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Court of Appeals of Minnesota.

Antonio Xavier DANIELS, petitioner, Appellant,
v.
STATE of Minnesota, Respondent.

A17–0623
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Hennepin County District Court File No. 27–CR–13–27736

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

UNPUBLISHED OPINION

KIRK, Judge

***1** 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.

***2** 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.

***3** 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.

DECISION

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*

***4** 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.

***5** 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*

***6** 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

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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*

*7 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*

***8** 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)).

***9** 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]

> 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.

***10** 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] 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.

***11** 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.

All Citations

Not Reported in N.W. Rptr., 2018 WL 817286

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Anthony London FORESTA, Appellant

No. A14–2146.
|
Jan. 19, 2016.

Hennepin County District Court, File No. 27–CR–13–25524.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN; and Michael O. Freeman, Hennepin County Attorney, Elizabeth R. Johnston, Assistant County Attorney, Minneapolis, MN, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by LARKIN, Presiding Judge; WORKE, Judge; and HOOTEN, Judge.

UNPUBLISHED OPINION

WORKE, Judge.

***1** Appellant argues that the district court erred in denying his *Batson* challenge to respondent's peremptory strike of an African–American juror. Appellant also challenges the sufficiency of the evidence supporting his conviction of aiding and abetting second-degree unintentional murder. We affirm.

FACTS

K.F. shared an apartment with his stepfather, F.P. During the early morning hours of March 4, 2013, screaming woke K.F. from his sleep. K.F. grabbed his air rifle, entered the living room, and saw a man with a gun. K.F. saw another man at the front door, but the man left the apartment. F.P. and K.F. grabbed the gunman and wrestled him to the floor. Shortly after, the gunman shot F.P. and fled the scene. An ambulance transported F.P. to the hospital where he died shortly after.

At F.P's apartment, police located a discharged 9mm casing and a 9mm bullet lodged in the wall. Law enforcement reviewed surveillance videos from F.P.'s apartment and determined that the suspects entered the building at approximately 4:11 a.m. and left at approximately 4:28 a.m. The police eventually identified Cinque Turner and appellant Anthony London Foresta as possible suspects involved in F.P.'s death. Foresta was charged with aiding and abetting: (1) second-degree intentional murder, (2) second-degree unintentional felony murder, and (3) attempted first-degree aggravated robbery.

Turner testified against Foresta in exchange for a reduced sentence. Turner testified that on March 3, 2013, he was with a group of people at Rachel Rasmussen's house. Turner heard Foresta questioning Rasmussen about where F.P. lived, how much money he had, and the amount of drugs he possessed. On March 4, 2013, Turner drove Rasmussen to F.P.'s apartment to buy drugs. After returning to Rasmussen's house, Foresta asked Turner to drive him to F.P.'s apartment.

Turner testified that he and Foresta entered F.P.'s apartment complex through the back door. Foresta handed Turner a semi-automatic pistol and put on a mask. Foresta suggested knocking on F.P.'s door and telling him that his apartment was leaking into the apartment below. When F.P. answered the door, Foresta pushed himself inside, and Turner followed. Turner raised the pistol and told everyone to get on the ground. Foresta rushed down a hallway inside the apartment and then rushed out of the apartment, closing the door behind him. Turner testified that F.P. and a young man jumped on him while he tried to conceal the pistol. F.P. and the young man refused to let go, so Turner fired a round that hit F.P. After shooting F.P., Turner left the apartment. Turner testified that it was Foresta's idea to rob F.P.

Rasmussen also agreed to testify against Foresta in exchange for a reduced sentence. Rasmussen testified that she propped open the back door to F.P.'s apartment complex when Turner dropped her off to buy heroin. Rasmussen previously told Foresta that F.P. sold drugs and stated how much money he had. After Rasmussen returned from F.P.'s apartment on the

morning of March 4, 2013, Rasmussen and Foresta discussed returning to F.P.'s apartment. Rasmussen testified that Foresta and Turner talked about robbing F.P. Rasmussen had seen Foresta carrying a gun in the past and knew that Foresta had a gun while at her house.

***2** Shortly after F.P.'s death, Foresta told Rasmussen that things "went bad" when he and Turner went to F.P.'s apartment. Foresta told Rasmussen that F.P. fought them, and Turner shot F.P. The jury found Foresta guilty of aiding and abetting second-degree unintentional felony murder and attempted first-degree aggravated robbery. This appeal follows.

DECISION

Batson challenge

Foresta argues that the district court erred by denying his *Batson* challenge because the state's race-neutral reason for exercising a peremptory challenge was pretextual. A prosecutor typically may exercise peremptory challenges for any reason so long as it relates to his view on the outcome of the case, but "the Equal Protection Clause forbids ... [striking] potential jurors solely on account of their race." *Batson v. Kentucky,* 476 U.S. 79, 89, 106 S.Ct. 1712, 1719 (1986).

Batson established a three-step process for determining whether a peremptory challenge constitutes purposeful racial discrimination. *Id.* at 96–98, 106 S.Ct. at 1723–24. First, a defendant must establish a prima facie case of purposeful discrimination by showing that "a member of a protected racial group has been peremptorily excluded from the jury and ... that circumstances of the case raise an inference that the exclusion was based on race." *State v. Blanche,* 696 N.W.2d 351, 364–65 (Minn .2005). Second, if the defendant makes a prima facie case, the state must present a neutral explanation for challenging the juror. *Batson,* 476 U.S. at 97, 106 S.Ct. at 1723. Third, the district court must determine if the defendant established purposeful discrimination. *Id.* at 98, 106 S.Ct. at 1724. The defendant carries the burden to persuade the district court of the existence of purposeful discrimination. *State v. Reiners,* 664 N .W.2d 826, 832 (Minn.2003). "[T]he existence of racial discrimination in the use of a peremptory challenge is a factual determination." *State v. Diggins,* 836 N.W.2d 349, 355 (Minn.2013). This court gives "great deference to the district court's ruling and will uphold the ruling unless it is clearly erroneous." *Id.* (quotation omitted).

During voir dire, juror A.A., an African–American man, provided vague responses relating to his personal experience with violence and the criminal justice system. In response to the district court's inquiry about experience in the criminal justice system, A.A. stated that the mother of his child was recently prosecuted in an out-of-state domestic-violence case.

A.A. also stated that he had friends who were involved in the criminal justice system because of guns and drugs, including a "drug deal gone bad" and incidents involving injury or death. A.A. did not think that his experiences would impact his potential service as a juror. When asked whether he could separate his friends' experiences from the allegations against Foresta, A.A. responded that "some things will ... trigger memories," but he could separate that from the allegations against Foresta. A.A. was also concerned about finding child care for one of his children and possibly missing work.

***3** In response to Foresta's questioning, A.A. stated that he was not involved in the legal process when his friends were killed or hurt. A.A. agreed that he could decide the case based on the evidence presented but that his experiences with police were "more negative." A.A. agreed that he could remain unbiased but then stated:

> I don't bring in ... any experiences, but ... when you are emotionally attached to something, it[ ] automatically triggers, I'm going to be honest in saying, yes, I would still try to distinguish the two, but, you know, when you have striking resemblances and ... similarities, sometimes it looks and sounds like it does....

While answering questions from the state, the following interaction took place:

> [THE STATE]: We don't want [personal experience] to overpower what actually happens in this courtroom or what you are actually presented with in this case. Does that make sense?
>
> A.A.: I do understand, but I also ... know that they are my life experience, and like I said before, most of them have been negative, so ... my life experience and ... my jobs, and ... today or during the course of this trial ... I can

> understand I'm expected to do a certain job and I will ... do that job to the best of my ability, but at the same time ... I know certain things I hear would ... trigger things.

When asked if it would be difficult to put personal experience aside, A.A. stated "I wouldn't say it would be difficult, I would say it would be a task."

The state exercised a peremptory challenge against A.A. Foresta, also an African–American man, objected and argued that the state struck A.A. because of race. The district court found that Foresta made a prima facie showing.

Next, the state provided two neutral reasons for striking A.A. First, the state stated that it struck A.A. because he had significant financial concerns about not working during trial. Second, the state stated that it struck A.A. because of his negative experiences with the criminal justice system and his hesitation as to whether he could put his personal experiences aside and focus on the facts of the case.

Finally, the district court found that Foresta did not prove purposeful discrimination because the state presented race-neutral reasons for striking A.A. that were not pretextual. "Appellate courts give considerable deference to the district court's finding on the issue of the prosecutor's intent because the court's finding typically turns largely on credibility." *State v. Taylor,* 650 N.W.2d 190, 202 (Minn.2002); *see State v. Martin,* 773 N.W.2d 89, 101 (Minn.2009) ("We afford great deference because the record may not reflect all of the relevant circumstances that the [district] court may consider.") (quotation omitted).

Foresta argues that the state's race-neutral reasons are pretextual because A.A.'s past experiences and negative view of police are experiences shared by a large percentage of fair-minded African Americans. Foresta relies on *State v. McRae,* 494 N.W.2d 252, 257 (Minn.1992). In *McRae,* the state peremptorily struck an African–American juror because of her feelings about "the system ." 494 N.W.2d at 257. The supreme court reversed and remanded, concluding, "To allow the striking of this juror on the basis of those answers in effect would allow a prosecutor to strike any fair-minded, reasonable black person from the jury panel who expressed any doubt [that] 'the system' is perfect." *Id.* at 257, 260. But *McRae* is distinguishable in many ways.

***4** First, in *McRae,* the state supported its challenge by stating that the juror thought the "system is unfair" and that the "jury process is a fraud." *Id.* at 257. But the supreme court characterized these statements by the prosecutor as "very troubling" and as an exaggeration, recognizing that the juror described "the system" as "generally fair" and never stated that "the system is unfair" or that the "jury process is a fraud." *Id.*

Second, the state struck the juror, in part, because it believed the juror would be lenient towards the defendant because they were both minorities. *Id.* The supreme court recognized that *Batson* forbids such reasoning. *Id.* Third, the state asked only the African–American juror whether she thought the system was fair. *Id.* at 254. Fourth, the district court failed to complete all three steps of the *Batson* analysis. *Id.* at 258.

Here, the state did not allege that A.A. would be more lenient to Foresta because of race. The questions, aside from follow up questions, were asked of each potential juror. The record supports the state's reasons for striking A.A., and they are not "very troubling" or exaggerated. The state asserted that it struck A.A. because he had close friends involved in drug dealing, friends who were killed or hurt as a result of such activities, mostly negative experiences with police, and hesitation over whether he could set aside personal experiences. The record supports these assertions.

The district court also explained and went through each step of *Batson* with Foresta before making its decision. Thus, Foresta's reliance on *McRae* is unpersuasive. *See Martin,* 773 N.W.2d at 103–04 (rejecting *Batson* challenge and distinguishing *McRae,* in part, because the district court properly performed *Batson* analysis); *State v. McDonough,* 631 N.W.2d 373, 385–86 (Minn.2001) (rejecting *Batson* challenge, in part, because the jurors were all asked the same questions).

The disproportionate exclusion of racial minorities from a jury may also factor into whether a peremptory challenge constitutes purposeful racial discrimination. *State v. Greenleaf,* 591 N.W.2d 488, 500 (Minn.1999). But the presence of at least one minority on a jury may weigh against the assertion that a strike was racially motivated. *See State v. Everett,* 472 N.W.2d 864, 869 (Minn.1991) ("[I]t is significant that the jury ultimately included a member of a minority."). In *Diggins,* the record did not clearly establish that the state's strike was racially motivated and the state accepted another juror who was African–American. 836 N.W.2d at 357. Here, the venire and jury panel included at least one additional minority. Therefore, the district court did not err by denying Foresta's *Batson* challenge.

Sufficiency of the evidence

Foresta argues that the evidence insufficiently supports his conviction for aiding and abetting second-degree unintentional felony murder. When reviewing an insufficient-evidence claim, we review the record to determine whether the evidence, when viewed in a light most favorable to the verdict, is sufficient to allow the fact-finder to reach the verdict that it did. *State v. Webb,* 440 N.W.2d 426, 430 (Minn.1989). We "assume that the jury believed the state's witnesses and disbelieved contrary evidence." *Dale v. State,* 535 N.W.2d 619, 623 (Minn.1995). The verdict shall not be disturbed if the fact-finder, 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. *Bernhardt v. State,* 684 N.W.2d 465, 476–77 (Minn.2004).

***5** A person commits second-degree unintentional murder if he "causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense." Minn.Stat. § 609.19, subd. 2(1) (2012). "A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn.Stat. § 609.05, subd. 1 (2012). A person is "also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." *Id.,* subd. 2 (2012).

Foresta asserts that the evidence is insufficient because F.P.'s death was not caused "while" attempting to commit first-degree aggravated robbery. Foresta asserts that F.P.'s death did not occur during the commission of the robbery because Foresta left the apartment, and Turner was merely trying to escape.

Foresta's arguments are unpersuasive. "[W]here the underlying felony is completed before the homicide occurs, a conviction under the felony murder statute may still be proper." *State v. Arrendondo,* 531 N.W.2d 841, 844 (Minn.1995).

> [T]he felony murder rule encompasses a killing by one trying to escape or conceal a felony as long as there was no break in the chain of events between the felony and the killing or as long as the fatal wound was inflicted during the chain of events so that the requisite time, distance, and causal relationship between the felony and killing are established.

Id. (citations and quotations omitted); *see State v. Russell,* 503 N.W.2d 110, 113 (Minn.1993) ("Even if the underlying felony is complete before the homicide occurs, felony murder may still be applicable.").

Here, Foresta and Turner went to F.P.'s apartment to rob F.P. Foresta handed Turner a loaded pistol. Foresta and Turner entered F .P.'s apartment while Turner pointed the handgun at the occupants. Within minutes, F.P. and K.F. tackled Turner, and Turner shot F.P. as he tried to escape. Turner's behavior constitutes "a killing by one trying to escape ... a felony" without a "break in the chain of events between the felony and the killing." *See Arrendondo,* 531 N.W.2d at 844 (quotation omitted). The possibility that the attempted robbery ceased before the murder is not determinative. *See id.* at 843–45 (affirming felony murder conviction where defendant completed robbery before the victim was murdered).

Foresta also argues that the evidence is insufficient because the killing was not committed "in pursuance of" the aggravated robbery nor was it reasonably foreseeable. Foresta argues that he only knew Turner had a gun and that knowledge or possession of a gun is insufficient to make a killing reasonably foreseeable as a probable consequence of attempted aggravated robbery. Foresta's arguments are unpersuasive. First, someone who intentionally aids another in the commission of an offense "is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." Minn.Stat. § 609.05, subd. 2. Foresta does not deny that he aided Turner in the attempted aggravated robbery.

***6** Second, F.P.'s murder was "in pursuance" of the intended crime, attempted aggravated robbery. Here, F.P.'s murder facilitated Turner's escape, prevented F.P. from later potentially identifying Turner and Foresta, and prevented the possibility of retaliation. Thus, F.P.'s murder was in pursuance of the attempted aggravated robbery. *See State v. McAllister.*

862 N.W.2d 49, 56 (Minn.2015) (concluding that a killing "furthered the commission of the robbery by facilitating the escape of the three men, preventing McMillan from later identifying his assailants, and preventing the possibility of retaliation."); *see also State v. Pierson,* 530 N .W.2d 784, 789 (Minn.1995) ("[T]he record supports a finding that the murder was committed in furtherance of the robbery, particularly because it shows that the first shot was fired just after [the victim] stated 'get off me' and resisted the robbery effort.").

Third, F.P.'s murder was a reasonably forseeable, probable consequence of attempted aggravated robbery. "Whether [Foresta] could reasonably foresee that [F.P.] would be murdered is a question of fact for the jury." *Russell,* 503 N.W.2d at 114. In making that decision, "the jury was entitled to make reasonable inferences from the evidence, including inferences based on their experiences or common sense." *Id.* (quotation omitted)

Robbery involves the use of force or the threatened use of imminent force. Minn.Stat. § 609.24 (2012). Here, Foresta planned to rob F.P., convinced Turner to drive to F.P.'s apartment, handed Turner a loaded pistol, and forcefully entered F.P.'s apartment. These facts could support the jury's conclusion that F.P.'s murder was reasonably foreseeable. *See State v. Jackson,* 726 N.W.2d 454, 460–61 (Minn.2007) (holding that murder was reasonably foreseeable when the defendant attempted to rob a store with an assault rifle and a person he knew was "crazy enough" to do anything); *Pierson,* 530 N.W.2d at 789 (stating that "evidence indicating [that] the victim was murdered during the commission of an aggravated robbery is a significant factor [that] the jury may consider in determining foreseeability"). Therefore, the evidence sufficiently supports Foresta's conviction for aiding and abetting second-degree unintentional murder.

