STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1228

State of Minnesota,
Respondent,

vs.

Derek Michael Chauvin,
Appellant.

Filed April 17, 2023
Affirmed
Reyes, Judge

Hennepin County District Court
File No. 27-CR-20-12646

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

Neal Kumar Katyal (pro hac vice), Special Assistant Attorney General, Washington, D.C. (for respondent)

William F. Mohrman, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for appellant)

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

SYLLABUS

I. When a criminal defendant moves to change venue, continue trial, or sequester the jury on the grounds that publicity surrounding the trial created either actual or presumed juror prejudice, a district court does not abuse its discretion by denying the

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

motions if it takes sufficient mitigating steps and verifies that the jurors can set aside their impressions or opinions and deliver a fair and impartial verdict.

II. A police officer can be convicted of second-degree unintentional felony murder for causing the death of another when the officer uses unreasonable force constituting third-degree assault to effect a lawful arrest.

OPINION

REYES, Judge

In this direct appeal from his conviction of second-degree unintentional murder, appellant Derek Michael Chauvin, an officer with the Minneapolis Police Department (MPD) at the time of the offense, argues that (1) the district court abused its discretion by denying his motions to change venue, continue the trial, and sequester the jury due to prejudicial publicity; (2) the district court abused its discretion by denying his request for a *Schwartz* hearing based on alleged juror misconduct; (3) this court must vacate his third-degree murder charge; (4) a police officer cannot be convicted of second-degree unintentional felony murder with third-degree assault as the underlying offense; (5) the district court abused its discretion when instructing the jury; (6) the district court abused its discretion by allowing the state to present cumulative evidence on the use of force; (7) the district court abused its discretion by excluding a presentation slide from MPD training materials submitted as evidence; (8) the district court abused its discretion by excluding an unavailable witness's out-of-court statement; (9) the district court abused its discretion by denying Chauvin's new-trial motion based on alleged prosecutorial misconduct; (10) the district court failed to ensure that sidebar conferences were

transcribed, as required by statute; (11) alleged cumulative errors denied Chauvin a fair trial; and (12) the district court abused its discretion by imposing an upward sentencing departure from the presumptive range under the sentencing guidelines. We affirm.

FACTS

Floyd's Arrest and Death

The facts below are based on evidence presented at trial, including but not limited to videos from officers' body cameras, expert testimony, witness testimony, and an autopsy report.

On May 25, 2020, at approximately 8:02 p.m., the Minneapolis 911 dispatch center received a report about a customer, later identified as George Perry Floyd, Jr., attempting to use a counterfeit $20 bill at Cup Foods. The caller also indicated that Floyd appeared to be under the influence of some substance. MPD Officers Alexander Kueng and Thomas Lane responded to the scene at 8:08 p.m. and found Floyd sitting in the driver's seat of a car parked on the street with two passengers, including M.H. Officer Lane approached the driver's side and ordered Floyd to get out of the car. Floyd appeared nervous. He started crying and told Lane several times, "Please don't shoot me." Lane assured Floyd that he was not going to shoot him and again ordered Floyd to get out of the car. Eventually, Lane pulled Floyd out and, with Kueng's assistance, handcuffed Floyd's hands behind his back. The officers then walked Floyd across the street to their squad car, checked that he was unarmed, and ordered him into the car. Floyd resisted, claiming that he was claustrophobic. Lane offered to roll the windows down for him, but Floyd remained agitated. A struggle ensued. In an effort to place Floyd into the squad car, Lane attempted to pull Floyd by his

legs into the backseat from the street side of the car while Kueng tried pushing him in from the curb side. Floyd became more nervous, crying and yelling that he could not breathe. Floyd's body slid across the backseat, with his upper body remaining inside the vehicle while his legs were outside. Lane and Kueng were trying to control Floyd when Chauvin and Officer Tou Thao arrived to assist.

