subd 1(1) (2022). The district court held a two-day jury trial at which appellant testified in his defense. The jury found appellant guilty on all counts.

Shortly after the verdict, a juror disclosed to a court employee that he felt "sick to his stomach" following the trial, that he believed that other jurors were rushing "to get out of there," and that he did not raise this issue in court because he did not want "a target on his back." The district court learned of this conversation the following day and immediately disclosed it to the parties.

Following the juror's disclosure, appellant moved the district court to: (1) impeach the guilty verdicts and rule them invalid; (2) order a new trial; and (3) have the juror testify at a *Schwartz* hearing on the motion. The district court denied appellant's motions.

Prior to sentencing, appellant moved for a downward dispositional departure. The district court denied appellant's motion, convicted and sentenced him to 36 months in prison for second-degree assault, and did not impose convictions or sentences on the other two counts. This appeal follows.

DECISION

I. The district court acted within its discretion by denying appellant's motion for a *Schwartz* hearing.

Appellant argues that the district court abused its discretion by denying his motion for a *Schwartz* hearing based on its determination that the juror's statements were not admissible. We disagree.

Appellate courts review a district court's denial of a request for a *Schwartz* hearing for an abuse of discretion. *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998). We similarly will only reverse a district court's determinations regarding the admissibility of evidence for a "clear abuse of discretion." *Moore v. State*, 945 N.W.2d. 421, 428 (Minn. App. 2020) (quotation omitted), *rev. denied* (Minn. Aug. 11, 2020). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Fernandez Sorto*, 12 N.W.3d 207, 212 (Minn. App. 2024) (quotation omitted), *rev. denied* (Minn. Dec. 17, 2024).

As noted above, a *Schwartz* hearing provides "a party an opportunity to impeach a verdict due to juror misconduct or bias." *Chauvin*, 989 N.W.2d at 22 (quotation omitted). "To obtain a *Schwartz* hearing, a defendant must establish a prima facie case of jury misconduct by submitting sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *Id.* (quotation omitted).

A district court may only consider evidence admissible under Minnesota Rule of Evidence 606(b) at a *Schwartz* hearing. Minn. R. Crim. P. 26.03, subd. 20(6). When investigating an allegation of juror misconduct would require testimony prohibited under

rule 606(b), a district court may deny a motion for a *Schwartz* hearing. *State v. Martin*, 614 N.W.2d 214, 226 (Minn. 2000). A juror may not testify about statements made during deliberations or what influenced that or another juror to reach a certain verdict. Minn. R. Evid. 606(b). However, two exceptions to rule 606(b) allow jurors to testify as to "whether any outside influence was improperly brought to bear upon [them], or as to any threats of violence or violent acts brought to bear on [them], from whatever source, to reach a verdict." *Id.*

In denying appellant's motion for a *Schwartz* hearing, the district court explained that the juror "spoke of emotions as influencing his assent to the verdict and psychological pressure he felt during and after the reaching of the verdict," adding that "[e]vidence of psychological intimidation, coercion, and persuasion [is] not admissible under Minn. R. Evid. 606."

Appellant first argues the juror's statement that the other jurors "wanted to get out of there" would have been admissible under rule 606(b) because it indicated that an "outside influence," the desire to end deliberations, impacted the verdict. But an outside influence is external information that a juror receives, not internal influences by the jury. *See State v. Jurek*, 376 N.W.2d 233, 235 (Minn. App. 1985) (noting outside influences necessitating *Schwartz* hearing came from person not on jury). Here, the "outside influence" did not come from outside the jury but was rather a purported desire by some jurors to finish deliberations.

Appellant next argues that the juror's statement that he was afraid of having "a target on his back" qualifies as a threat under rule 606(b). Our caselaw has generally set a high

bar for what qualifies as a violent threat, with *State v. Jackson* holding that not even "[e]vidence of psychological intimidation, coercion, and persuasion" rises to the level of a threat that would warrant the admissibility of a juror's statements about such evidence. 615 N.W.2d 391, 396 (Minn. App. 2000), *rev. denied* (Minn. Oct. 17, 2000). The juror's perception of having "a target on his back," without more, does not rise to the level of a threat of violence, but rather shows the juror's apprehension about expressing an opinion in tension with other jurors' views. As such, the district court acted within its discretion by determining that this statement constituted inadmissible psychological pressure. We therefore conclude that the district court acted within its discretion by denying appellant's motion for a *Schwartz* hearing.