Pro se arguments

In his pro se supplemental brief, Foresta seeks a new trial because: (1) the district court gave an erroneous jury instruction; (2) the evidence failed to exclude every rational hypothesis except that of guilt; (3) his trial counsel provided ineffective assistance; and (4) the district court violated his right to a speedy trial. After careful review, we conclude that Foresta's claims are meritless and, therefore, he is not entitled to a new trial. *See State v. Davis,* 820 N.W.2d 525, 539 (Minn.2012) (rejecting meritless pro se claims in summary fashion).

Affirmed.

All Citations

Not Reported in N.W.2d, 2016 WL 207698

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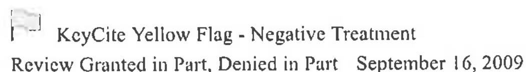
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Review Granted in Part, Denied in Part September 16, 2009

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Amani FARDAN, Appellant.

No. A08–0364.
|
June 30, 2009.
|
Review Denied Sept. 16, 2009.

West KeySummary

1 **Infants** Warnings and counsel; waivers

211 Infants
211XV Juvenile Justice
211XV(F) Evidence
211k2618 Admissibility
211k2625 Confessions, Admissions, and Statements
211k2625(12) Interrogation and Investigatory Questioning
211k2625(15) Warnings and counsel; waivers
(Formerly 211k174, 110k412.2(5))

Juvenile's *Miranda* waiver was knowing, intelligent, and voluntary. Juvenile had the capacity to understand the warnings given him, the nature of his rights, and the consequences of waiving them. Additionally, no evidence indicated that juvenile was an immature 15–year–old. Moreover, juvenile did not assert that he suffered any significant physical deprivations, nor that his detention was illegal or improperly long. Further, juvenile had cognitive abilities within the average range.

1 Cases that cite this headnote

Hennepin County District Court, File No. 27–CR–06–005997.

Attorneys and Law Firms

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Lawrence Hammerling, Chief Appellate Public Defender, Bradford S. Delapena, Special Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by SHUMAKER, Presiding Judge; HALBROOKS, Judge; and CRIPPEN, Judge. *

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

UNPUBLISHED OPINION

HALBROOKS, Judge.

***1** Appellant appeals from his convictions of first-degree aggravated robbery, second-degree assault, kidnapping, first-degree burglary, first-degree criminal sexual conduct, and false imprisonment. He argues that the district court erroneously (1) admitted his confession because his *Miranda* waiver was not knowing, intelligent, and voluntary; (2) excluded evidence that an accomplice-witness, R.G., testified for the state as a result of prosecution threats and that appellant was particularly suggestible due to fetal-alcohol effect (FAE); (3) convicted him of multiple offenses against the same victims; (4) sentenced him on the second-degree assault convictions that were part of the same behavioral incident; and (5) imposed an aggregate sentence that unfairly exaggerates the criminality of his conduct. Because we conclude the district court improperly convicted appellant of three duplicative offenses against the same victims, we reverse and remand in part. But we otherwise affirm the district court.

FACTS

In the early morning hours of October 10, 2005, appellant Amani Fardan was with R.G., M.B., and Wandlee Jourdain. They were 15,[1] 16, 16, and 22, respectively. At about 2:00 a.m., the foursome was in the parking lot of a south Minneapolis grocery store and observed C.D. (a female) and A.K. (a male) emerge, carrying groceries.

1 Appellant was 15 at the time of the offenses and the interrogation, but he was 17 at the time of trial and is now 18.

Appellant and his accomplices decided to rob the couple, so they followed them. When C.D. and A.K. parked near their apartment, the foursome proceeded to rob them. Appellant brandished a gun during the robbery. He and his accomplices took C.D.'s and A.K.'s wallets and keys and ordered the couple to get in the trunk of the car that the foursome was driving. They drove around, looking for an ATM, and took money out of C.D.'s bank account, using her debit card and the PIN they had obtained from her.

The foursome then decided to rob C.D. and A.K.'s apartment. Appellant and his accomplices learned from their two captives that there was a third roommate, S.D. (a female), who would be sleeping in the living room. S.D. awoke to find the foursome in the apartment. They bound S.D.'s hands, covered her head with a blanket, and told her that they had shot her roommates. Appellant's three companions left the apartment carrying stolen items. Appellant proceeded to fondle S.D., digitally penetrate her, penetrate her with a sex toy that he found in a bedroom, and have intercourse with her twice.

After stealing items from the apartment, appellant and his accomplices removed C.D. and A.K. from the trunk, ordered them to remove their clothing, and then forced them back into the trunk. Appellant fired three shots through the trunk lid; one bullet grazed C.D.'s arm and another struck her in the right thigh and lodged in her leg. The foursome subsequently left C.D. and A.K., who were still naked, on the shoulder of I–35W and went to R.G.'s house to unload the stolen items. C.D. and A.K. were able to flag down a passing motorist and subsequently called the police.

***2** The police quickly focused their investigation on appellant and his cohorts. Appellant was arrested at a friend's home during the early morning hours of October 15. The officers who arrested appellant were in plain clothes. They handcuffed appellant and placed him in the back of an unmarked vehicle. Appellant testified that he asked the arresting officers, as they took him into Minneapolis City Hall, if "my dad could be present, like, he can be with me, and they said he will." Appellant also saw his father present inside City Hall as the officers walked him through the lobby.

Appellant was interrogated by two Minneapolis police officers who were not present at appellant's arrest or when he was brought into City Hall. The interrogation was video recorded, and a partially redacted version of the interrogation was played for the jury at appellant's trial.

At the beginning of the interrogation, the officers told appellant that they had a search warrant for his DNA, and they took two cheek-swab samples from him. The officers also verified appellant's family and living situation, including that he lived with his father. Appellant did not, at the mention of his father, request his father's presence. The officers then informed appellant why he was being interrogated and obtained a purported *Miranda* waiver:

Q. Do you know why you're down here, Amani?

A. You tell me.

Q. Huh?

A. You tell me.

Q. Well, I'm telling you that, because you're down here because you were involved in some incidences that occurred late Sunday night, early Monday morning. We've been talking to a lot of people today. We've been up since, almost twenty-four hours doing this, talking to people and we've talked to just about everybody. They gave us their stories of what happened, what they recall and they all went ahead and spoke for themselves and here's your opportunity. I'm sure you have questions for us and want to ask us and we might want to ask you some questions and clear things up. Those guys want, you don't want those guys speaking for Amani. Only Amani speaks for Amani, right? You want them guys to determine what's going to happen to your future? Here's the deal. Because you were brought down here and you are not free to leave right now, I'm going to read you your rights. Have you been read your rights before, Amani? You have the right to remain silent. Anything you say can and will be used against you in court. You have the right to an attorney. You can have an attorney present now or any time during questioning. If you cannot afford an attorney, one will be provided for you without cost. Do you understand what that all means?

A. Yes.

Q. You have the right to remain silent. What does that mean to you? Amani?

A. I ain't got to talk to you without a lawyer.

Q. Okay. You don't have to talk to us without a lawyer. That's right.

And if you cannot afford a lawyer, one will be provided for you. Do you know what that means?

*3 A. Yeah.

Q. Okay. Having all those rights in mind, we want to talk to you and ask you some questions about what happened, what these people are saying. What we hear from other people that are involved.

A. What people?

Q. Well, let me get by this before I can talk to you. I got to ask you, do you want to talk to us about this? Can we ask you some questions?

A. Yeah.

Q. The incident they say you were involved in, we've talked to everybody involved. You guys were involved in an incident down south Minneapolis that occurred, like I said, early on Monday morning. And we know all about it. We know who all the players are. And we know what happened. We want your side of the story.

A. All right. All right, can I get a cigarette from anybody?

During the course of the interrogation, appellant confessed to the rape of S.D., kidnapping C.D. and A.K., taking money from an ATM using C.D.'s debit card, and shooting into the occupied trunk. At various points, he also tried to place blame on others for either committing the acts or forcing him to commit them. At the end of the interrogation, when the officers were preparing to transport him to the juvenile detention center, appellant asked about his father: "Can I see my dad real quick? ... Can I go see my dad?"

A grand jury returned an indictment on 15 relevant counts: [2]

[2] The grand jury also indicted appellant on three counts related to crimes against a fourth victim, B.B.B. Those counts were tried separately, and appellant's separate appeal to the supreme court is pending. *State v. Fardan,* No. A08–1425 (Minn. argued Apr. 7, 2009).

1. First-degree aggravated robbery (C.D.)
2. First-degree aggravated robbery (A.K.)
3. Second-degree assault (C.D.)
4. Second-degree assault (A.K.)
5. Kidnapping, to facilitate the commission of a felony (C.D.)
6. Kidnapping, to facilitate the commission of a felony (A.K.)
7. Kidnapping, to terrorize the victim or another (C.D.)
8. Kidnapping, to terrorize the victim or another (A.K.)
9. Kidnapping, to facilitate the commission of a felony (S.D.)
10. First-degree burglary, with a dangerous weapon
11. First-degree burglary, involving an assault
12. First-degree criminal sexual conduct, with a dangerous weapon (S.D.)
13. First-degree criminal sexual conduct, with fear of great bodily harm (S.D.)
14. First-degree criminal sexual conduct, with force or coercion (S.D.)
15. Kidnapping, to terrorize the victim or another (S.D.)

The district court certified appellant to stand trial as an adult. The certification was appealed to this court, and we affirmed. *In re Welfare of A.J.F.,* No. A06–303, 2007 WL 92843 (Minn.App. Jan.16, 2007). The district court denied appellant's motions to suppress his statement to the police and to allow him to present evidence of FAE for the purposes of showing that he committed his acts under duress and that his statement to the police was not voluntary.

A jury rendered guilty verdicts on all counts, except first-degree criminal sexual conduct with a dangerous weapon (count 12); first-degree criminal sexual conduct with fear of great bodily harm (count 13); and kidnapping S.D. to terrorize

her or another (count 15). The jury also returned a guilty verdict on false imprisonment of S.D., which was a lesser-included charge of kidnapping S.D. to terrorize her.

***4** The district court imposed an aggregate sentence of 486 months with 777 days' credit, a ten-year conditional-release term, and restitution. This appeal follows.

DECISION

I.

Appellant's principal argument is that his *Miranda* waiver was not knowing, intelligent, and voluntary and that the district court erred by not suppressing the statement he gave after this purportedly defective waiver. Whether a juvenile's *Miranda* waiver is knowing, intelligent, and voluntary is a fact question that depends on the totality of the circumstances. *State v. Jones,* 566 N.W.2d 317, 324 (Minn.1997). The district court's legal conclusion is reviewed de novo, but its findings of fact surrounding the purported waiver are reviewed for clear error. *State v. Burrell,* 697 N.W.2d 579, 591 (Minn.2005).

Among the factors to be considered are the juvenile's age, maturity, intelligence, education, prior criminal experience, and ability to comprehend; the presence or absence of parents; and the circumstances of the interrogation and detention themselves, such as any physical deprivations, the length and legality of the detention, the lack of or adequacy of warnings, and the nature of the interrogation. *Burrell,* 697 N.W.2d at 595; *State v. Hogan,* 297 Minn. 430, 440, 212 N.W.2d 664, 671 (1973); *see also Fare v. Michael C.,* 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979) (stating that the inquiry is concerned with whether the juvenile "has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights").

1. Age and maturity

Appellant was 15 at the time of the interrogation. The supreme court has upheld *Miranda* waivers made by 15 year olds. *E.g., State v. Ouk,* 516 N.W.2d 180, 185 (Minn.1994); *Hogan,* 297 Minn. at 441, 212 N.W.2d at 671. Nothing in the record indicates that appellant was an immature 15–year–old. This factor weighs in favor of admitting the statement.

2. Physical deprivations; length and legality

Appellant does not assert that he suffered any significant physical deprivations, nor that his detention was illegal or improperly long. These factors weigh in favor of admitting the statement.

3. Education, intelligence, and ability to comprehend

Appellant asserts that he has a mental deficiency as a result of his diagnosed FAE. But the psychologists' report on which he relies concludes that "[o]verall, [appellant] demonstrates cognitive abilities within the average range." And on specific tests that measure skills relevant to making a *Miranda* waiver —general cognitive functioning, executive functioning, and language reasoning and judgment—appellant scored within the normal range for his age group. Appellant relies on the fact that, on some of the tests, he measured near the low end of the average range. But "average" is a range on these tests, not a specific point. The report does not indicate that he was below average, just at the low end of average. Its main recommendations all relate to providing him with structure and guidance as to appropriate behaviors. As the district court concluded, "The report fairly indicates that [appellant] has the intelligence and capacity to understand the warnings that were given to him." This factor weighs in favor of admitting the statement.

4. Prior criminal experience

***5** Appellant argues he has no prior criminal experience, only prior juvenile-justice experience. And because the juvenile-justice system is rehabilitative rather than punitive and adversarial, *State v. Loyd,* 297 Minn. 442, 445, 212 N.W.2d 671, 674 (1973), he argues that juvenile-justice experience with *Miranda* should not be weighed against him.

The parties stipulated to the district court that appellant had previously been provided a *Miranda* advisory by his school principal before being interviewed; the district court observed that there was no detail of the alleged offense, but that appellant "is not a complete stranger to the justice system."

Appellant seemed quite comfortable with the *Miranda* advisory, even restating the warning in his own terms. This demonstration of his knowledge and understanding of his rights supports the determination that he made a valid waiver. *See Burrell,* 697 N.W.2d at 608 (Hanson, J., concurring and dissenting). This factor weighs in favor of admitting the statement.

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5. Nature of the interrogation

The nature-of-the-interrogation factor is concerned with psychological tactics such as deception, trickery, threats, and cajolement used to persuade a suspect to waive his *Miranda* rights. *Burrell,* 697 N.W.2d at 596 (majority opinion). Appellant argues that the interrogating officers put psychological pressure on him, specifically challenging his "manliness" if he did not talk to them. But the record does not support this contention. The officers did tell appellant that they had just spoken to others, and they suggested that appellant might not want to let other suspects speak for him. This is not a challenge to his manliness. Nor does it appear that appellant was intimidated or coerced by the officers. Instead, he was argumentative from the outset. This factor weighs in favor of admitting the statement.

6. Lack or adequacy of warnings

Appellant argues he was inadequately warned because he was not explicitly warned of the possibility of adult criminal prosecution. Although the best practice may be to explicitly warn a juvenile of possible adult prosecution, the supreme court has rejected the creation of a per se rule that would require an explicit warning. *Ouk,* 516 N.W.2d at 185. Awareness of potential adult criminal consequences can be imputed to a juvenile. *Id.* Appellant contends that such awareness cannot be imputed to him, in part because his arrest lacked drama or a show of force. While he was arrested by plainclothes officers and placed in an unmarked vehicle, it is also significant that he was arrested in the middle of the night, handcuffed, taken to City Hall rather than the juvenile detention center, and aggressively interrogated after providing a DNA sample pursuant to a search warrant. These are not the circumstances of a non-adversarial juvenile interview. *See In re Welfare of G.M.,* 542 N.W.2d 54, 61 (Minn.App.1996) (noting that awareness of potential criminal responsibility could be imputed to a juvenile who was interrogated at a police department by a police officer), *aff'd,* 560 N.W.2d 687 (Minn.1997). In addition, appellant volunteered his involvement in the rape after the officers told him only that they were interested in some incidents that had occurred early Monday by a south Minneapolis grocery store. This factor weighs in favor of admitting the statement.

7. Presence or absence of parents

***6** Appellant argues that the police effectively denied his attempt to protect his rights when he asked the arresting officers to see his father. He contends that knowledge of his earlier request should be imputed to the interrogating officers and that their failure to bring his father into the interrogation room was an affirmative effort to prevent him from getting advice about making a *Miranda* waiver.

The supreme court has repeatedly rejected a per se rule requiring parental presence at interrogations of juveniles. *Burrell,* 697 N.W.2d at 597; *Hogan,* 297 Minn. at 440, 212 N.W.2d at 671. Although a request for a parent may, in the totality of the circumstances, operate to invoke the right to remain silent, it does not always do so. *Fare,* 442 U.S. at 725, 99 S.Ct. at 2572. As the Supreme Court has recognized, only the request for a lawyer automatically triggers an invocation of rights because lawyers play a unique role in our system, and their training in the law positions them to assist the accused. *Id.* at 719, 99 S.Ct. at 2569.