At 8:19 p.m., the four officers removed Floyd from the squad car and forced him into a prone position by pressing him against the ground with his face and stomach facing down. Chauvin pressed his left knee into Floyd's neck and placed his right knee on Floyd's back. Kueng placed his knee around Floyd's buttocks area, and Lane restrained Floyd's feet and legs. Almost immediately, Floyd stopped resisting and started telling the officers that he could not breathe, which he repeated multiple times. A group of bystanders gathered around them. As the restraint continued, Floyd's voice grew thicker and slower. He tried to push himself up with his fingers, knuckles, and forehead so that he could breathe. Approximately four minutes and 45 seconds into the prone restraint, Floyd ceased pleading and went silent. Floyd became nonresponsive approximately 53 seconds later.

Among the bystanders was an off-duty firefighter. Seeing that Floyd was handcuffed, was no longer moving, and that his face appeared puffy and swollen, the firefighter identified herself to the officers and offered to provide medical assistance to Floyd. The officers, including Chauvin, refused. The firefighter then alerted the officers that if Floyd had no pulse, they needed to start chest compressions. The officers ignored the advice, and Chauvin continued to press his knee into Floyd's neck with most of his body weight. Concerned bystanders insisted that the officers check Floyd's pulse. Kueng

did so. At 8:25 p.m., Kueng told the other officers that he could not find a pulse. Chauvin responded, "huh," but did not remove his knee from Floyd's neck. The group around them became increasingly stressed but remained peaceful and followed the officers' orders to keep a distance. Some bystanders asked Chauvin to get off Floyd. However, Chauvin did not take his knee off Floyd's neck and release him until an ambulance arrived and the paramedics rolled the gurney next to Floyd. At no point did Chauvin give medical aid to Floyd or allow anyone else to do so.

The period of restraint lasted approximately nine minutes and 29 seconds in total, from the time that the officers initially placed Floyd into the prone position until the time that Chauvin lifted his knee off Floyd's neck and released him. Shortly thereafter, Floyd was pronounced dead at Hennepin County Medical Center. Dr. Andrew Baker, Chief Hennepin County Medical Examiner, conducted an autopsy of Floyd's body and identified the immediate cause of death as "cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression." Dr. Baker explained at trial that this refers to a sudden loss of heart and respiratory functions occurring in the process of law enforcement subduing and restraining Floyd and Chauvin applying pressure on Floyd's neck.

Respondent State of Minnesota charged Chauvin with second-degree unintentional murder in violation of Minn. Stat. § 609.19, subd. 2(1) (2018), third-degree murder in violation of Minn. Stat. § 609.195(a) (2018), and second-degree manslaughter in violation of Minn. Stat. § 609.205(1) (2018). Following a jury trial, the jury found Chauvin guilty on all counts.

Procedural History

Since May 25, 2020, this case has garnered substantial publicity not only within the state but across the country. Before trial, Chauvin moved to change venue from Hennepin County based on pervasive prejudicial publicity and public-safety concerns. Chauvin asserted that "the Twin Cities jury pools have surely been tainted" because "protests over [] Floyd's death, riots and looting were televised internationally, and near nonstop on local media." After a hearing on September 11, 2020, the district court issued a preliminary order denying the motion to change venue.[1] The district court reasoned that "no corner of the [s]tate of Minnesota has been shielded from pretrial publicity regarding the death of George Floyd," and "a change of venue is unlikely to cure the taint of potentially prejudicial pretrial publicity." Regarding the safety concern, the district court observed from the hearing at the Hennepin County Family Justice Center that effective security measures are difficult to put in place in a smaller courthouse with limited entrances and exits. It therefore ordered that the trial would take place in the Hennepin County Government Center where floor access and movement of both defendants and attorneys could be tightly controlled. "Moving venue to a smaller county will not assuage the defendants' security concerns," the district court explained, "because the relevant courthouse would certainly be smaller than the Hennepin County Government Center." The district court agreed to "reconsider [the motion] as the case develops if circumstances warrant [it]." By a separate order, it ordered that the jurors' names and addresses be kept confidential, the parties to refer to

[1] At this point in the proceedings, Chauvin's trial was joined with that of his three codefendants.

jurors by their number, jury selection be sequestered, and the jury be partially sequestered during trial. The district court also ordered that pretrial hearings would not be broadcast but allowed audio and video coverage of the trial.