II. The district court acted within its discretion by denying appellant's motion for a dispositional departure and imposing a presumptive sentence.

Appellant argues that the district court abused its discretion by denying his motion for a dispositional departure by (1) finding that he failed to show "true remorse," arguing that his remorse weighed in favor of granting a departure and (2) making an error of law by considering appellant's prior contact with law enforcement and determining that he had prior convictions. We are not persuaded.

Appellate courts review a district court's sentencing decision for an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). We will affirm a district court's decision to impose a presumptive sentence if "the record shows [that] the [district] court carefully evaluated all the testimony and information presented before making a determination." *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation

omitted). Only in a rare case will an appellate court reverse a district court's refusal to depart. *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *rev. denied* (Minn. Mar. 31, 2009).

Appellant's conviction of second-degree assault with a dangerous weapon carries a mandatory-minimum sentence of 36 months in prison. *See* Minn. Stat. § 609.11, subds. 5(a) (2022), 9 (Supp. 2023). A district court may depart from a "mandatory minimum sentence[] . . . [only] if the court finds substantial and compelling reasons to do so." *Id.*, subd. 8(a) (2022) (explaining that such a sentence is a departure under the Minnesota Sentencing Guidelines). Substantial and compelling circumstances are ones "that distinguish a case and overcome the presumption in favor of a guidelines sentence." *Soto*, 855 N.W.2d at 308. The presence of a mitigating factor, however, does not require a district court to depart. *Pegel*, 795 N.W.2d at 253-54.

Here, the district court began by stating that it considered the parties' arguments, appellant's comments, and the presentence investigation report. It then provided a detailed explanation for its decision not to depart and analyzed the factors under *State v. Trog*, which are relevant to determining whether "a defendant is particularly suitable to individualized treatment in a probationary setting." 323 N.W.2d 28, 31 (Minn. 1982). These factors include: "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *Id.*

Appellant first challenges the district court's finding that he did not demonstrate "true remorse" and argues that this factor weighs in favor of a dispositional departure. But appellate courts defer to a district court's credibility determinations regarding remorse.

State v. Sejnoha, 512 N.W.2d 597, 600 (Minn. App. 1994) ("[A] reviewing court must defer to the district court's assessment of the sincerity and depth of the remorse and what weight it should receive in the sentencing decision."), *rev. denied* (Minn. Apr. 21, 1994). Moreover, even though appellant apologized for his conduct, his testimony that his conduct was "a joke" minimized its seriousness. We discern no abuse of discretion by the district court.

Second, appellant asserts that the district court made an error of law by determining that he had prior convictions because petty misdemeanors are not "crimes" under Minn. Stat. § 609.02, subd. 4a (2022). However, the supreme court has explained that a petty misdemeanor, despite not being a crime, still results in a conviction. *State v. Morgan*, 968 N.W.2d 25, 31 (Minn. 2021). Appellant's argument is therefore unpersuasive. Lastly, to the extent appellant argues that he is particularly amenable to probation, we note that a district court is not required to depart even if a defendant is particularly amenable to probation. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009). We accordingly conclude that the district court acted within its discretion by imposing the mandatory-minimum sentence.

III. Appellant's self-represented arguments do not provide a basis for relief.

In his self-represented brief, appellant argues that (1) the prosecutor committed misconduct during closing argument; (2) the state presented insufficient evidence to sustain his conviction; and (3) errors in jury instructions violated his right to a fair trial. We address each in turn.

A. The prosecutor did not commit misconduct.

Appellant argues that the prosecutor committed misconduct by making inflammatory statements during closing argument. His argument is unavailing.