Appellant contends that the police should be admonished for ignoring his request to speak with his parents, citing *State v. Lemieux,* 726 N.W.2d 783, 789 (Minn.2007), for the proposition that the arresting officers' knowledge of his request must be imputed to the interrogating officers. We disagree.[3] First, *Lemieux* is an emergency-aid warrantless-search case, not a *Miranda* case. Unlike the law-enforcement function served by interrogation, emergency-aid searches serve a "community-caretaking function." *Lemieux,* 726 N.W.2d at 787. Second, the fact that a juvenile has requested parental presence is not dispositive in the way that a request for a lawyer would be. As *Fare* recognized, there is a difference between lawyers and laypersons.

3 We observe that a small number of jurisdictions, not including Minnesota, have adopted the imputation rule that appellant proposes. *See, e.g., United States v. Scalf,* 708 F.2d 1540, 1544–45 (10th Cir.1983); *People v. Medina,* 71 Ill.2d 254, 16 Ill.Dec. 447, 375 N.E.2d 78, 80 (Ill.1978); *State v. Arceneaux,* 425 So.2d 740, 744 (La.1983); *State v. Middleton,* 135 Wis.2d 297, 399 N.W.2d 917, 924 n. 7 (Wis.Ct.App.1986), *overruled on other grounds by State v. Anson,* 282 Wis.2d 629, 698 N.W.2d 776, 793 (Wis.2005). It is not our place to make a dramatic change in constitutional interpretation. *State v. Rodriguez,* 738 N.W.2d 422, 431–32 (Minn.App.2007), *aff'd,* 754 N.W.2d 672, 675 (Minn.2008).

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Appellant's single request for his father, which the district court noted was established only by appellant's own testimony, was simply not enough to indicate that he was invoking his right to remain silent. This is not *Burrell*, where the accused asked for his mother 13 times. 697 N.W.2d at 595. At most, appellant asked for his father twice, several hours apart—once upon entering City Hall and once at the conclusion of the interrogation. Nor is this a situation where appellant did not believe that he could ask for his father. Appellant, a 15–year–old who could not legally smoke, had the self-assurance to ask two police officers for a cigarette at the outset of the interrogation. If appellant had wanted his father's presence, there is no reason to conclude that he would not have requested it. This factor weighs in favor of admitting the statement.

Our review of the record leads us to conclude, based on the totality of the circumstances, that appellant had the capacity to understand the warnings given him, the nature of his rights, and the consequences of waiving them. We therefore affirm the district court's determination that appellant's *Miranda* waiver was valid.

II.

***7** Appellant argues the district court erroneously excluded (a) evidence that R.G. testified only because of the prosecutor's threats against him and (b) expert testimony regarding FAE. Evidentiary rulings will only be reversed if the district court clearly abused its discretion. *State v. Amos,* 658 N.W.2d 201, 203 (Minn.2003). But the exclusion of defense evidence is subject to harmless-error analysis, and if "there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, then the erroneous exclusion of the evidence is prejudicial." *State v. Post,* 512 N.W.2d 99, 102 (Minn.1994); *see also State v. Ferguson,* 742 N.W.2d 651, 656–57 (Minn.2007) (stating Confrontation Clause violations are subject to harmless-error analysis).

A. R.G.'s testimony

To support his argument that R.G. was threatened by the prosecutor, appellant selectively quotes from the trial transcript. But the full exchange between R.G. and the district court provides a more complete picture: R.G. spontaneously stated that he did not want to testify, and the prosecutor had recently visited him in jail to say that she would withdraw his plea agreement if he did not testify. The district court reminded R.G. that he had agreed to testify as part of the plea agreement and confirmed that a public defender had visited R.G. the previous day to talk about his upcoming testimony. After the prosecutor and appellant's counsel argued to the court about what limits, if any, should be placed on appellant's ability to cross-examine R.G., the district court decided "to order [appellant] not to go into what [R.G.] contends was discussed in the jail with [the prosecutor] present until [appellant has] completed the rest of [his] examination." After appellant cross-examined R.G., the district court again denied appellant's "request to examine him about any conversation that might have occurred in the jail."

Cross-examination of the state's witnesses is one of the primary interests protected by the Confrontation Clause. *Ferguson,* 742 N.W.2d at 656. Cross-examination is the principal means of testing a witness's believability and the truthfulness of the witness's testimony. *Id.* Part of this testing is exposing the witness's biases or motivation for testifying. *Id.* But "the Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Kentucky v. Stincer,* 482 U.S. 730, 739, 107 S.Ct. 2658, 2664, 96 L.Ed.2d 631 (1987) (quotation omitted).

Appellant had, and took advantage of, the opportunity to cross-examine R.G. about his biases and motivations for testifying. R.G. was specifically asked whether one of the conditions of his plea agreement was that he testify at his co-defendants' trials. Appellant also confirmed that R.G. "could have gotten a lot more time" if he had rejected a plea agreement and gone to trial. Appellant asked R.G. whether, due to the state's motion for an upward departure, he could have spent the rest of his life in prison if he had gone to trial and lost; R.G. responded, "Guaranteed." And at the end of this line of questioning, appellant reinforced the terms of the guilty plea: "And part of this deal was to testify, isn't that correct?" Based on this record, the district court acted within its discretion by ruling that appellant could not inquire about the alleged jailhouse conversation.

B. FAE evidence

***8** Appellant sought to introduce FAE evidence for two purposes: (1) to establish his defense of duress by helping the jury see "the whole man" and (2) to undermine the apparent voluntariness of his statement to the police.

Appellant's challenge is based solely on alleged error under Minn. R. Evid. 702 and the *Frye–Mack* standard for expert testimony. But the district court determined that appellant's proposed expert evidence was excludable under both rule 702 and rule 403.

Expert testimony is subject to both rule 403 and rule 702. *State v. Koskela,* 536 N.W.2d 625, 629 (Minn.1995). Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Minn. R. Evid. 403. Rule 702 permits the admission of expert testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. But the expert opinion must have "foundational reliability"; and if it involves a novel theory, "the underlying scientific evidence [must be] generally accepted in the relevant scientific community." *Id.*

The district court's 702 ruling was based on an absence of scientific foundational reliability for the proposed testimony that appellant, as a result of FAE, is "impulsive and easily talked into difficult behaviors by [his] peers." First, the report on which the testimony would be based did not support a factual conclusion, independent of FAE, that appellant behaves in that manner. The report does not indicate that the authoring psychologists observed him in the presence of his peers. Rather, the behavioral and emotional evaluations were based on reports from appellant's father, who indicated that appellant was getting in fights at school, and on the psychologists' own interactions with him, which would reflect how appellant responded to adult direction, not peer influence. Second, the report did not draw any connection between FAE and the alleged behavioral tendency for suggestibility. Although appellant criticizes the district court for becoming an amateur scientist by questioning the report, the district court properly determined that the proposed testimony lacked the required "foundational reliability."

The district court's rule 403 conclusion was based on its concerns that the proposed testimony would be "unfairly prejudicial to the State" and have a "tendency to confuse the jury." "[E]xpert testimony is generally not admissible during the guilt phase of a trial to inform the fact-finder about the general effects of a mental illness." *State v. Bird,* 734 N.W.2d 664, 673 (Minn.2007). The supreme court has recognized an exception for a defendant with "a past history of mental illness" that "helps explain 'the whole man' as he was before the events of the crime." *Id.* (quotation omitted). But appellant does not have "a past history of mental illness," at least not one that is evidenced by the report on which he relies. The report places the FAE diagnosis on Axis III and indicates an Axis I diagnosis of attention deficit hyperactivity disorder and no Axis II diagnosis. Axis III is used to describe general medical conditions that may affect the mental conditions reported on Axes I and II. Am. Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders* 27–29 (4th ed. Text Revision 2000). And it is on Axes I and II that one finds the disorders usually relied upon by criminal defendants to evade culpability. *Compare id.* at 28–29 (listing schizophrenia on Axis I and schizoid personality disorder on Axis II) *with Koskela,* 536 N.W.2d at 629–30 (discussing proposed evidence of schizoid personality disorder), *and State v. Provost,* 490 N.W.2d 93, 97 n. 1 (Minn.1992) (noting proffered diagnosis of schizophrenia).

***9** Even if appellant has a history of mental illness, the district court's concerns about unfair prejudice and jury confusion are well-grounded. The supreme court has long been concerned about the possibility of jury confusion and the use of psychiatric opinion testimony as a backdoor way of adopting diminished-capacity and diminished-responsibility defenses. *Provost,* 490 N.W.2d at 100 (stating that "if psychiatric opinion testimony is admitted on the issue of whether the defendant *did or didn't* have the requisite guilty mind, the jury will inevitably take the testimony as an invitation to consider whether the defendant *could or couldn't* have a guilty mind"). The proposed FAE evidence simply comes too close to inviting the jury to exonerate him on the basis of diminished capacity or diminished responsibility. No jury instruction could undo that harm. *See id.* ("The law cannot giveth psychiatric testimony on the one hand and taketh it away with the other.")

We therefore affirm the district court's exclusion of appellant's proposed FAE testimony.

III.

Appellant argues the district court improperly convicted him of multiple offenses against the same victim. He cites three convictions and argues that they must be vacated: kidnapping C.D. to terrorize her (count 7), which is duplicative of the conviction of kidnapping her to facilitate the commission of a felony (count 5); kidnapping A.K. to terrorize him (count 8), which is duplicative of the conviction of kidnapping him to facilitate the commission of a felony (count 6); and burglary

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involving an assault (count 11), which is duplicative of the conviction of burglary with a dangerous weapon (count 10).

Under Minn.Stat. § 609.04 (2004), "a defendant cannot be convicted twice of the same offense ... based on the same act or course of conduct." *State v. Hodges,* 386 N.W.2d 709, 710 (Minn.1986). The statute also "bars the conviction of a defendant twice for the same offense against the same victim on the basis of the same act." *State v. Ture,* 353 N.W.2d 502, 517 (Minn.1984). Although a conviction that is improper under section 609.04 must be vacated, the underlying finding of guilt remains intact. *State v. Pflepsen,* 590 N.W.2d 759, 766 (Minn.1999).

Because the convictions on counts 7, 8, and 11 are duplicative and violate section 609.04, we reverse in part and remand to the district court to correct this error.

IV.

Appellant argues the district court improperly sentenced him on the second-degree assault convictions concerning C.D. and A.K. (counts 3–4) because the assaults were part of the same behavioral incident as the aggravated robberies (counts 1–2). Whether offenses are part of the same behavioral incident is a fact determination we review for clear error. *State v. Butterfield,* 555 N.W.2d 526, 530 (Minn.App.1996), *review denied* (Minn. Dec. 17, 1996).

The legislature has provided that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn.Stat. § 609.035, subd. 1 (2004). "Whether multiple offenses arose out of a single behavior incident depends on the facts and circumstances of the particular case." *State v. Bookwalter,* 541 N.W.2d 290, 294 (Minn.1995). In making this determination, a court "must consider whether the offenses (1) arose from a continuous and uninterrupted course of conduct, (2) occurred at substantially the same time and place, and (3) manifested an indivisible state of mind, or were motivated by a single criminal objective." *State v. Suhon,* 742 N.W.2d 16, 24 (Minn.App.2007), *review denied* (Minn. Feb. 19, 2008).

***10** Appellant seizes on the opening line of a footnote in the district court's findings on aggravating factors: "In this case, [appellant] has been convicted of multiple counts evolving from a continuous course of conduct." But the footnote continues:

> These circumstances present issues of attribution of particular facets of conduct as aggravating factors of various counts. Thus, for example, whether particular acts of cruelty should be attributed to one count as opposed to two or more counts is not always capable of easy resolution.

The district court was not using the "continuous course of conduct" language with regard to the *Suhon* considerations or a section 609.035 analysis. Rather, the district court was trying to explain why it found particular cruelty as an aggravating factor for only the kidnapping offenses, even though appellant's cruel behavior might have aggravated (from the victims' perspectives) the assault, burglary, and robbery offenses.

Further, the second and third *Suhon* considerations weigh against a determination that the assault and aggravated robberies were part of the same behavioral incident. Appellant fired blindly into the trunk, risking hitting A.K. and C.D. and actually hitting C .D., well after the robberies were complete. Time had passed, and the vehicle was no longer near the victims' apartment. Nor did the assaults share a criminal objective with the robberies; there was no purpose in shooting wildly toward A.K. and C.D. except to inflict fear upon them.

The district court's treatment of the aggravated robberies and assaults as not part of a single behavioral incident is not clearly erroneous.

V.

Appellant argues that his 486–month aggregate sentence unfairly exaggerates the criminality of his conduct. When a district court imposes multiple sentences, it may not "unfairly exaggerate the criminality of the defendant's conduct." *State v. Williams,* 337 N.W.2d 387, 390 (Minn.1983) (quotation omitted). In reviewing an aggregate sentence for unfair exaggeration, we compare the defendant's sentence with those of other offenders. *Id.* Appellant fails to address how his aggregate sentence unfairly exaggerates the criminality of his

conduct or what an appropriate sentence would be. He simply asks us to "modify and reduce" the sentence based on our experience reviewing sentences.

But as the state argues, "it is virtually impossible to exaggerate the criminality of [a]ppellant's brutal, terroristic conduct." Appellant chose his victims at random, followed them home, robbed them, forced them into the trunk of a vehicle, and threatened them with further violence while driving them around Minneapolis. He took them back to their home in order to rob it. When there, he bound S.D., told her that her roommates had been shot, and repeatedly raped her. He randomly and blindly shot into the trunk where A.K. and C.D. had been placed, and he left them naked on the side of a busy interstate highway.

***11** The district court did not reach its sentence in haste. "I've had a lot of time to think about this and I've devoted a lot of time to thinking.... I've done a number of different calculations and used different rationales.... [Appellant] committed serious, violent offenses and ... now he's going to have to pay the price for doing that." The district court was well aware that, under the sentence it was imposing, appellant could expect to spend at least 25 years behind bars. Appellant's aggregate sentence does not unfairly exaggerate the criminality of his conduct.

Affirmed in part, reversed in part, and remanded.

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Ashimiyu Gbolahan ALOWONLE, Appellant.

No. A14–1308.
|
Aug. 24, 2015.
|
Review Denied Nov. 17, 2015.

Hennepin County District Court, File No. 27–CR–13–40770.

Attorneys and Law Firms

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

Considered and decided by HOOTEN, Presiding Judge; HALBROOKS, Judge; and TOUSSAINT, Judge. *

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

UNPUBLISHED OPINION

HOOTEN, Judge.

***1** Appellant was convicted of multiple counts of being a prohibited person in possession of a firearm and unlawful possession of a firearm for the benefit of a gang. On appeal, appellant argues that: (1) the evidence is insufficient to support the convictions because the circumstances proved do not eliminate the rational hypothesis that appellant did not constructively possess the firearms; (2) the prosecutor committed misconduct by misstating the presumption of innocence during his closing argument; (3) the district court erred in admitting a photograph of appellant's tattoo as character and propensity evidence; (4) the district court's jury instructions materially misstated the doctrine of constructive possession; (5) the district court erred by refusing to suppress testimony as a sanction for the state's intentional discovery violation; and (6) the district court unlawfully convicted him of a lesser-included offense. We affirm in part, reverse in part, and remand.

FACTS

In connection with the December 2013 execution of a search warrant and the recovery by police of several firearms, a large amount of ammunition, and cocaine from a Minneapolis residence, respondent State of Minnesota charged appellant Ashimiyu Gbolahan Alowonle with one count of being a prohibited person in possession of a firearm. The state amended its complaint on May 2, 2014, shortly before trial, and charged appellant with a total of seven counts: three counts of being a prohibited person in possession of a firearm for the benefit of a gang, each connected to one of the three locations in the residence where police found firearms (counts 1–3); three counts of being a prohibited person in possession of a firearm, each similarly connected to a location in the residence where firearms were discovered (counts 4–6); and one count of fifth-degree possession of a controlled substance (count 7). A jury trial was held in May 2014, and the following facts were adduced at trial.

On November 3, 2013, Tyrone Washington was shot and killed at a nightclub in downtown Minneapolis. Washington had been a leader of 1–9 Block Dipset, a gang based in north Minneapolis. Appellant, a fellow member of 1–9 Block Dipset and a close friend of Washington, witnessed the shooting and carried Washington's body out of the nightclub. According to prison telephone calls between appellant and incarcerated members of 1–9 Block Dipset shortly after Washington's death, appellant sought to violently retaliate against the rival gangs he believed to be responsible for the murder. As of May 2014, no one had been charged in connection with Washington's murder.