On December 14, 2020, Chauvin moved for a continuance of the March 8, 2021 trial date. Chauvin alleged that discovery violations by the state had prejudiced his ability to prepare for trial. The state also moved to continue the trial to June 7, 2021, based on health concerns related to the COVID-19 pandemic. The district court denied both motions to continue Chauvin's trial but granted the state's motion in part to continue Chauvin's three codefendants' trial to August 23, 2021.

On March 8, 2021, the first day of trial, the district court considered the parties' motions in limine, and jury selection started the next day. The prospective jurors had completed jury questionnaires several months earlier. *See* Minn. R. Crim. P. 26.02, subd. 2(2), (3). The jurors were sequestered during their examination, with each prospective juror drawn from the panel for questioning outside the presence of the other potential jurors and examined first by the district court and then by each of the parties. *See* Minn. R. Crim. P. 26.02, subd. 4(2)(b). Each party had the opportunity to challenge the potential jurors for cause or exercise a peremptory challenge after completing questioning. *See* Minn. R. Crim. P. 26.02, subd. 4(3)(d). The district court increased the number of peremptory challenges for each party, giving Chauvin 18 and the state ten. *See* Minn. R. Crim. P. 26.02, subd. 6 (providing defendant with five and state with three peremptory challenges in cases not involving first-degree murder).

On March 12, 2021, during jury voir dire, the City of Minneapolis announced a $27 million settlement with the Floyd estate in the related civil wrongful-death action. On March 15, 2021, Chauvin (1) moved to change venue, continue the trial, or immediately fully sequester the jury during trial; (2) requested additional peremptory challenges; and (3) asked the district court to recall the seven jurors who had already been seated. The district court denied the motions for additional peremptory challenges and jury sequestration but granted his motion to recall the seven seated jurors for questioning about the settlement and allowed Chauvin to remove for cause any juror who was unable to be impartial based on the civil settlement. The district court took the other motions under advisement. Chauvin later made a record to support the motions to change venue or continue the trial, asking the court to presume prejudice to the jury pool based on elected officials making prejudicial statements and the civil lawsuit information, or to give him more latitude when questioning jurors.[2]

The district court recalled the seven seated jurors and excused two jurors for cause based on what they had heard or seen about the settlement and opinions they had formed as a result. Chauvin and the state filed memoranda on the motion to change venue or continue the trial. Chauvin argued that the "barrage" of publicity created a presumption of prejudice that "threatens the fairness of the trial." He also identified statements by the police chief, commissioner of public safety, and mayor referring to Floyd's death as a

[2] Chauvin made this record after the court excused eight out of the last 11 jurors for cause and he used a peremptory to remove juror number 69 because the juror expressed an opinion that Floyd was murdered.

murder and characterized them as opinions on Chauvin's guilt. And he referenced a "leak regarding the failed plea agreement" being disseminated before jury selection but after the questionnaires had been returned. The district court denied the motions to change venue or continue the trial, reasoning that no county in the state can do more to ensure a fair trial than Hennepin, and, because the pretrial publicity was unlikely to stop, a continuance would not remedy the concern about juror prejudice.

During trial, on April 12, 2021, Chauvin moved to sequester the jury in the wake of an officer-involved shooting in Brooklyn Center, which gave rise to a renewal of riots and civil unrest. The district court denied the motion. On April 19, 2021, Chauvin moved for a mistrial based on extensive pretrial publicity and remarks by California Representative Maxine Waters that if the jury acquits Chauvin, protestors must "stay on the street" and "get more confrontational." The district court denied the motion.

After the jury returned guilty verdicts, Chauvin moved for a new trial. He argued that the district court abused its discretion when it denied his motions to change venue, continue the trial, and sequester the jury because the "pervasive publicity before and during the trial tainted the jury pool and prejudiced the jury," depriving him of a fair trial. Chauvin specifically pointed to the extensive security at the courthouse during trial, stating that "in order to enter the Hennepin County Government Center, jurors and potential jurors [] had to negotiate concrete barriers, topped with fences and razorwire, and walk past National Guard members and police officers wearing tactical gear and carrying automatic weapons." Chauvin claimed that this high level of security sent a signal to the jurors that a "wrong verdict would have consequences for the Twin Cities."