Because appellant did not object to these statements at trial, we review appellant's prosecutorial-misconduct argument under the modified plain-error test. *State v. Portillo*, 998 N.W.2d 242, 248 (Minn. 2023). Under this test, a defendant must show that any misconduct "constitutes (1) error, (2) that was plain." *Id.* (quotation omitted). Only then does the burden shift to the state to show that the error did not affect the defendant's substantial rights. *Id.*

Prosecutors have a duty to "avoid inflaming the jury's passions and prejudices against the defendant." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). A prosecutor's argument "need not be colorless," but "it must be based on the evidence produced at trial." *Id.* (quotation omitted). A prosecutor has the flexibility "to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences that the jury must draw from it." *State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008) (quotation omitted), *rev. denied* (Minn. Sept. 23, 2008). We consider the closing argument as a whole when evaluating prosecutorial-misconduct claims. *Id.*

Here, the prosecutor's statements are either inferences stemming from evidence that the state presented at trial or proper descriptions of that evidence. For example, the prosecutor's statement that appellant was "prepared to shoot" the victim is a reasonable inference from the victim's trial testimony and surveillance video in which appellant pointed a gun at the victim. Further, the prosecutor appears to make the statement that

"[g]uns are never jokes" in response to appellant's trial testimony that the incident was just a prank. Likewise, the prosecutor's description that appellant "rush[ed], pull[ed] a handgun on [the victim], . . . [and] point[ed] it" at the victim is supported by the surveillance video and other evidence. Because appellant cannot show error, his argument fails.

B. Sufficient evidence supports appellant's intent to commit assault and threaten the victim.

Appellant next argues that the circumstances proved establish a reasonable inference inconsistent with guilt because he only intended his actions as a "prank or joke." Appellant adds that the record lacks evidence that he intended to harm the victim or put the victim in fear of harm. We are not convinced.

We assume without deciding that appellant's conviction relies on circumstantial evidence and accordingly apply heightened scrutiny under the circumstantial-evidence standard. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). Under this test, appellate courts first identify the "circumstances proved," deferring to "the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *State v. Alarcon*, 932 N.W.2d 641, 648 (Minn. 2019) (quotation omitted). Appellate courts then independently examine the reasonableness of all inferences to draw from the circumstances proved, giving no deference to the fact-finder's choice between reasonable inferences. *Id.* Appellate courts will reverse a conviction if a reasonable inference inconsistent with guilt exists. *Id.*

To secure a conviction of second-degree assault, the state must prove that appellant committed an assault, which is "an act done with intent to cause fear in another of

immediate bodily harm or death." Minn. Stat. § 609.02, subd. 10(1) (2022); *see also* Minn. Stat. § 609.222, subd. 1 (listing elements for second-degree assault).

We begin by outlining the relevant circumstances proved:

1. Appellant entered the apartment building, quickly approached the victim, pointed a loaded firearm at her, and said "gimme all your money."
2. Appellant was in close physical proximity to the victim while pointing the firearm at her head or upper body.
3. Appellant, incorrectly believing that the victim was his friend, told law enforcement that he had "this terrible idea to scare her."

We first conclude that the circumstances proved are consistent with guilt. In addition, we find unpersuasive appellant's argument that his intent for his actions to be a "prank" or "joke" raises a reasonable inference inconsistent with guilt. Appellant's behavior is consistent with the intent element of the second-degree assault crime, which merely requires proof that he intended to cause the victim to fear "immediate bodily harm or death." Minn. Stat. § 609.02, subd. 10(1). Appellant admitted to law enforcement that he intended to scare a person he thought was his friend, indicating that he, by pointing a loaded gun at the victim with the intent to scare her, committed assault. Because there are no reasonable inferences inconsistent with guilt, we conclude that the state provided sufficient evidence of appellant's intent.

C. The jury instructions did not violate appellant's right to a fair trial.

Appellant last argues that (1) the district court's correction of typographical errors in the jury instructions during the trial could have confused the jury and (2) the removal of

a jury instruction regarding his right not to testify might have influenced the jury to expect testimony from him. Appellant's arguments fail.

Because appellant did not object to the instructions at trial, we review them for plain error. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). The district court here corrected the typographical errors before instructing the jury on the relevant portions of the instructions. There is therefore no basis for concluding that the typographical errors could have confused the jury.

On the second issue, *State v. Pippitt*, 645 N.W.2d 87, 95 (Minn. 2002), is instructive. There, the supreme court held that the district court did not err by failing to provide an instruction concerning the defendant's right not to testify when the defendant did in fact testify, adding that such an instruction "would have been thoroughly confusing to the jury." *Id.* Similarly, here, appellant testified in his defense, and the record does not indicate that he requested an instruction regarding his right not to testify. We conclude that the district court's removal of a jury instruction regarding appellant's right not to testify does not constitute error.

Affirmed.