The key witness for the prosecution was B.T., who agreed to testify against appellant as part of a plea bargain with the state. B.T. was not a member of 1–9 Block Dipset, but she had known appellant "forever" and began letting appellant and

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other gang members visit her residence in north Minneapolis around the end of October 2013. Appellant and other gang members would often come and go from the house as they pleased, although B.T. mainly had contact with appellant. Appellant did not have a key to B.T.'s residence, but another gang member did. Because B.T. had young children, she sometimes became irritated with the amount of activity at her residence and at one point offered to move out and let appellant have the house.

*2 B.T. had previously seen appellant in possession of a gun and had overheard appellant instruct someone to meet him to get a gun. But, she claimed ignorance as to "who was putting what where" regarding firearms that were stored in her house, although at one point she told appellant to have people who brought firearms into her house to place them in a cabinet drawer. B.T. further testified that she had told the prosecutor that appellant was responsible for putting guns in the basement. However, she clarified at trial that she also saw other gang members going into the basement and could not verify that appellant was the only individual responsible for those firearms. She volunteered that appellant was "responsible for his friends," that she had nothing to do with the firearms in the basement, and that any firearms in a dining room cabinet were accessible to any member of the gang.

On December 2, 2013, Minneapolis police pursued an armed robbery suspect into B.T.'s residence. The police searched the home, discovering one firearm in the basement and a box of ammunition in a purse in B.T.'s bedroom. B.T., the armed robbery suspect, and at least one other member of 1–9 Block Dipset were present during this search, but appellant was not at the residence at that time.

Also in early December, a confidential informant told police that 1–9 Block Dipset was using B.T.'s residence to store weapons and ammunition in preparation for its retaliation against a rival gang for the death of Washington. The informant identified three gang members, including appellant, who were using the residence for this purpose, and further provided that appellant was responsible for supplying the gang with firearms. Minneapolis Police Officer George Peltz prepared a search warrant for the residence based on this information on December 5, but police did not immediately execute it. Officer Peltz indicated that he instead periodically conducted surveillance of the house before executing the warrant, during which he observed several individuals entering and leaving the residence but did not see appellant.

Officers executed the search warrant on the evening of December 12, 2013, by forcefully gaining entrance into the residence. They encountered eight or nine adults inside, including appellant and B.T. Upon the officers' entry, appellant fled from the house's dining room into the kitchen and was then detained. Once the residence was secured, officers searched the house and found several firearms. In a bedroom on the first floor, near the kitchen, one of the officers observed the butt of a handgun sticking out of the pocket of a jacket on the bed. The firearm was recovered by police and determined to be a 9mm handgun. Police also found a set of keys in the jacket, which contained two electronic fobs that Officer Peltz later determined were linked to appellant's membership at the public library and a gym. B.T. testified that this jacket belonged to appellant, although others sometimes wore it, and she previously told officers that appellant had been wearing this jacket when he arrived at the residence that evening, "shortly" before police executed the search warrant. The prosecution also introduced a photograph from November 30, 2013, that showed appellant wearing the jacket. Police later found cocaine in the jacket when it was being inventoried.

*3 Officers discovered more firearms elsewhere in the residence. Three handguns were found in the basement of the house: one in the ceiling rafters and two in a box underneath a set of stairs. Officers found three more handguns in two drawers of a built-in cabinet in the dining room. In a detached garage next to the residence, police also found two backpacks containing a large amount of ammunition.

Police conducted forensic testing on the various items seized. No fingerprint evidence was obtained from the firearms, and the latent fingerprints obtained from the ammunition and other items found in the garage did not match appellant but did match several other individuals. DNA testing revealed a mixture of DNA on each of the firearms, but appellant was only included as a possible source of DNA for the handgun that was found in the jacket in the back bedroom. However, due to the mixture of DNA on that handgun, the forensic scientist testified that more than 84% of the general population could possibly have contributed DNA to the sample in question.

The jury returned a verdict of guilty on the six firearm-related charges, but found appellant not guilty of fifth-

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degree possession of a controlled substance. The district court sentenced appellant to concurrent 72–month sentences for each of his convictions under counts 1–3 and 60–month sentences for each of his convictions under counts 4–6, and provided that counts 4–6 "merged" into counts 1–3. This appeal followed.

DECISION

I.

Appellant argues that the evidence regarding his constructive possession of the firearms seized by police is insufficient to support his convictions. Appellant challenges only the possession elements of his three convictions under Minn.Stat. § 624.713, subd. 1(2) (2012) (prohibiting possession of firearms by a person convicted of a crime of violence) and his three convictions under Minn.Stat. § 609.229, subd. 2 (2012) (prohibiting the commission of a crime for the benefit of a criminal gang). "To obtain a conviction under [section 624.713], the state must establish either actual or constructive possession of a firearm." *State v. Porter,* 674 N.W.2d 424, 427 (Minn.App.2004).

It is uncontroverted that appellant was not in actual possession of the firearms police discovered at B.T.'s residence. The state thus had to prove appellant's constructive possession of the firearms by showing that either (1) "the prohibited item was found 'in a place under defendant's exclusive control to which other people did not normally have access,' or (2) if the prohibited item was found 'in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.' " *State v. Salyers,* 858 N.W.2d 156, 159 (Minn.2015) (quoting *State v. Florine,* 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975)). Because the state does not argue, and the record does not show, that the firearms were in a place under appellant's exclusive control, we need only consider whether the state proved beyond a reasonable doubt that there was a "strong probability" that appellant exercised "dominion and control" over the firearms found at B.T.'s house. *See State v. Sam,* 859 N.W.2d 825, 833 (Minn.App.2015). "We look to the totality of the circumstances in assessing whether or not constructive possession has been proved." *State v. Denison,* 607 N.W.2d 796, 800 (Minn.App.2000), *review denied* (Minn. June 13, 2000).

***4** In support of its possession charges against appellant, the state presented circumstantial evidence of appellant's constructive possession of the firearms. We apply a two-step analysis when reviewing the sufficiency of circumstantial evidence: (1) we identify the circumstances proved; and (2) we then "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *State v. Silvernail,* 831 N.W.2d 594, 598–99 (Minn.2013) (quotations omitted). We first examine what circumstances were proved at trial. "In identifying the circumstances proved, we defer, consistent with our standard of review, 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 [s]tate." *State v. Al–Naseer,* 788 N.W.2d 469, 473 (Minn.2010) (quotations omitted). In short, "we consider only those circumstances that are consistent with the verdict." *Silvernail,* 831 N.W.2d at 599.

The circumstances proved at trial are: (1) appellant was a high-ranking member of the 1–9 Block Dipset gang; (2) a fellow gang leader had recently been murdered and appellant had threatened retaliation against the gangs he believed were responsible; (3) at the end of October 2013, B.T. began letting appellant and other gang members visit her home and knew that they might keep firearms there; (4) B.T. had seen appellant with a gun but had not seen him store firearms in the house; (5) B.T.'s home was searched by police on December 2, 2013, who recovered one firearm and some ammunition but did not encounter appellant; (6) police obtained a search warrant for B.T.'s residence after learning that the gang was storing guns there and that appellant was responsible for supplying the weapons; (7) police conducted surveillance at B.T.'s house prior to executing the warrant and did not observe appellant entering or exiting the house; (8) upon executing the warrant on December 12, 2013, police found appellant and several other adults inside the home; (9) appellant tried to flee toward the back of the house when police first entered; (10) police recovered one handgun and a small bag of cocaine from a jacket in a back bedroom; (11) B.T. had seen appellant in this jacket shortly before police arrived, and the jacket contained key fobs that were linked to appellant; (12) police recovered three handguns from the house's basement and three handguns from a dining room cabinet, along with ammunition; (13) DNA testing indicated that appellant was a potential source of the DNA found on the handgun recovered from the jacket in the bedroom; and (14) forensic testing did not link appellant to the other firearms or ammunition.

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Next, we determine whether these circumstances proved are both consistent with guilt and inconsistent with any rational hypothesis *except* that of guilt. *Id.* "Circumstantial evidence must form a complete chain that, as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Hanson,* 800 N.W.2d 618, 622 (Minn.2011). We give no deference to the jury's choice between reasonable inferences. *Al–Naseer,* 788 N.W.2d at 474. However, a rational hypothesis must "point to evidence in the record that is consistent" with the theory and be supported by more than "mere conjecture." *State v. Tscheu,* 758 N.W.2d 849, 858 (Minn.2008) (quotation omitted).

Counts 1 and 4: Firearm in the jacket in the back bedroom

***5** The circumstances proved are consistent with the inference that there is a "strong probability" that appellant consciously had "dominion and control" over the handgun found in the jacket in the back bedroom. *See Salyers,* 858 N.W.2d at 159 (quotation omitted). Police found appellant inside the house, and he fled in the general direction of the back bedroom when they first entered. *Cf. State v. Carr,* 311 Minn. 161, 163, 249 N.W.2d 443, 444–45 (1976) (noting that the evidence supported possession when defendant "rushed toward the area where" the contraband was located). More significantly, there was testimony that this jacket belonged to appellant and that he had been wearing it just before the police arrived. This evidence was further corroborated by the presence of keys inside the jacket with electronic fobs linked to appellant. Appellant was also known to possess guns, and DNA testing linked him to this gun, albeit weakly. Given this circumstantial evidence, there is a strong probability that appellant had dominion and control over the handgun found in the jacket.

Moreover, appellant's alternative hypotheses regarding the circumstances of this firearm are unreasonable. His first proposed hypothesis is that he had no knowledge that this gun existed. But, given the presence of this gun in a jacket so strongly linked to him and just a few rooms away, this hypothesis is unreasonable. He also argues that even if he knew about the gun, another gang member, and not him, could have been exercising conscious dominion and control over the firearm when the police arrived. While it is true that there were several people in the house, appellant had just been seen wearing the jacket and his keys were inside of it. The location of contraband near clothing or other personal items belonging to a defendant is sufficient to establish constructive possession. *See State v. Dickey,* 827 N.W.2d 792, 797 (Minn.App.2013) (collecting cases). No other evidence linked the jacket or the firearm to anyone else at that time, beyond its general location. Because appellant's alternative hypotheses are unreasonable, we conclude that there is sufficient evidence to uphold his convictions of counts 1 and 4, relating to appellant's possession of the handgun found in the back bedroom. [1]

1 Appellant also argues that the jury's decision to acquit him of the controlled substance possession charge associated with the cocaine found in the same jacket as this firearm "confirms that the inference of innocence of the gun-possession charge is at least reasonable." This argument is unpersuasive because "[t]he alleged inconsistency of the verdicts does not affect the sufficiency of the evidence to convict appellant." *State v. Thomas,* 467 N.W.2d 324, 327 (Minn.App.1991). Juries are allowed to exercise lenity in a criminal case, and our "focus is not upon the inconsistency of the acquittals, but upon whether there is sufficient evidence to sustain the guilty verdict." *Nelson v. State,* 407 N.W.2d 729, 731 (Minn.App.1987), *review denied* (Minn. Aug. 12, 1987).

Counts 2, 3, 5, and 6: Firearms in the basement and dining room

Regardless of whether it would be reasonable to infer from the circumstances proved that appellant constructively possessed the firearms found by police in the house's basement and dining room, there is at least one reasonable hypothesis *inconsistent* with appellant's guilt regarding these firearms: the firearms could have been placed there by other gang members without appellant's knowledge, direction, or acquiescence. The state claims that the evidence does not support this hypothesis, and argues that the circumstances proved show only that appellant's exercise of control over B.T.'s residence and his fellow gang members gave him the requisite possessory control over the firearms.

***6** Constructive possession can "exist[ ] where an owner intentionally gives actual possession—direct physical control—of the property to another in order for that person to do some act for the owner to or with the property." *State v. Simion,* 745 N.W.2d 830, 842 (Minn.2008). "[W]here the master surrenders physical control of the property to the servant for a use or purpose for the direct benefit of the master, the master has constructive possession while the servant has mere custody of the property." *Id.* (quotation omitted). This

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type of constructive possession is consistent with the doctrine of "joint" possession, which provides that "[a] person may constructively possess [contraband] alone or with others." *Denison,* 607 N.W.2d at 799; *see also State v. Lee,* 683 N.W.2d 309, 316 n. 7 (Minn.2004).

We agree with appellant's argument that the circumstances proved in this case reasonably support his hypothesis that there was no such principal-agent relationship between appellant and his fellow gang members regarding the firearms in question. The record lacks any indication that appellant gave any direction regarding, or had any interaction with, these *specific* firearms prior to the execution of the search warrant. The record, therefore, lacks the key link between principal and agent described in *Simion*—the principal's relinquishment of physical possession of the property to an agent for the agent to use at the principal's direction. *See* 745 N.W.2d at 842. While it may be reasonable to infer that the gang members procured these weapons at appellant's behest in order to further the upcoming retaliatory violence against their rival gang, the evidence is simply insufficient to obviate the reasonableness of the opposite inference: the gang members hid these guns in the house without appellant's knowledge or approval. Although appellant had been seen with a firearm and supplied guns for the gang, there was no evidence that appellant or other gang members had obtained, distributed, or hidden these *specific* firearms at the direction of appellant.

Apart from the lack of circumstances proved showing appellant's control of the gang members in relation to the firearms, the other circumstances are similarly insufficient to eliminate this hypothesis that is inconsistent with guilt. The contraband was not found in an area over which appellant exercised exclusive dominion and control; rather, it was found in a house where appellant spent time but did not live, and in areas to which several other gang members had access at times when appellant was not present. Our caselaw on constructive possession makes clear that the defendant must exercise dominion and control over *the item itself,* not merely the area. *State v. Hunter,* 857 N.W.2d 537, 542 (Minn.App.2014) ("[A] defendant must exercise dominion and control over the [contraband] itself in order to constructively possess it."); *see also State v. Ortega,* 770 N.W.2d 145, 150 (Minn.2009) (noting that "mere proximity to criminal activity" is insufficient to establish probable cause for arrest for possession of contraband). Moreover, forensic testing was unable to link appellant's DNA or fingerprints to these firearms. Beyond the fact that B.T.'s house was collectively used by the gang to store firearms and appellant was found by police in the house, "no direct evidence tied appellant to possession of the contraband here." *Sam,* 859 N.W.2d at 835.

***7** Appellant's proximity to the recovered firearms, his role in the gang, and his frequent presence at B.T.'s residence are insufficient to eliminate all reasonable hypotheses inconsistent with appellant's guilt. Therefore, we conclude that the evidence is insufficient to show a "strong probability" that appellant had "dominion and control" over the firearms associated with his convictions of counts 2, 3, 5, and 6. We reverse these convictions.

II.

For the first time on appeal, appellant argues that the prosecutor in this case committed prosecutorial misconduct in his closing argument. Unobjected-to prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey,* 721 N.W.2d 294, 302 (Minn.2006). The defendant must demonstrate error that is plain because it "contravenes case law, a rule, or a standard of conduct." *Id.* If the defendant is able to make this showing, the burden shifts to the state to demonstrate a lack of prejudice by showing "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.* (quotations omitted). "If the [s]tate is unable to meet its burden, we must decide whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *State v. Vue,* 797 N.W.2d 5, 13 (Minn.2011).

We review closing arguments in their entirety to determine whether prosecutorial misconduct occurred. *Id.* "The prosecutor has the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom." *State v. Williams,* 586 N.W.2d 123, 127 (Minn.1998) (quotation omitted). However, "[m]isstatements of the burden of proof are highly improper and would, if demonstrated, constitute prosecutorial misconduct." *State v. Hunt,* 615 N.W.2d 294, 302 (Minn.2000).

Appellant specifically challenges these remarks by the prosecutor:

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> Now, surely when this case began [the district court] told you that the defendant was presumed innocent. This presumption need not remain forever. [The district court] read to you the instruction as it relates to the presumption of innocence and it states that it remains with the defendant unless and until the defendant has been proven guilty beyond a reasonable doubt.
>
> In this case[,] once [defense counsel] stood up, you were able to find that the presumption of innocence no longer existed. You were able to find that the defendant lost the presumption. This is because the State has produced evidence that allows you to find the truth to overcome that presumption and to find guilt on all the counts.

Appellant argues that this is a material misstatement of the presumption of innocence because the presumption is extended until the jury renders a guilty verdict and cannot be removed before jury deliberations. We agree.