Chauvin also argued that the district court must order a *Schwartz* hearing[3] to investigate misconduct by two jurors. Chauvin claimed that juror 96 "lacked candor during the jury selection process" by expressing concern for her safety depending on the outcome but indicating after the verdict that she was only concerned for her safety if the jury acquitted Chauvin. Chauvin further argued that juror 52 lacked candor in jury selection because (1) he failed to disclose his participation in the August 2020 march on Washington, D.C., to commemorate Dr. Rev. Martin Luther King, Jr.'s historic march, where Floyd's family spoke about his death and (2) he falsely denied having any negative views of the MPD. Finally, Chauvin argued that juror 52's postverdict media interviews revealed that he based his decision on outside influences and his desire for political change. In one radio interview, juror 52 stated that he "had been pulled over by Minneapolis police regularly—probably about 50 times—for no good reason," that serving as a juror in this case allowed him to "have a chance to make history," and that the jurors discussed Chauvin's failure to testify and that "it probably was to his detriment that he didn't take the stand."

The district court denied the motions and convicted Chauvin of second-degree unintentional murder based upon the underlying offense of third-degree assault. It then sentenced Chauvin to 270 months in prison, an upward durational departure from the presumptive range of the Minnesota Sentencing Guidelines. This appeal follows.

[3] This procedure takes its name from *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301 (Minn. 1960).

ISSUES

I. Did the district court abuse its discretion by denying Chauvin's motions to change venue, continue the trial, and sequester the jury?

II. Did the district court abuse its discretion by denying Chauvin's request for a *Schwartz* hearing?

III. Should this court vacate Chauvin's third-degree murder charge?

IV. Can a police officer be convicted of second-degree unintentional felony murder with third-degree assault as the underlying offense?

V. Did the district court abuse its discretion when instructing the jury?

VI. Did the district court abuse its discretion by allowing the state to present cumulative evidence on the use of force?

VII. Did the district court abuse its discretion by excluding a presentation slide from MPD training materials submitted as evidence?

VIII. Did the district court abuse its discretion by excluding the out-of-court statement made by M.H., a passenger in Floyd's car before the incident?

IX. Did the district court abuse its discretion by denying Chauvin's new-trial motion based on alleged prosecutorial misconduct?

X. Is Chauvin entitled to a new trial based upon the district court's failure to ensure that sidebar conferences regarding objections made during trial were transcribed?

XI. Did cumulative errors deny Chauvin a fair trial?

XII. Did the district court abuse its discretion by departing upward from the presumptive range under the sentencing guidelines?

ANALYSIS

I. The district court did not abuse its wide discretion by denying Chauvin's motions to change venue, continue the trial, and sequester the jury.

Chauvin argues that the district court abused its discretion by denying his motions to change venue, continue the trial, and sequester the jury because (1) publicity and riots

both before and during the trial, combined with the city's announcement of a settlement with the Floyd family, created a presumption of prejudice and (2) the jurors were actually prejudiced. For the reasons explained below, we are not persuaded to grant relief.

Because these issues are related and the analysis ultimately depends on whether the district court ensured that Chauvin received a fair trial by an impartial jury, we address the issues together, as the parties have done. *See State v. Blom*, 682 N.W.2d 578, 607 (Minn. 2004) (considering Blom's motions to change venue, continue trial, and sequester jury "together because they are factually interrelated" and have same standard of review).