***8** The prosecutor in this case committed plain error by arguing to the jury that it was "able to find that the defendant lost" his presumed innocence once defense counsel "stood up." We construe this statement to be a reference to defense counsel standing up to begin the defendant's case-in-chief after the state finished its presentation of evidence. However, the presumption of innocence remains until the defendant is proven guilty beyond a reasonable doubt. *See* 10 *Minnesota Practice* CRIMJIG 3.02 (2006) (providing that the presumption of innocence "remains with the defendant unless and until the defendant has been proven guilty beyond a reasonable doubt"). Here, the prosecutor told the jury that it could disregard the presumption of innocence during the course of the trial, *before* the defense presented its evidence and well before the jury began deliberations. This is incorrect. "The presumption of innocence is a fundamental component of a fair trial," and the defendant "has the right to have the jury take it to the jury room with them as the voice of the law." *State v. Peterson,* 673 N.W.2d 482, 486 (Minn.2004) (quotation omitted); *see also United States v. Crumley,* 528 F.3d 1053, 1065 (8th Cir.2008) (noting that the presumption of innocence "is extinguished only upon the jury's determination of guilt beyond a reasonable doubt" and that "[i]t is improper [for prosecutors] to refer to the evidence as having removed the presumption" (quotation omitted)). The prosecutor's misstatement of the burden of proof also contravened the jury's duty to "[k]eep an open mind about all the evidence until the end of the trial." 10 *Minnesota Practice* CRIMJIG 1.02A (Supp.2014); *see also* 10 *Minnesota Practice* CRIMJIG 1.02B (Supp.2014). By misstating the presumption of innocence and directing the jury to view appellant's presentation of evidence without the required presumption in place, the prosecutor plainly erred. [2]

2 Our conclusion is further supported by the fact that, two months prior to trial in this case, we issued an unpublished opinion holding that the same prosecutor erred by making a similar misstatement of the presumption of innocence during closing arguments in another trial. *State v. Ford,* No. A13–0577, 2014 WL 1272107, at *3–4 (Minn.App. Mar.31, 2014).

Because we conclude that the prosecutor's closing argument was plainly erroneous, the state bears the burden of showing a lack of prejudice. *Ramey,* 721 N.W.2d at 302. The state argues that any prejudice here was overcome by the instructions of the district court throughout trial. "[A] prosecutor's attempts to shift the burden of proof are often nonprejudicial and harmless where ... the district court clearly and thoroughly instructed the jury regarding the burden of proof." *State v. McDonough,* 631 N.W.2d 373, 389 n. 2 (Minn.2001); *see also State v. Budreau,* 641 N.W.2d 919, 926 (Minn.2002) ("[W]e presume that jurors follow the court's instructions."). In its opening and closing instructions, the district court stressed to the jury that the presumption of innocence remained with appellant "unless and until he has been proven guilty beyond a reasonable doubt." The prosecutor also used the correct presumption language elsewhere in his closing argument. Although we are troubled by the plain error committed by the prosecutor in this case, it is not reasonably likely that any misconduct "would have had a significant effect on the verdict of the jury" that would warrant a reversal and new trial on this ground. *Ramey,* 721 N.W.2d at 302 (quotation omitted).

III.

***9** Before opening statements, appellant's counsel raised an objection to the admission of a photograph of appellant's chest tattoo. The tattoo features two smoking revolvers across appellant's chest, with the words "Born Alone, Die Alone" above the revolvers and "1–9" between the revolvers. Over appellant's claim that the photograph had minimal probative value of his gang membership and "terribly high" potential for unfair prejudice, the district court allowed the photograph to be admitted, reasoning that:

> The reason is that i[t] does relate to the gang issue although [its] relevance isn't that high here because there is no disagreement about the membership in the gang. To me what was probably more relevant and more probative is that as people tattoo themselves, they're expressing themselves and someone tattoos themselves with guns, that certainly can be something ... seen as indicative, the culture or attitude toward guns, doesn't mean as possess them, but certainly reflects an attitude toward them and I think that is [an] attitude that the jury is entitled to share.

The photograph of the tattoo was then admitted and published to the jury during the testimony of a police gang investigator, who testified that the "1–9," smoking revolvers, and the phrase "Born Alone, Die Alone" all signified gang membership.

Appellant argues that the district court erred by admitting this evidence because it was impermissible character evidence under Minn. R. Evid. 404(a) and unfairly prejudicial under Minn. R. Evid. 403. We review the district court's evidentiary rulings for an abuse of discretion. *State v. Diggins,* 836 N.W.2d 349, 357 (Minn.2013). "We defer to the court's evidentiary rulings because the court stands in the best position to evaluate the prejudicial nature of evidence." *Id.* (quotation omitted). If the district court has erred in admitting evidence, we then examine whether the error is prejudicial by determining whether there is a reasonable possibility that the evidence significantly affected the verdict. *State v. Post,* 512 N.W.2d 99, 102 n. 2 (Minn.1994).

Appellant does not contest that the photograph of his tattoo was relevant to ascertaining his gang membership. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. "[U]nfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Swinger,* 800 N.W.2d 833, 839 (Minn.App.2011) (quotation omitted), *review denied* (Minn. Sept. 28, 2011). One of those illegitimate means is "[e]vidence of a person's character or a trait of character" introduced "for the purpose of proving action in conformity therewith on a particular occasion." Minn. R. Evid. 404(a).

Thus, we must determine whether the district court abused its discretion in determining that the probative value of this evidence outweighed its potential for unfair prejudice. When weighing the probative value of character evidence against its prejudicial effect, "the court must consider how crucial the [character] evidence is to the state's case." *See Pierson v. State,* 637 N.W.2d 571, 581 (Minn.2002) (quotation omitted); *see also Old Chief v. United States,* 519 U.S. 172, 184, 117 S.Ct. 644, 652, 136 L.Ed.2d 574 (1997) (noting that probative value of evidence under the federal analogue to rule 403 "may be calculated by comparing evidentiary alternatives"). The district court noted that the relevance of the photograph "isn't that high here" because there was no disagreement about appellant's membership in the gang. The record supports this determination. Appellant's counsel began the trial by admitting that his client was a member of 1–9 Block Dipset and had "been [in] a gang for a long ... time. And guess[ ] what, he's got gang tattoos." Many of the trial witnesses stated that appellant was a member of 1–9 Block Dipset, and recordings of conversations between appellant and incarcerated members of the gang further corroborated this fact.

***10** In contrast, there was a significant danger of unfair prejudice here. The photograph showed appellant, a man charged with several counts of unlawful firearm possession, as having a large chest tattoo prominently featuring two smoking revolvers. Part of the district court's rationale for admitting this photograph was the "more probative" fact that a tattoo with guns indicates a person's "culture or attitude toward guns," which was an attitude "that the jury is entitled to share." However, to the extent that the evidence showed that appellant "is a person who possesses firearms," the jury was *not* entitled to share this attitude. Such evidence "invite[d] the inference" by the jury that appellant had the propensity to own guns and therefore possessed the firearms in this case. *State v. Smith,* 749 N.W.2d 88, 93 (Minn.App.2008) (holding inadmissible a photograph of a defendant near a table with guns which "associate[d] [the defendant] with firearms and [did] so with a nefarious connotation"). This is exactly the kind of prejudicial character evidence the rules of evidence are meant to exclude. We conclude that the district court abused its discretion in admitting the photograph.

But, appellant has not met his burden of showing that this evidence "substantially influence[d] the jury's decision." *State v. Nunn*, 561 N.W.2d 902, 907 (Minn.1997). If there is a reasonable probability that the verdict might have been more favorable to the defendant without the admission of the evidence, then the error is prejudicial. *Post*, 512 N.W.2d at 102 n. 2. In evaluating prejudice, we are to consider "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether the defense effectively countered it." *Townsend v. State*, 646 N.W.2d 218, 223 (Minn.2002). Although there was substantial evidence supporting the firearm possession charges against appellant relative to the firearm found in his jacket, the tattoo photograph was by no means the linchpin of the state's case. It did not come into evidence until the state's final witness was testifying, was briefly referred to by that witness, and only defense counsel, not the state, referenced the tattoo during closing arguments. Given the lack of prejudice, we conclude that the district court's error in admitting the tattoo photograph does not require reversal of appellant's convictions.

IV.

Appellant further argues that the district court erroneously instructed the jury as to the proper definition of constructive possession. A district court has broad discretion in giving jury instructions. *State v. Kelley*, 855 N.W.2d 269, 274 (Minn.2014). "But a district court abuses that discretion if its jury instructions confuse, mislead, or materially misstate the law. We review the jury instructions as a whole to determine whether the instructions accurately state the law in a manner that can be understood by the jury." *Id.* (citation omitted). Because appellant did not object at trial to the jury instruction, we review this claim for plain error affecting substantial rights. *State v. Manley*, 664 N.W.2d 275, 283 (Minn.2003). The three-pronged test for plain error requires appellant to show that: (1) the district court committed error; (2) the error committed was plain; and (3) the plain error affected his substantial rights. *Id.*

***11** The district court instructed the jury regarding constructive possession as follows:

> Possession, it is not necessary that possession occur for any particular amount of time. A person possessing a firearm is if it [is] on his person. A person also possesses a firearm if [it] was in a place under his exclusive control to which other people [did] not normally have access or found in a place to which others had access [and] he knowingly exercised dominion and control over it.
>
> The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has directive of a control [sic] over a thing is then [in] actual possession of it. *A person who is not in actual possession of a thing that has knowingly ... got the power and the intention to exercise authority and control over it, either directly or through another person, is then in constructive possession of it.*

(Emphasis added.) Appellant acknowledges that the first paragraph of this instruction accurately quotes the definition of constructive possession provided by the supreme court and used in current pattern jury instructions. *See Florine*, 303 Minn. at 105, 226 N.W.2d at 611 (holding that constructive possession is shown "if police found [contraband] in a place to which others had access [and] there is a strong probability ... that defendant was at the time consciously exercising dominion and control over it"); *see also* 10 *Minnesota Practice* CRIMJIG 32.42 (Supp.2014). He instead takes issue with the second paragraph of the instruction, arguing that it materially misstates the *Florine* standard.

These arguments are unavailing. Appellant asserts that this instruction allowed the jury to find constructive possession based on appellant's "future" intention to exercise control. He stresses the word "intention" in the instruction, but the instruction required the jury to find that appellant had "*the power and* the intention to exercise authority and control" over the guns. (Emphasis added.) This language is substantially similar to the "conscious [ ] exercise[ ][of] dominion and control" found in *Florine*. *See* 303 Minn. at 105, 226 N.W.2d at 611. Any concern that the jury could find appellant guilty for "future" intent was allayed by the district court's instruction to the jury that the criminal acts must have taken place between December 1 and December 12, 2013.

He next argues that the district court incorrectly expanded the doctrine to cover constructive possession "through another person." But, appellant's own citation to caselaw indicates that constructive possession "exists where an owner intentionally gives actual possession ... of the property to another." *Simion*, 745 N.W.2d at 842. As discussed *supra*, [3] a defendant may constructively possess contraband "through another person" if the facts sufficiently establish the

defendant's continued dominion and control over an item after relinquishing it to another. *See id.*

3 We further note that, even if we held that the district court's jury instruction here was plainly erroneous, any resulting prejudice is obviated by our reversal of appellant's convictions relating to the firearms found in the house's basement and dining room.

***12** Finally, appellant argues that the instruction failed to require proof that appellant "once actually possessed the contraband." Although *Florine* does indicate that the "purpose" of this doctrine was to allow the definition of "possession" in the statute to include "those cases ... where the inference is strong that the defendant at one time physically possessed the [contraband]" and then maintained that possessory interest through dominion and control, its holding does not require proof that the defendant had physically possessed the item in the past. *See* 303 Minn. at 104–05, 226 N.W.2d at 610–11. Accordingly, we conclude that the district court did not materially misstate the law in its jury instruction regarding constructive possession.

V.

Appellant argues that the prosecution violated criminal discovery rules and that we should therefore reverse and remand for a new trial. Prior to trial, appellant moved the district court for dismissal of the charges or suppression of evidence in relation to the prosecution's delay in providing the defense with a transcribed statement B.T. gave to the state. B.T.'s statement appears to have been made on April 11, 2014, but was not disclosed by prosecutors to appellant until May 2, four days before trial began and three weeks after the statement was taken. The prosecutor had informed appellant's counsel on April 28 that a witness from the residence would be testifying, but did not indicate what the substance of the testimony would be. Appellant's counsel indicated that he sought dismissal of the case or suppression of this testimony because the delayed disclosure was a "significant disadvantage to prepar[ing][an] adequate defense" for appellant. Appellant did not seek a continuance because he had demanded a speedy trial.

In response, the prosecutor and district court indicated that the state had withheld the statement from disclosure because: (1) B.T.'s testimony at appellant's trial hinged on the resolution of child endangerment charges which had been brought against her, and a plea agreement involving her trial testimony was not reached until April 28; and (2) "[t]here were some issues relating to ... witness safety." The district court was also handling B.T.'s criminal case, and the prosecutor indicated that he had proceeded at the direction of the district court in delaying disclosure of the witness statement until May 2. The district court confirmed this, indicating that it had told the prosecutor on April 28 to inform appellant's counsel "of the substance of the revelation that [B.T.] was going to be testifying [to]" and then provide appellant with a copy of the transcript by May 2. The district court ultimately denied appellant's motion for dismissal or preclusion of B.T.'s testimony, but indicated that it would grant a continuance if needed.

Appellant argues that the district court failed to properly remedy the violation by precluding B.T.'s testimony, and he asserts that a new trial is therefore required. "The imposition of sanctions for violations of discovery rules and orders is a matter particularly suited to the judgment and discretion of the [district] court.... Accordingly, we will not overturn its ruling absent a clear abuse of discretion." *State v. Patterson,* 587 N.W.2d 45, 50 (Minn.1998) (quotation omitted). Even assuming that the prosecutor's conduct here was a violation of the discovery rules, we conclude that the district court did not abuse its discretion in deciding that a continuance was the appropriate remedy. There is no indication that the prosecutor withheld the statement in bad faith, and appellant was informed that the state would be calling a witness who was at B.T.'s residence. The district court gave appellant the option of a continuance if he needed more time to prepare for trial, and, before B.T. testified at trial, the district court indicated that it would allow the defense to recall B.T. if there were additional areas of inquiry that arose after other state witnesses concluded their testimony. Given the willingness of the district court to accommodate any prejudice that resulted from the prosecutor's late disclosure, we conclude that the district court did not abuse its discretion in declining to preclude B.T. from testifying in connection with the state's delayed witness-statement disclosure.

VI.

***13** Appellant argues that his conviction of being a prohibited person in possession of a firearm (count 4) is a lesser-included offense of his conviction of being a prohibited person in possession of a firearm for the benefit of a gang (count 1), and thus should not have

been adjudicated. A defendant cannot be convicted of both a charged crime and an included offense if the included offense is "[a] crime necessarily proved if the crime charged were proved." Minn.Stat. § 609.04, subd. 1(4) (2012). As conceded by the state, it is clear that appellant's firearm-possession conviction was a lesser-included offense. "In a crime committed for the benefit of a gang, the underlying crime is an included crime." *State v. Lopez–Rios,* 669 N.W.2d 603, 615 (Minn.2003). The district court correctly recognized this fact, at both the sentencing hearing and in a written sentencing order, by indicating that counts 4–6 "merged" into counts 1–3. However, the warrant of commitment formally adjudicated appellant guilty of all six counts, including counts 4–6. A written judgment of conviction provides "conclusive evidence of whether an offense has been formally adjudicated." *Spann v. State,* 740 N.W.2d 570, 573 (Minn.2007) (quotation omitted). Because appellant's lesser-included offense "should not be formally adjudicated at this time," *id.* (quotation omitted), we remand for the district court to vacate appellant's conviction on count 4, being a prohibited person in possession of a firearm, regarding the firearm found in the jacket in the back bedroom. [4]

[4] Our reversal of counts 2, 3, 5, and 6 render appellant's remaining sentencing arguments moot.

Because the evidence is insufficient to support appellant's convictions on counts 2, 3, 5, and 6, we reverse those convictions. We also remand for the district court to vacate appellant's conviction on count 4 because it is a lesser-included offense. Although we conclude that the admission into evidence of the photograph of appellant's tattoo and the prosecutor's misstatement of the presumption of innocence were erroneous, appellant was not prejudiced by these errors. Accordingly, we affirm appellant's conviction of count 1, being a prohibited person in possession of a firearm for the benefit of a gang, and remand for resentencing on this remaining conviction.

Affirmed in part, reversed in part, and remanded.

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This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2018).
Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Antonio Deshaun COLLINS, Appellant.

A19-1277
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Filed August 31, 2020
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Review Denied November 25, 2020

Hennepin County District Court, File No. 27-CR-18-8903

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Considered and decided by Johnson, Presiding Judge; Cochran, Judge; and Schellhas, Judge. *

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

UNPUBLISHED OPINION

COCHRAN, Judge

***1** In this direct appeal, appellant challenges his conviction of carrying or possessing a pistol without a permit in violation of Minn. Stat. § 624.714, subd. 1a (2016). Appellant argues that he is entitled to a new trial because the district court erred by failing to strike a juror sua sponte for bias. He also argues that the district court abused its discretion by limiting cross-examination of the arresting officers. In addition, he contends that the evidence was insufficient to support his conviction. Concluding that appellant has failed to demonstrate grounds for a new trial or reversal of his conviction, we affirm.

FACTS

On the night of February 14, 2018, two police officers stopped a vehicle driven by appellant Antonio Deshaun Collins. The police stopped the vehicle after one of the officers observed that the vehicle's headlights were "extremely dim" and that the driver was not wearing a seat belt. When that officer approached the stopped vehicle, he could smell marijuana emanating from the vehicle. The officer then searched the vehicle while his partner remained outside with Collins. During the search, the officer found a pistol in the center console. The officers took Collins to the police station to question him. During the interview at the police station, Collins told one of the officers that he had a permit for the pistol, but that the permit was no longer valid. The state charged Collins with possession of a pistol without a permit under Minn. Stat. § 624.714, subd. 1a.

The case proceeded to a jury trial. During voir dire, the district court asked the potential jurors about their feelings and opinions on drugs. A potential juror, Juror C, informed the court that he "would not be able to be fair if drugs are brought out in this." The district court asked Juror C if he would be able to consider the evidence presented and apply the law as instructed. Juror C responded that "if someone was arrested and had drugs on them, no matter what I was told, I would go guilty automatically." The court then asked if any jurors had "such strong views about drug abuse" that they would be unable to be fair and impartial in this case. Juror C raised his hand.

At the end of voir dire, defense counsel challenged two jurors for cause—neither of which was Juror C. Defense counsel challenged one juror because she stated that she could not be fair and impartial in a case involving firearms. Defense counsel challenged a second juror because she experienced a sexual assault at gunpoint and also expressed concern about whether she could be fair and impartial. The district court granted the first challenge, but denied the second. Defense counsel later used a peremptory challenge to remove the second-challenged juror. Defense counsel had remaining

peremptory challenges, but did not challenge Juror C. Juror C served on the jury.

At trial, the state called the two arresting officers to testify. At the time they stopped Collins, both officers were members of the Community Response Team, a team responsible for narcotics and weapons investigations. The first officer testified about his observations that led to the stop. He also testified that he recognized the vehicle that they stopped. And, when he approached the stopped vehicle, he recognized Collins as the driver of the vehicle. The officer was familiar with Collins from an investigation of Collins's brother in 2017. During the 2017 investigation, the officer learned that Collins carried a pistol in his vehicle and that he had a permit to carry the pistol at that time. With regard to the stop at issue here, the officer explained that he searched the vehicle because he smelled marijuana when he first approached the vehicle. During the search, the officer found a pistol in the center console under the cup holders.

***2** The officer also testified about interviewing Collins at the police station. According to the officer, Collins admitted during the interview that the pistol belonged to him. The officer also testified that Collins indicated that he no longer had a valid permit to carry the pistol. And that Collins did not present him with a valid permit. The officer then testified that, according to records he had accessed, Collins was not issued a new permit for the pistol.

On cross-examination, defense counsel played an audio recording of the interview at the police station. Defense counsel asked the officer if, after the recorded interview ended, he tried to recruit Collins to be an informant. The officer testified that he did not recall, but also stated that he may have had "other conversations" with Collins. Defense counsel then asked the officer if he remembered the specifics of the "other conversations." The state objected on relevance grounds. The district court sustained the objection.

The second arresting officer also testified that he had met Collins during the 2017 investigation and that he knew that Collins had a pistol in the past. The officer acknowledged that a bodycam video of the incident at issue in this case captured him saying that Collins "keeps it in his center console." He also testified that he attempted to drive Collins's car to the precinct where Collins was interviewed. When asked on cross-examination why Collins was brought in to be interviewed—to recruit him as an informant or to investigate the permit offense—the officer replied, "I don't know." Defense counsel then asked the officer if "that" was "something that has been done before?" At that point, the state objected on relevance grounds and the district court sustained the objection.

After the officers testified, Collins testified in his own defense. He testified that he met the two arresting officers in 2017 when they were executing a warrant at his house concerning his brother. During that interaction, the officers took his pistol and wallet, and brought him to the precinct to be interviewed. Collins testified that, at that time, he had a license to carry. And that, during the 2017 interview, the officers asked him about his brother and if his brother was selling drugs. They also asked Collins if he knew anyone selling large amounts of marijuana. In response, Collins told the officers that he did not interact with anyone selling drugs.

Collins also testified about the February 2018 incident at issue here. He confirmed that the officers pulled him over and that they found a pistol in his car. He denied, however, that there was an odor of marijuana in the car. Collins admitted that the pistol found by the officers belonged to him. He testified that he did not remember when he put the pistol in the car and stated it was an "honest mistake." Collins also testified that after the recorded interview at the police station, there was a "significant conversation." The state objected to further questioning about the unrecorded conversation. The district court sustained the objection.

The jury found Collins guilty of possessing a pistol without a valid permit. Collins appeals.

DECISION

Collins raises three issues on appeal: (1) whether the district court plainly erred by failing to sua sponte strike Juror C for bias; (2) whether the district court abused its discretion by limiting cross-examination of the arresting officers; and (3) whether the evidence was sufficient to prove Collins's guilt beyond a reasonable doubt. We address each issue in turn.

I. Collins's juror-bias argument is not reviewable.

***3** Collins argues that the district court erred when it failed to strike Juror C sua sponte for bias after Collins's trial counsel failed to challenge Juror C. The state argues that under *State v. Stufflebean*, 329 N.W.2d 314 (Minn. 1983), Collins was

required to challenge Juror C for bias in district court to preserve the issue on appeal. We agree with the state.

Minnesota courts have held it is "too late" to challenge a biased juror for the first time on appeal. *State v. Thieme*, 160 N.W.2d 396, 398 (1968) (declining to consider appellant's biased-juror argument because the "defendant, after consultation with his counsel, chose to make no ... challenge" to the juror); *see also Stufflebean*, 329 N.W.2d at 317 (stating that an appellant must challenge the juror for cause to preserve the issue for appeal); *State v. Geleneau*, 873 N.W.2d 373, 379 (Minn. App. 2015) (same), *review denied* (Minn. Mar. 29, 2016). As the supreme court recognized in *Thieme*, allowing a defendant to challenge a juror for the first time on appeal "would extend an invitation to every defendant to leave unchallenged an objectionable juror only to raise the objection upon appeal." 160 N.W.2d at 398.

In *Stufflebean*, the supreme court held that "[i]n an appeal based on juror bias, an appellant must show [1] that the challenged juror was subject to challenge for cause, [2] that actual prejudice resulted from the failure to dismiss, and [3] that appropriate objection was made by appellant." 329 N.W.2d at 317. [1] The first *Stufflebean* requirement leaves no room for an appeal based on juror bias where appellant failed to challenge the juror for cause. *See Geleneau*, 873 N.W.2d at 380 (noting that *Stufflebean* establishes that "an objection is *necessary* for appellate relief, which implies that the absence of an objection in the district court is a sufficient basis for rejecting a biased-juror argument on appeal" (emphasis added)). As we observed in *Geleneau*, the requirement that a defendant first challenge a juror for cause in the district court "is consistent with the principle that the district court is in the best position to determine whether a prospective juror can be an impartial juror because the district court can assess the prospective juror's demeanor and credibility during voir dire." *Id.* Accordingly, *Stufflebean* requires that a defendant must first challenge the juror for bias in the district court to raise the issue of juror bias on appeal.

1 We note that the supreme court has clarified that an appellant is not required to demonstrate that a juror's bias resulted in actual prejudice. *See State v. Fraga*, 864 N.W.2d 615, 625-26 (Minn. 2015). Rather, the presence of a biased juror is a structural error that requires a new trial, without any inquiry into the consequences of the biased juror's participation. *Id.*

Collins argues that we should circumvent the challenge requirement in *Stufflebean* and instead review the juror-bias issue pursuant to Minn. R. Crim. 31.02. That rule provides that a "[p]lain error affecting a substantial right can be considered by the court ... on appeal even if it was not brought to the trial court's attention." Minn. R. Crim. P. 31.02. Collins contends that the issue of Juror C's bias is properly raised on appeal under rule 31.02 because the district court's failure to strike the juror was plain error. The language of rule 31.02, however, is permissive—not mandatory. The rule provides that an appellate court "can" consider a question of plain error, not that it "must." *See generally The American Heritage Dictionary of the English Language* 269, 1162 (5th Ed. 2011) (defining "can" as a word "[u]sed to indicate possibility or probability" and "must" as a word "[u]sed to indicate inevitability or certainty"). And the supreme court decided *Stufflebean* after the promulgation of the rule 31.02 and still required the appellant to challenge the juror for cause to preserve the issue on appeal. *See generally In re Proposed Rules of Criminal Procedure*, No. 45517 (Minn. Feb. 26, 1975) (order adopting the Minnesota Rules of Criminal Procedure). Therefore, we decline to apply the plain-error standard of review and instead apply the standard set forth in *Stufflebean*, which requires Collins to show that he challenged the juror for cause at the district court level. *See State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) (noting that we are "bound by supreme court precedent"). Because Collins failed to bring a for-cause challenge to Juror C in district court, the question of whether the district court erred by failing to strike Juror C sua sponte is not properly before us. [2]

2 Moreover, even if we were to apply the plain-error test, Collins would be unsuccessful. The plain-error test requires a defendant to establish (1) an error; (2) that is plain; and (3) that affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain "when it contravenes a rule, case law, or a standard of conduct." *State v. Brown*, 792 N.W.2d 815, 823 (Minn. 2011). The error here was not plain because "[n]either the caselaw nor the rules of criminal procedure impose on the district court a duty to strike prospective jurors for cause sua sponte." *State v. Gillespie*, 710 N.W.2d 289, 296 (Minn. App. 2006), *review denied* (Minn. May 16, 2006).

II. The district court did not abuse its discretion when it limited cross-examination of the arresting officers.

*4 Collins next argues that the district court abused its discretion when it limited cross-examination of the arresting officers regarding an alleged unrecorded conversation because the excluded testimony had the potential to show that the arresting officers wanted to recruit Collins as an informant and were biased against him. The state argues that Collins was afforded an adequate opportunity to question the officers about bias, and therefore the district court did not abuse its discretion in limiting the testimony. We agree with the state.

Under the Confrontation Clause, the accused has a right to confront witnesses. U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6. "The essence of confrontation is the opportunity to cross-examine opposing witnesses." *State v. Greer*, 635 N.W.2d 82, 89 (Minn. 2001); *see also State v. Brown*, 739 N.W.2d 716, 720 (Minn. 2007) ("[T]he defendant's right to cross-examine witnesses for bias is secured by the Sixth Amendment."). District courts, however, have broad discretion to control the scope of cross-examination. *Greer*, 635 N.W.2d at 89.

In terms of witness bias, "the Confrontation Clause contemplates a cross-examination of the witness in which the defendant has the opportunity to reveal a prototypical form of bias on the part of the witness." *State v. Lanz-Terry*, 535 N.W.2d 635, 640 (Minn. 1995). To establish a violation of the Confrontation Clause, a defendant must show "that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Id.* (quotation omitted). "Bias is a catchall term describing attitudes, feelings, or emotions of a witness that might affect [the witness's] testimony, leading [the witness] to be more or less favorable to the position of a party for reasons other than the merits." *Id.* (quotation omitted). Thus, not everything a witness testifies to will show bias, and evidence that is "only marginally useful" for that purpose may be excluded. *Id.* Our examination of whether the district court abused its discretion in restricting a defendant's attempted cross-examination to show bias "turns on whether the jury has sufficient other information to make a discriminating appraisal of the witness's bias or motive to fabricate." *Id.* at 641 (quotation omitted).

We conclude that the district court did not abuse its discretion by excluding the attempted cross-examination because the jury had sufficient other information by which to make an appraisal of any bias on the part of the officers. *Lanz-Terry*, 535 N.W.2d at 641. At trial, the jury watched portions of the second officer's bodycam video in which the officer revealed that he knew where Collins kept his pistol before the other officer searched the car. Similarly, each of the officers testified that they knew Collins from a prior investigation of his brother and that they knew Collins had a pistol. Moreover, Collins himself testified, over the state's objection, that the officers tried to recruit him to be an informant in 2017. He described how the officers asked about his brother's involvement with drugs and if he knew of others who sold drugs. Collins also testified that after the interaction in 2017, the officers continued to stop him. And defense counsel played the recording of the police-station interview to the jury where Collins asked the officer if they were talking about the other investigation, and the officer told Collins that they would talk about that later. Finally, while the district court sustained the state's objection to certain questions regarding the alleged conversation, both officers did answer some questions about the issue on cross-examination before an objection was made by the state on relevance grounds. Accordingly, there was sufficient information by which the jury could evaluate any officer's bias or motive to fabricate without the excluded cross-examination. *Id.*

*5 Moreover, Collins focuses his argument on the motive *for stopping and arresting* him as a basis for showing officer bias. Even though extrinsic evidence may be used to show bias, "courts may exclude evidence that is only marginally useful for this purpose." *State v. Larson*, 787 N.W.2d 592, 598 (Minn. 2010) (quotation omitted). It is unclear to us how additional evidence related to the motive for the stop and arrest would be helpful in showing officer bias on testimony regarding the elements of the crime of carrying a pistol without a license, particularly given that Collins himself admitted that the pistol belonged to him and that he did not have a valid permit. The excluded testimony in this case is only "marginally useful" to show officer bias. *Id.*

In sum, the jury had sufficient information to appraise the officers' bias or motive to fabricate given the evidence presented at trial. Therefore, the district court did not abuse its discretion by limiting the scope of the cross-examination.

III. There is sufficient corroborating evidence to support Collins's admission.

Collins next argues that the state failed to prove beyond a reasonable doubt that he did not have a permit and therefore failed to prove an element of the offense—that he did not possess a permit to carry the pistol. The state argues that Collins's admission that he did not have a valid permit is direct evidence of his guilt and that one of the arresting officers

corroborated Collins's admission by confirming that he was not issued a new permit.

We analyze a claim of insufficient evidence by determining whether the evidence, when considered in the light most favorable to the conviction, could reasonably support the verdict with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). In doing so, we assume that the jury believed the state's witnesses and evidence and disbelieved contrary evidence. *State v. Robinson*, 539 N.W.2d 231, 238 (Minn. 1995).

A defendant's confession is direct evidence of guilt. *State v. McClain*, 292 N.W. 753, 755 (1940). However, despite our deference to the jury on matters of credibility, uncorroborated confessions of guilt are not sufficient to support a conviction under Minnesota law. *See* Minn. Stat. § 634.03 (2016) ("A confession of the defendant shall not be sufficient to warrant conviction without evidence that the offense charged has been committed[.]"). Section 634.03 has a dual function: "it discourages coercively acquired confessions and requires that admissions and confessions be reliable." *State v. Heiges*, 806 N.W.2d 1, 10 (Minn. 2011). But section 634.04 does not require that each element of the offense charged be individually corroborated. *Id.* at 13; *see also In re Welfare of M.D.S.*, 345 N.W.2d 723, 735 (Minn. 1984) (stating that "not all or any of the elements had to be individually corroborated" to sufficiently corroborate a defendant's confession). Instead, it "only requires independent evidence of attending facts or circumstances from which the jury may infer the trustworthiness of the confession." *Heiges*, 806 N.W.2d at 13 (quotation omitted). The statement at issue here relates to only one element of the offense—that Collins did not possess a permit to carry the pistol.

The evidence in this case establishes that, during the traffic stop, Collins admitted that he did not have a permit to carry the pistol. Then, during the interview at the precinct, Collins told the officer that he had a permit to carry the pistol in the past but that it was no longer valid.

To corroborate Collins's confession, the state presented an officer's testimony that Collins admitted the pistol was his and that he did not have a valid permit to carry the pistol. The same officer also testified that Collins did not present him with a valid permit. The prosecutor then asked the officer, "And according to the records, did you have access to—he was not issued a permit, a new permit; is that correct?" The officer replied, "Correct."