A. Standard of review

Generally, criminal trials must be held in the county where the offense was committed, "unless the rules direct otherwise." Minn. R. Crim. P. 24.01. A district court "must" grant a motion to change venue or continue the trial "whenever potentially prejudicial material creates a reasonable likelihood that a fair trial cannot be had." Minn. R. Crim. P. 25.02, subd. 3. A party may move to sequester the jury either at the beginning of trial or during trial. Minn. R. Crim. P. 26.03, subd. 5(2). Similar to the requirements for a change of venue or a continuance, "sequestration must be ordered if the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the jurors' attention." *Id.*

This court will not reverse a district court's decision on whether to grant a change of venue absent a clear abuse of its wide discretion. *State v. Salas*, 306 N.W.2d 832, 835 (Minn. 1981). Similarly, the question of whether to grant a continuance or to sequester a jury is left to the sound discretion of the district court. *State v. Morgan*, 246 N.W.2d 165,

168 (Minn. 1976). "[W]hether the [district] court abused its discretion depends on whether it properly assessed the likelihood that prejudicial publicity would affect the impartiality of the jurors and thereby prevent a fair trial." *Blom*, 682 N.W.2d at 608 (quoting *State v. Morgan*, 246 N.W.2d 165, 169 (Minn. 1976)).

"Prospective jurors cannot be presumed partial solely on the ground of exposure to pretrial publicity." *State v. Kinsky*, 348 N.W.2d 319, 323 (Minn. 1984) (citations omitted). A fair trial does not mean jurors must be "totally ignorant of the facts and issues involved" in an important criminal case that has generated public interest, "and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The Supreme Court has aptly described this as: "prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*." *Skilling v. United States*, 561 U.S. 358, 381 (2010).

Under Minnesota caselaw, a criminal defendant seeking reversal on prejudicial-publicity grounds generally must show actual juror prejudice. *State v. Beier*, 263 N.W.2d 622, 626 (Minn. 1978). However, the Supreme Court has recognized that, in rare cases, publicity surrounding the trial may be so corrupting that it raises a presumption of juror prejudice. *See Rideau v. Louisiana*, 373 U.S. 723 (1963); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Irvin*, 366 U.S. 717 (1961). Regardless of whether an appellant bases their challenge on actual or presumed prejudice, the ultimate test remains "whether [] prospective juror[s] can set aside [their] impression or opinion and render an impartial verdict." *State v. Warren*, 592 N.W.2d 440, 447-48 (Minn. 1999) (concluding motion to

transfer venue properly denied when appellant failed to show actual or presumed prejudice); *Blom*, 682 N.W.2d at 607 (concluding motions to change venue, continue trial, and sequester jury properly denied when district court took mitigating steps and sufficiently verified seated jurors would be fair and impartial); *see also Irvin*, 366 U.S. at 723 ("It is sufficient if the juror can lay aside [their] impression or opinion and render a verdict based on the evidence presented in court."). Based on both Minnesota caselaw and the Supreme Court precedents, we hold that, when a criminal defendant moves to change venue, continue a trial, or sequester the jury on the grounds that publicity surrounding the trial created either actual or presumed juror prejudice, a district court does not abuse its discretion by denying the motions if it takes sufficient mitigating steps and verifies that the jurors can set aside their impressions or opinions and deliver a fair and impartial verdict.

B. Chauvin fails to show actual prejudice by the jury.

To establish actual prejudice resulting from publicity surrounding the trial, a defendant must show that the publicity "influenced the specific jurors involved in the case." *State v. Fairbanks*, 842 N.W.2d 297, 302 (Minn. 2014). Factors appellate courts may consider include, among others, whether the publicity was factual, "the length of time between the publicity and the trial," and whether the district court mitigated any potential prejudice at trial. *Warren*, 592 N.W.2d at 447-48.

Chauvin fails to show actual prejudice. First, with a few very limited exceptions,[4] the publicity was generally factual in nature. *Cf. State v. Thompson*, 123 N.W.2d 378, 381-

[4] On appeal, Chauvin references statements by the MPD police chief and the commissioner of public safety describing the incident as a "murder" before he was convicted. We

82 (Minn. 1963) (identifying "vice of the publicity" as "opinions of people who are supposed to know the facts"). Chauvin claims that "[n]umerous news stories said Chauvin had his knee on Floyd's neck and Floyd could not breath."[5] However, the record, including the videos, shows that Chauvin had one knee on Floyd's back and one knee on his neck. While Chauvin identifies the extent of the publicity, he fails to analyze its content or explain *why* the publicity prejudiced him. Second, although the trial started in March 2021, approximately ten months after Floyd's death, the district court found that the trial was very likely to generate substantial publicity regardless of when and where it was held, so moving the trial or delaying it would not have made a difference. This is consistent with the Minnesota Supreme Court's reasoning in *Blom* that "nowhere in the state would Blom face a jury unexposed to publicity about the case," and even if publicity might die down temporarily, it would reoccur once the trial started. 682 N.W.2d at 608 (involving trial for first-degree murder and kidnapping during which the state was "inundated with media coverage").

Third, the district court took numerous steps to verify that the seated jurors would be fair and impartial, thereby mitigating any potential prejudice. In *Blom*, the supreme court concluded that the district court did not abuse its discretion by denying motions to

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acknowledge that these were not pure statements of fact but presupposed guilt. However, because the district court took numerous mitigating steps and verified that the jurors could decide the case fairly and impartially, we conclude that this properly eliminated any potential prejudice among the seated jurors.

[5] Both during oral argument and in his brief to this court, Chauvin repeatedly insisted that he only "placed his *knees* on Floyd's back," ignoring the substantial evidence showing that he pressed his left knee on Floyd's neck.

change venue, continue the trial, and sequester the jury because it, among other actions, (1) continued to reevaluate the change-of-venue motions as new information arose and as new jurors were seated; (2) questioned jurors individually and extensively, and permitted counsel to do so as well; (3) verified that all 15 jurors indicated that they would reach a verdict based solely on evidence presented in court; (4) ensured that jurors who had been exposed to possibly prejudicial publicity agreed to follow the court's instructions; and (5) instructed jurors not to discuss the case with anyone. 682 N.W.2d 608-09. Similarly, in *Fairbanks*, the supreme court held that actual prejudice did not occur when (1) a jury questionnaire was used; (2) the parties consulted in advance about which jurors should be excused before being summoned; (3) the district court granted each party additional peremptory challenges; (4) voir dire was conducted outside the presence of other jurors; (5) the court gave defense counsel ample opportunity to question prospective jurors about their exposure to prejudicial publicity; (6) none of the 16 jurors selected indicated they had formed opinions about the case and all said they could set aside anything they heard about the case; and (7) Fairbanks did not use all of his peremptory challenges until alternates were selected. 842 N.W.2d at 303 (stating these steps mitigated any potential prejudice from nonfactual information).

As in *Blom* and *Fairbanks*, the district court here took similar steps to ensure that Chauvin had a fair and impartial jury. The district court (1) allowed Chauvin to renew his motions to change venue, continue the trial, and sequester the jury as new circumstances arose during the trial; (2) ordered an anonymous jury and conducted jury selection by sequestration, with each juror questioned individually; (3) required jurors to complete a

comprehensive jury questionnaire with questions asking about their exposure to publicity surrounding the trial, opinions about Chauvin and Floyd, participation in protests, attitudes about Black Lives Matter and Blue Lives Matter, and support for police reform; (4) directed jurors not to read or intentionally view anything about the trial, or investigate or research the case, and promptly removed for cause any juror who did not follow this admonishment; (5) allowed the parties to consult and stipulate to remove jurors for cause without summoning the jurors; (6) immediately removed for cause any prospective juror who had formed an opinion about Chauvin's guilt after the city announced the settlement with Floyd's family; and (7) increased the number of defense peremptory challenges to 18 and the state's peremptory challenges to ten.

Moreover, as in *Fairbanks*, Chauvin did not use all his peremptory challenges and had three left. Unused peremptory challenges suggest that a defendant is satisfied that the jurors selected would be unbiased. *Warren*, 592 N.W.2d at 448; *Fairbanks*, 842 N.W.2d at 303. Finally, and most importantly, despite the publicity, riots, and heightened security around the courthouse, all jurors who served confirmed that they could decide the case based on the evidence presented in court and could be fair and impartial. *Kinsky*, 348 N.W.2d at 324 ("If [] the jurors indicate their intention to set aside any preconceived notions and demonstrate to the satisfaction of the [district court] that they are able to do so, [appellate courts] will not lightly substitute [their] own judgment.").