***6** Collins argues that because the question regarding the officer's record search was compound and confusing, the state failed to corroborate Collins's confession. We are not persuaded. It is clear that the prosecutor was asking whether the officer found a valid permit in his record search. While we agree the better practice would be to support the confession by other evidence such as the records themselves, the corroboration need only provide the jury with independent evidence to "infer the trustworthiness of the confession." *Heiges*, 806 N.W.2d at 13 (quotation omitted). We conclude that the state presented sufficient evidence to corroborate the attendant facts and circumstances of Collins's confession.

IV. Pro Se Brief

Collins also filed a supplemental pro se brief. In his brief, Collins describes a number of encounters with the arresting officers and the circumstances surrounding his arrest but does not articulate any legal arguments. Nor does he cite to legal authority. To the extent we are able to discern any legal arguments, the arguments that he raises are similar to those raised in his primary brief. Because Collins's supplemental pro se brief contains no argument or citation to legal authority, we deem the issues raised waived and do not address them except to the extent that we have already addressed similar issues in the preceding sections of this opinion. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (noting that allegations of error without "argument or citation to legal authority in support of the allegations" are deemed waived).

Affirmed.

All Citations

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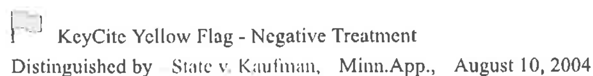

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Mebrat Belay YEAZIZW, Appellant.

No. CX-02-1486.
|
Aug. 5, 2003.

Hennepin County District Court, File No. 01014419.

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Considered and decided by SHUMAKER, Presiding Judge, WRIGHT, Judge, and FORSBERG, Judge. *

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

UNPUBLISHED OPINION

WRIGHT, Judge.

***1** In this appeal from her convictions of disorderly conduct and obstructing legal process, appellant argues that (1) the disorderly conduct and obstructing legal process statutes are unconstitutionally vague and overbroad; (2) there was insufficient evidence to support her convictions; (3) the district court abused its discretion in finding probable cause to support the charged offenses; (4) the district court abused its discretion in denying her a hearing on her motion to dismiss for discriminatory enforcement; (5) because of the cumulative effect of several evidentiary rulings, she did not receive a fair trial; (6) the district court erred in denying her motion for a new trial; and (7) the district court erred in denying her motion for a *Schwartz* hearing. The state argues that appellant's brief should be disregarded because it fails to comply with rules of appellate procedure. We affirm in part, reverse in part, and remand.

FACTS

On January 18, 2001, appellant Mebrat Yeazizw was no longer employed by English Rose Suites (ERS), a private residential facility in Edina that provides care for people with dementia and related disorders. She visited the facility to pick up her last paycheck. Yeazizw went to an office on the lower level of the facility and spoke with Geralyn Mornson, a co-owner of ERS, regarding her paycheck. During the conversation, Yeazizw and Mornson began to argue about a discrepancy in the number of work hours reflected in Yeazizw's paycheck. Testimony differs about the argument and subsequent events. Co-owner Jayne Clairmont, whose office was nearby, testified at trial that she asked Yeazizw three times to lower her voice because of the adverse effect it would have on the patients in the facility. After repeatedly asking Yeazizw to leave, Clairmont put her hand on Yeazizw's arm to guide her from her seat. When Yeazizw did not comply with the requests to leave, Clairmont asked Mornson to call the police.

Yeazizw testified that Mornson became angry while recalculating Yeazizw's hours and threw a calculator at Yeazizw, striking her arm and causing it to bleed. Yeazizw also stated that she tried to call the police, but Mornson pulled the telephone away from her and took her earring. Yeazizw testified that Clairmont and another individual restrained her, and she was never asked to leave before the police arrived.

There are also differing accounts of what happened once Edina police officers Kris Eidem, Troy Kemp, and Abagail Hammond responded. Clairmont testified that, after the police arrived, they spoke with Yeazizw and gave her a card explaining how she could pursue a civil lawsuit to recover any money ERS owed her. Clairmont testified that the officers were able to understand Yeazizw [1] and Yeazizw did not ask

for an interpreter. The officers also spoke with Clairmont to determine how she was involved in the incident. The officers asked Yeazizw more than once to leave the property. According to Clairmont, on the way up the stairs, Yeazizw began to flail and resist the officers, such that the officers had to put her against a wall. Eidem, Kemp, and Hammond also testified that, as they walked Yeazizw up the stairs, she was struggling, physically resisting, and screaming in a high tone of voice. Eidem also testified that, once the officers got Yeazizw outside of ERS, Yeazizw started to pull away. Consequently, the officers handcuffed her because they were concerned that she would hurt someone or break a window.

1 Yeazizw was born in Ethiopia, and her native language is Amharic.

***2** Yeazizw testified that when the police arrived, they went directly to her, handcuffed her, and dragged her out of the facility. She stated that she had difficulty understanding the officers and did not have an opportunity to tell her side of the story.

On February 9, 2001, Yeazizw was charged with disorderly conduct, in violation of Minn.Stat. § 609.72, subd. 1(3) (2000), and obstruction of legal process, in violation of Minn.Stat. § 609.50, subd. 1(1) (2000). After a jury trial, Yeazizw was convicted of both offenses and sentenced to serve 180 days in the workhouse, with 175 days stayed. This appeal followed.

DECISION

I.

Yeazizw contends that the statutes underlying her convictions are unconstitutionally vague and overbroad, both facially and as applied. The constitutionality of a statute presents a question of law, which we review de novo. *State v. Wright,* 588 N.W.2d 166, 168 (Minn.App.1998), *review denied* (Minn. Feb. 24, 1999). "In evaluating constitutional challenges, the interpretation of statutes is a question of law." *State v. Manning,* 532 N.W.2d 244, 247 (Minn.App.1995) (citation omitted), *review denied* (Minn. July 20, 1995).

A. Disorderly Conduct

1. Facial Challenge

Yeazizw argues that Minn.Stat. § 609.72, subd. 1(3) (2000), which proscribes disorderly conduct, is unconstitutional on its face because it is both vague and overbroad. Established precedent holds otherwise. Section 609.72 provides, in pertinent part:

> Whoever does any of the following in a public or private place, * * * knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor:
>
> * * * *
>
> (3) Engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.

Minn.Stat. § 609.72, subd. 1(3).

Vague statutes are prohibited under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 7, of the Minnesota Constitution. *State v. Newstrom,* 371 N.W.2d 525, 528 (Minn.1985). A statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* (quoting *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983)). "A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights." *State v. Machholz,* 574 N.W.2d 415, 419 (Minn.1998) (citation omitted). In a facial challenge to a statute punishing spoken words, the conduct underlying the conviction is irrelevant. *In re Welfare of S.L.J.,* 263 N.W.2d 412, 419 (Minn.1978). Thus, we need not consider Yeazizw's charged conduct to consider whether the statute is facially constitutional.

***3** Although it narrowed the reach of Minn.Stat. § 609.72, subd. 1(3), in *S.L.J.,* the Minnesota Supreme Court has upheld the facial constitutionality of the statute in terms of both vagueness and overbreadth. *S.L.J.,* 263 N.W.2d at 419; *see also State v. Klimek,* 398 N.W.2d 41, 42 (Minn.App.1986). As to its application to speech, the disorderly conduct statute may only prohibit "fighting words." *In re Welfare of M.A.H.,* 572 N.W.2d 752, 756 (Minn.App.1997) (quoting *S.L.J.,* 263 N.W.2d at 418-19). Prohibiting speech that merely arouses

" 'alarm, anger or resentment' is overbroad and vague." *Id.* "Fighting words" are defined as "those personally abusive epithets which, when addressed to the ordinary citizen, are likely to provoke violent reaction or tend to incite an immediate breach of the peace. Words that merely tend to arouse alarm, anger, or resentment in others are not fighting words." *Klimek,* 398 N.W.2d at 43 (quotation and citation omitted). Thus, "a conviction of disorderly conduct cannot be predicated only on a person's words unless those words are 'fighting words.' " *State v. McCarthy,* 659 N.W.2d 808, 810-11 (Minn.App.2003) (quoting *S.L.J.,* 263 N.W.2d at 419). As Yeazizw points out, the relevant language of Minn.Stat. § 609.72, subd. 1(3), has not changed since *S.L.J.* was decided. Although the reach of the statute has been narrowed, Minn.Stat. § 609.72, subd. 1(3), is facially constitutional.

2. As-Applied Challenge

In examining the conduct of a person accused of disorderly conduct, the words of a defendant are considered as a "package" along with conduct and physical movements. *M.A.H.,* 572 N.W.2d at 757 (citation omitted). Here, Yeazizw's charged conduct included physically resisting the officers and was not merely oral statements. At the least, the disorderly conduct statute's proscription of abusive and boisterous conduct applies to both Yeazizw's speech and her physical conduct. Thus, the application of Minn.Stat. § 609.72, subd. 1(3), to the total "package" of Yeazizw's conduct is constitutional. *Id.*

B. Obstruction of Legal Process

1. Facial Challenge

Yeazizw also contends that Minn.Stat. § 609.50, subd. 1(1) (2000), which prohibits obstruction of legal process, is unconstitutional on its face. The statute prohibits conduct that "obstructs, hinders, or prevents the lawful execution of any legal process, civil or criminal, or apprehension of another on a charge or conviction of a criminal offense." Minn.Stat. § 609.50, subd. 1(1).

The Minnesota Supreme Court has held that section 609.50, subdivision 1(1), is not facially overbroad or vague. *State v. Krawsky,* 426 N.W.2d 875, 879 (Minn.1988); *see also State v. Tomlin,* 622 N.W.2d 546, 548 (Minn.2001) (noting that the *Krawsky* court "held that section 609.50 was not facially overbroad or vague"). In reaching this holding, the *Krawsky* court reasoned that "[p]ersons of common intelligence need not guess at whether their conduct violates the statute" and that the statute does not "encourage arbitrary or discriminatory enforcement by the police." *Krawsky,* 426 N.W.2d at 878. In *State v. Ihle,* 640 N.W.2d 910, 915 (Minn.2002), the Minnesota Supreme Court stated that, in *Krawsky,*

> ***4** [w]ithout making an explicit holding on its constitutionality, we construed the statute narrowly, holding that the statute required the state to prove that the defendant acted intentionally and that the statute was directed at words and acts that have the effect of physically obstructing or interfering with a police officer.

Ihle, 640 N.W.2d at 915. Although *Ihle's* characterization of *Krawsky* leaves doubt as to how explicit *Krawsky's* holding is, it nevertheless makes clear that, on its face, the statute constitutionally prohibits words and acts that physically obstruct or interfere with a peace officer's duties. We thus conclude that this issue has been decided and that Minn.Stat. § 609.50, subd. 1(1), is neither unconstitutionally vague nor overbroad.

2. As-Applied Challenge

"*Krawsky* requires that in order for a violation of Minn.Stat. § 609.50, subd. 1(1) or (2) to exist, there must be a finding that the accused physically obstructed or interfered with a police officer while that officer was engaged in the performance of his official duties." *Tomlin,* 622 N.W.2d at 549. Because the allegations against Yeazizw included physical conduct that interfered with a peace officer, as applied to this case, Minn.Stat. § 609.50, subd. 1(1), is neither unconstitutionally vague nor overbroad. Thus, we conclude that Yeazizw's challenge to the obstruction of legal process statute has no merit.

II.

Yeazizw also challenges the sufficiency of the evidence to support her convictions of disorderly conduct and obstructing legal process. In considering a claim of insufficient evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light

most favorable to the conviction, is sufficient to allow the jurors to reach a guilty verdict. *State v. Webb,* 440 N.W.2d 426, 430 (Minn.1989). We must assume 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). 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 the defendant was guilty of the charged offense. *State v. Alton,* 432 N.W.2d 754, 756 (Minn.1988).

A. Disorderly Conduct

The elements of disorderly conduct are: (1) the defendant "engaged in offensive, obscene, abusive, boisterous, or noisy conduct, or in offensive, obscene, or abusive language tending reasonably to arouse, alarm, anger, or resentment in others;" (2) the defendant "knew, or had reasonable grounds to know, that the conduct would, or could tend to" alarm, anger, or disturb others; and (3) the conduct occurred in a public or private place. Minn.Stat. § 609.72, subd. 1(3); 10 *Minnesota Practice,* CRIMJIG 13.121 (1999). Verbal conduct may be examined along with physical conduct. *M.A.H.,* 572 N.W.2d at 757. As discussed above, "a defendant's words are considered as a 'package' in combination with conduct and physical movements, viewed in light of the surrounding circumstances." *Id.* (citation omitted).

***5** The record establishes that Yeazizw's truculent conduct was both physical and verbal. Clairmont testified that, as the officers escorted Yeazizw out of ERS, Yeazizw was flailing and resisting the officers and "yelling and screaming at the top of her lungs." Clairmont's testimony also established the sensitive nature of the residents of ERS. In addition, Eidem, Hammond, and Kemp testified that, while screaming in a high tone of voice, Yeazizw struggled and physically resisted their efforts to walk her up the stairs. A jury could reasonably conclude from the evidence that Yeazizw committed disorderly conduct. Accordingly, there is sufficient evidence to support her conviction.

B. Obstruction of Legal Process

Conduct charged under Minn.Stat. § 609.50, subd. (1), "must rise to the level of a physical obstruction or be words, such as fighting words, that have the effect of physically obstructing or interfering with an officer conducting an investigation." *Tomlin,* 622 N.W.2d at 548. The elements of obstruction of legal process are: (1) that the officers were engaged in the performance of their duties; (2) that the defendant obstructed, hindered, or interfered with the officers in the performance of their duties; and (3) that the defendant acted with intent to obstruct, hinder, prevent, interfere with, or deter the officers. Minn.Stat. § 609.50, subd. 1(1); 10A *Minnesota Practice,* CRIMJIG 24.26 (1999). As discussed above in relation to the disorderly conduct offense, there is ample evidence of Yeazizw's intentional physical and verbal conduct that obstructed and interfered with the officers. Because a jury also could reasonably conclude from the evidence that Yeazizw committed the offense of obstruction of legal process, this challenge to the sufficiency of the evidence also fails.

III.

Yeazizw argues that she was not allowed to challenge probable cause in her case. We construe this statement as an argument that the district court abused its discretion when it denied Yeazizw's motion for a contested probable-cause hearing. Several orders at various stages of the pretrial proceedings addressed probable cause. In its November 13, 2001, order denying Yeazizw's motion to dismiss for lack of probable cause, the district court found that "the trial court has already determined that probable cause existed." Yeazizw moved for an additional probable-cause hearing, and the district court again denied the motion, concluding that probable cause had already been determined two times-first, when Yeazizw was arraigned without objecting to probable cause and again, months later, in the November 13 order. The district court then proceeded to find for a third time that "[a] review of the complaint shows that the facts establishing probable cause to believe an offense has been committed and that the Defendant committed it are included therein."

We are satisfied that the charges were supported by probable cause, as the district court correctly determined each time the issue was raised. Yeazizw's conduct occurred in the presence of the officers and her former employers. Thus, her identity was never in question. Further, "[w]hile probable cause to arrest requires something more than mere suspicion [of criminal activity], it requires less than the evidence necessary for conviction." *State v. Horner,* 617 N.W.2d 789, 796 (Minn.2000) (citation omitted). Because the existence of probable cause had previously been determined without objection at the time that Yeazizw sought a contested hearing, the district court did not abuse its discretion when it denied the motion for a contested probable-cause hearing. Moreover, because Yeazizw was convicted of the offenses, we conclude

that the issue of whether there was probable cause at the time of her arrest is moot.

IV.

*6 Yeazizw also contends that we should order an independent investigation of the conduct that led to her arrest. Because Yeazizw cites no legal authority demonstrating that she is entitled to this remedy or that we are empowered to order it, and because Yeazizw has not directed us to any decision of the district court related to this issue for appellate review, this argument clearly lacks merit.

V.

Yeazizw asserts that the district court erred when it denied her motion to dismiss for discriminatory enforcement. Yeazizw alleges that she was arrested and prosecuted because of her race and ethnicity. Finding that Yeazizw's allegations were frivolous and conclusory, the district court determined that she had not met the threshold requirements for a hearing on discriminatory enforcement. We review de novo the district court's denial of a motion to dismiss. *State v. Linville,* 598 N.W.2d 1, 2 (Minn.App.1999).

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits intentional, discriminatory enforcement of nondiscriminatory laws. *City of Minneapolis. v. Buschette,* 307 Minn. 60, 64, 240 N.W.2d 500, 502 (1976) (citation omitted). A criminal defendant may raise the defense of discriminatory enforcement of criminal laws by law enforcement officials at all levels. *Id.* at 66, 240 N.W.2d at 503. Yeazizw has the burden of producing evidence of discrimination by a clear preponderance of the evidence. *Id.*

To prove discriminatory enforcement,

> a defendant bears the heavy burden of establishing, at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.,* based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional right.

State v. Russell, 343 N.W.2d 36, 37 (Minn.1984) (citation omitted).

Our review of the record establishes that the district court's determination was not erroneous. The proffered evidence does not show that Yeazizw was singled out because of her race or ethnic origin. There is no evidence that the officers knew of her race or ethnic origin before they responded to ERS. Although she was the only black and Ethiopian-born person at ERS who was arrested, she was also the only person who physically resisted the officers. Further, while our careful review of the *Scales* tape from the police station reveals a heated discussion between one of the officers and Yeazizw as to whether she was arrested because of her race, she has not met her burden of showing that her race, ethnicity, or this post-arrest discussion led to Yeazizw's prosecution. Accordingly, the district court properly denied Yeazizw's motion to dismiss for discriminatory enforcement.

VI.

*7 Yeazizw argues that the cumulative effect of several evidentiary rulings by the district court resulted in an unfair trial. Appellate courts largely defer to the district court's evidentiary rulings, which will not be overturned absent a clear abuse of discretion. *State v. Kelly,* 435 N.W.2d 807, 813 (Minn.1989).

A. Mornson's Medical Records

Yeazizw sought additional discovery after learning that, in March 2002, Mornson had a "psychotic episode" resulting in a traffic fatality.[2] Yeazizw argues that the district court abused its discretion when it declined to conduct an in camera review of Mornson's medical records and denied the discovery motion. Yeazizw contends that evidence of the episode would explain Yeazizw's behavior toward the police. A district court has broad discretion in discovery rulings. *State v. Wildenberg,* 573 N.W.2d 692, 696 (Minn.1998). The district

court denied the motion, concluding that the records were not relevant because "they would tend to prove Defendant's version of events *before* the police arrived," rather than after they arrived. (Emphasis in original.) The district court further stated that "[w]hether or not Ms. Mornson was acting erratic with regard to Defendant simply has no bearing on Defendant's interaction with the police." We agree.

2 The record contains a *Minneapolis Star Tribune* article reporting on an accident in which Mornson's vehicle struck and killed a pedestrian while fleeing the police. The article stated that Mornson was having a "psychotic episode" prior to the police pursuit.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. The district court must also recognize that the defendant has a constitutional right to "be afforded a meaningful opportunity to present a complete defense * * *." *Wildenberg,* 573 N.W.2d at 697 (quoting *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 2532 (1984)). While "not all relevant evidence in the hands of the prosecution is discoverable, where it is material to guilt or innocence, or to sentencing, denying access to the defendant unconstitutionally impairs the defense[.]" *Wildenberg,* 573 N.W.2d at 697.

Mornson's medical records were not relevant to the charges against Yeazizw. The offense conduct consists of Yeazizw's actions toward the police, not actions occurring between Mornson and Yeazizw. Any evidence regarding Mornson's mental health would not have addressed the fact questions regarding what happened once police arrived at ERS. While Mornson's mental health may have affected *why* Yeazizw conducted herself the way she did when police arrived, it does not affect the probability of *whether* she committed the charged offenses. We, therefore, conclude that the district court did not abuse its discretion in denying Yeazizw's discovery motion. *See State v. Bakken,* 604 N.W.2d 106, 110-11 (Minn.App.2000) (holding that the district court did not abuse its discretion in ruling that sexual assault victim's social services records "contained nothing relevant or material to [appellant]'s defense"), *review denied* (Minn. Feb. 24, 2000). In the absence of any showing that Mornson's medical records were relevant to Yeazizw's defense, we also conclude that the district court was not compelled to perform an in camera review of the records. *See State v. Hummel,* 483 N.W.2d 68, 72 (Minn.1992) (concluding that petitioner's insufficient showing that the victim's confidential medical records were material and favorable to petitioner's defense did not trigger the need for in camera review).

B. Testimony of Psychological Expert

***8** "The admission of expert testimony is within the broad discretion accorded a trial court, and rulings regarding materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence may be reversed only if the trial court clearly abused its discretion." *State v. Ritt,* 599 N.W.2d 802, 810 (Minn.1999) (quotation and citations omitted). "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704.

Yeazizw argues that the district court prevented her from effectively using her psychological expert at trial. Ferris Fletcher, Ph.D., a licensed psychologist, testified regarding her evaluation and diagnosis of Yeazizw's posttraumatic stress disorder (PTSD). She also described the disorder's characteristics and symptoms. Yeazizw specifically asserts that the district court misapplied Minn. R. Evid. 704 when it "refused to allow Fletcher to opine about whether Yeazizw would be likely to go into a PTSD trigger reaction under conditions present on January 18."

The trial record reveals no reference to Rule 704 by the district court or counsel. After the state objected during Fletcher's direct examination, the district court excluded evidence of prior acts of domestic abuse against Yeazizw. From the record, it appears that the district court's ruling was not, as Yeazizw contends, based on Rule 704. Excluding the expert's opinion testimony on prior domestic abuse was not a clear abuse of discretion because it lacked relevance to the issues of whether Yeazizw engaged in disorderly conduct and obstructing legal process. Further, the expert was permitted to testify regarding several other aspects of PTSD as it applied to Yeazizw. Contrary to Yeazizw's assertion, the district court did not abuse its discretion in limiting the expert testimony.

C. Testimony of Police Officers

Yeazizw also argues that the district court abused its discretion in limiting appellant's cross-examination of police officers regarding "their incorrect knowledge of criminal statutes" and the civil lawsuit against them. Yeazizw's argument regarding the officers' knowledge of criminal statutes has no merit. She does not identify a decision of the district court for our review.

None of her citations to the record reveals any objections to the officers' testimony, and Yeazizw concedes that she did not object at trial. In the absence of an objection before the district court, this issue is not properly before us. *See Roby v. State,* 547 N.W.2d 354, 357 (Minn.1996) (concluding that reviewing court will not consider matters not argued before and considered by the district court).

As to cross-examination about the civil lawsuit that she has filed against them, Yeazizw contends that, because the civil lawsuit may have biased the officers' testimony in the criminal trial, her constitutional right to confront witnesses was violated by the inability to cross-examine them on this topic. The district court ruled that the civil lawsuit was irrelevant to the criminal case. A criminal defendant establishes a violation of the Confrontation Clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a *prototypical form of bias* on the part of the witness." *State v. Lanz-Terry,* 535 N.W.2d 635, 640 (Minn.1995) (emphasis added) (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 680, 106 S.Ct. 1431, 1436 (1986) (other quotation omitted)). "Bias is a catchall term describing attitudes, feelings, or emotions of a witness that might affect [the witness's] testimony, leading [the witness] to be more or less favorable to the position of a party for reasons other than the merits." *Id.* (citation omitted).

> ***9** But not everything tends to show bias, and courts may exclude evidence that is only marginally useful for this purpose. The evidence must not be so attenuated as to be unconvincing because then the evidence is prejudicial and fails to support the argument of the party invoking the bias impeachment method.

Id. (citations omitted).

Evidence of the civil lawsuit was attenuated and prejudicial. That Yeazizw has filed a lawsuit is not probative of whether Yeazizw committed the charged offense. It was also prejudicial, inviting a conclusion of wrongdoing based not on evidence, but on the mere commencement of a civil action. *State v. Harris,* 560 N.W.2d 672, 678 (Minn.1997) (citation omitted) (defining "prejudice" as "the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means"). Because the existence of a civil lawsuit was not probative of any of the facts in the criminal case, the district court did not abuse its discretion when it excluded evidence of the civil lawsuit. Minn. R. Evid. 401 (stating that relevant evidence makes consequential facts more or less probable).

D. Testimony of Police Expert

Yeazizw argues that the district court abused its discretion when it barred her expert on police practices. "The imposition of sanctions for violations of discovery rules and orders is a matter particularly suited to the judgment and discretion of the trial court." *State v. Lindsey,* 284 N.W.2d 368, 373 (Minn.1979) (citation omitted); *see also* Minn. R.Crim. P. 9.03, subd. 8 (permitting the district court to sanction for discovery violations). We will overturn such decisions only if the district court abused its discretion. *Lindsey,* 284 N.W.2d at 373. In exercising its discretion, the district court should consider "(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors." *Id.*

In a pretrial hearing, the district court set the deadline for submission of expert reports and explicitly warned the attorneys that a late submission would likely result in exclusion of the expert testimony. The district court excluded the police expert's testimony because the report was untimely submitted and because the information provided in the report was not sufficient to inform the prosecution of the expert's proposed testimony. In light of the district court's explicit warning and the substantive deficiency of the late report, we conclude that the district court's decision to exclude the expert testimony was not an abuse of discretion.

E. Arguments Regarding the Interpreter Issues

"Law enforcement officials must provide an interpreter before interrogating or taking a statement from a person handicapped in communication." *State v. Marin,* 541 N.W.2d 370, 373 (Minn.App.1996) (citing Minn.Stat. § 611.32, subd. 2 (1994)), *review denied* (Minn. Feb. 27, 1996). "A person is handicapped in communication if he or she cannot understand legal proceedings because of a difficulty speaking or comprehending English." *Id.* (citing Minn.Stat. § 611.31 (1994)). Thus, the purpose of Minn.Stat. §§ 611.31 and .32 is to protect the rights of people who are being interrogated.

***10** Yeazizw argues that the district court erred when it (1) ruled that prosecution witnesses could render an opinion as to whether Yeazizw needed an interpreter and (2) precluded Yeazizw from questioning police about Minn.Stat. §§ 611.31, .32, which address an arrestee's right to an interpreter. Yeazizw's claims are not supported by the record. The testimony demonstrates that Clairmont, Eidem, Kemp, and Hammond testified regarding Yeazizw's ability to understand the officers, but none of them offered an opinion regarding whether Yeazizw needed an interpreter when interacting with the police. Contrary to Yeazizw's assertion, the issue of whether such opinion testimony was admissible was not raised at trial, and there was no objection to testimony about Yeazizw's ability to understand the officers. Thus, the record does not contain a district court ruling or issue for our consideration. *Roby,* 547 N.W.2d at 357.

Yeazizw's attorney questioned Jeff Long, a supervising officer who spoke with Yeazizw at the police station, about his familiarity with the interpreter statute. The district court sustained the state's objection to this questioning, and we conclude that it was proper to do so. Here, where the basis of Yeazizw's arrest was conduct that occurred in the presence of police and no evidence was obtained or introduced at trial from any interrogation, the applicability of the interpreter statute was not relevant to the contested issues. *See* Minn. R. Evid. 401 (defining relevant evidence). The district court properly sustained the state's objection to questioning regarding the interpreter statute.

VII.

A district court's denial of a motion for a new trial based on alleged prosecutorial misconduct will be reversed only "when the misconduct, considered in the context of the trial as a whole, was so serious and prejudicial that the defendant's constitutional right to a fair trial was impaired." *State v. Johnson,* 616 N.W.2d 720, 727-28 (Minn.2000) (citations omitted). The test for determining whether prosecutorial misconduct was harmless depends partly upon the type of misconduct. In cases involving "unusually serious prosecutorial misconduct," we must be certain beyond a reasonable doubt that the misconduct was harmless before we will affirm. *State v. Caron,* 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974). In cases involving less-serious prosecutorial misconduct, the test is whether the misconduct likely played a substantial part in influencing the jury to convict. *Id.* at 128, 218 N.W.2d at 200.

Yeazizw asserts that the district court erred when it denied her motion for a new trial based on prosecutorial misconduct. The district court found Yeazizw's allegations of prosecutorial misconduct unwarranted and "completely lacking in foundation." A review of the record reveals that most of the comments that Yeazizw considers improper disparagement are actually arguments countering Yeazizw's theory of the case, which we conclude were appropriate. Further, the district court sustained some of Yeazizw's objections to misstatements of the law, and the prosecutor corrected his argument. The supreme court has "repeatedly warned prosecutors that it is improper to disparage the defense in closing arguments or to suggest that a defense offered is some sort of standard defense offered by defendants when nothing else will work." *State v. Griese,* 565 N.W.2d 419, 427 (Minn.1997) (citations and quotation omitted). In his closing argument, the prosecutor stated, "So if you don't bite [that] she's the victim, then she has Post Traumatic Stress disorder and I'm not responsible for what I did." The prosecutor's comments addressing Yeazizw's PTSD were improper.

***11** The misconduct in this case, however, was not so serious and prejudicial as to warrant a new trial. *See Griese,* 565 N.W.2d at 428 (concluding that, despite prosecutor's improper conduct, statements were not so prejudicial as to deny appellant a fair trial). Based on the strength of the evidence considered by the jury, any misconduct committed by the prosecutor did not play a substantial part in the jury's decision to convict. *Caron,* 300 Minn. at 128, 218 N.W.2d at 200; *see also State v. Buggs,* 581 N.W.2d 329, 341-42 (Minn.1998) (where verdict "surely" not attributable to prosecutorial misconduct, defendant not entitled to new trial).

VIII.

Yeazizw argues that the district court's denial of a *Schwartz* hearing based on alleged juror misconduct was an abuse of discretion. "The granting of a *Schwartz* hearing is generally a matter of discretion for the trial court." *State v. Rainer,* 411 N.W.2d 490, 498 (Minn.1987) (citation omitted). The trial court should be liberal in granting a hearing, but the defendant must first present evidence that, if unchallenged, would warrant the conclusion that jury misconduct occurred. *Id.* We will not reverse the denial of a *Schwartz* hearing unless

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the denial constitutes an abuse of discretion. *State v. Church,* 577 N.W.2d 715, 721 (Minn.1998).

During an inquiry into the validity of a verdict, a juror is permitted to testify regarding whether "extraneous prejudicial information was improperly brought to [the] jury's attention." Minn. R. Evid. 606(b); *see also State v. Pederson,* 614 N.W.2d 724, 731 (Minn.2000) (citing Minn. R. Evid. 606(b) and stating that "[w]e are concerned with discovering whether extraneous prejudicial information was considered by the jury"). But a juror is not permitted to testify regarding the jury's thought processes or deliberations. *See* Minn. R. Evid. 606(b); *Pederson,* 614 N.W .2d at 731.

In support of her motion, Yeazizw submitted the affidavit of Stephanie Howard-Clark, an attorney who works for the law firm representing Yeazizw. The affidavit states that Howard-Clark contacted a juror "to learn [her] general views of the trial, and how the lawyers performed at trial." The juror told Howard-Clark

> that there was an interpreter, so [the juror] assumed that meant the Defendant couldn't speak English. But then [the juror] heard the Defendant speaking some English during a break, to someone in the hall. [The juror] also saw [Yeazizw] have brief conversations with her attorney. [The juror] said that in the jury room she mentioned to the other jurors that she had observed the Defendant speaking English in the hall, and then some of the jurors disclosed they had heard it too. [The juror] said it was that observation of the Defendant speaking English that largely persuaded her to decide that the Defendant was guilty. She thought that if the Defendant lied about needing an interpreter, she must've lied about what happened in her case.

***12** The district court denied a *Schwartz* hearing, stating that Yeazizw provided insufficient evidence to warrant a hearing. Howard-Clark's affidavit raises allegations that jurors committed misconduct by considering extraneous information that was prejudicial. These allegations, if unchallenged, lead to no conclusion other than juror misconduct.

We conclude that Yeazizw has met her evidentiary burden. Evidence that jurors obtained from outside the courtroom would be "extraneous prejudicial information" and not information regarding the jury's deliberations. If the allegations prove to be true, consideration of such "extraneous prejudicial information" constitutes juror misconduct. Accordingly, it was an abuse of discretion to deny Yeazizw a *Schwartz* hearing. We reverse the denial of a *Schwartz* hearing and remand for further proceedings not inconsistent with this ruling.

IX.

The state argues that, because the format of Yeazizw's brief fails to conform to the Minnesota Rules of Civil Appellate Procedure, the brief should be disregarded. The state does not expressly move to strike any portion of Yeazizw's brief, which is appropriate where a party's brief does not conform to the rules of appellate procedure. *State v. Duncan,* 608 N.W.2d 551, 559 (Minn .App.2000), *review denied* (Minn. May 16, 2000). We, therefore, decline to consider the state's argument.

Affirmed in part, reversed in part, and remanded.

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