C. The publicity surrounding Chauvin's trial was not so corrupting that it created a presumption of prejudice.

As an initial matter, Chauvin has not identified any Minnesota precedent in which an appellate court reversed a conviction based on a presumption of prejudice due to publicity surrounding the trial. Moreover, Supreme Court caselaw in which publicity resulted in presumed jury prejudice involved circumstances more extreme than those in Chauvin's trial. For example, in *Rideau*, the Supreme Court held that the failure to change venue violated Rideau's due-process rights when his "interview" was broadcast on television multiple times, showing him in jail, flanked by the sheriff and two state troopers, and admitting details of the robbery and murder in response to leading questions. 373 U.S. at 726.[6] In *Irvin*, the Supreme Court held that publicity surrounding the trial raised a presumption of prejudice when (1) newspaper accounts revealed the defendant's criminal history and juvenile record, his confession to the six murders, and his offer to plead guilty and (2) eight out of the 12 seated jurors stated that they thought the defendant was guilty during voir dire. 366 U.S. at 722-29. And in *Sheppard*, the Supreme Court held that a presumption of prejudice existed when (1) the media sensationalized the murder of Sheppard's pregnant wife and characterized his silence and refusal to take a lie-detector test as evidence of his guilt; (2) the trial was a media circus with the press taking over the courtroom and sitting at a table inside the bar less than three feet from the jury box,

[6] Chauvin also relies on *Estes v. Texas*, which held that the defendant's due-process right to a fair trial was violated by televising his trial. 381 U.S. 532 (1965). The *Estes* Court did not consider whether possibly prejudicial publicity necessitated a change of venue or a continuance, and Chauvin does not argue that his trial should not have been televised, so this case is inapposite.

hampering defense counsel's ability to consult with Sheppard; (3) jurors were photographed when they entered or left the courtroom; (4) news articles falsely accused defense counsel of inappropriate conduct; (5) jurors were constantly exposed to news media, but the court did not admonish them to avoid such exposure; (6) the trial began two weeks before a hotly contested election in which the prosecutor and judge were candidates for judgeships; and (7) the district court did nothing to control the "carnival atmosphere." 384 U.S. at 336-49, 353-54, 358-59.

Unlike *Rideau*, *Irvin*, and *Sheppard*, none of the publicity here included Chauvin confessing to the crimes. Further, the district court took numerous steps to prevent the trial from becoming "utterly corrupted by press coverage" by sequestering jurors during jury selection and deliberation as well as controlling media access to the trial by precluding video and audio coverage of pretrial hearings. *Cf. Skilling*, 561 U.S. at 380-881 (concluding negative pretrial publicity involving Enron bankruptcy trial did not raise presumption of prejudice in part because press coverage did not include his confession, and trial atmosphere was not "utterly corrupted by press coverage"). Its associated publicity was not so corrupting as to raise a presumption of jury partiality under either Minnesota or Supreme Court precedents. While there was substantial security around the courthouse during trial, it was put into place to ensure a safe trial for the parties as well as the general public. As the district court pointed out, a smaller courthouse in a different venue would unlikely be able to accommodate the necessary security measures. We conclude that the district court took sufficient steps to mitigate the publicity surrounding the trial and verified that all seated jurors could set aside their impressions or opinions and

deliver a fair and impartial verdict. It therefore did not abuse its wide discretion by denying Chauvin's motions to change venue, continue the trial, and sequester the jury based on actual or presumed prejudice.

II. The district court did not abuse its broad discretion by denying Chauvin's request for a *Schwartz* hearing.

Chauvin argues that the district court "should have held a *Schwartz* hearing" based on alleged misconduct by two jurors. We are not persuaded.

A district court has "fairly broad discretion in determining whether" to grant a *Schwartz* hearing. *State v. Stofflet*, 281 N.W.2d 494, 498 (Minn. 1979). Accordingly, appellate courts review a district court's order denying a request for a *Schwartz* hearing for an abuse of discretion. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004).

"A *Schwartz* hearing provides a party an opportunity to impeach a verdict due to juror misconduct or bias." *Pulczinski v. State*, 972 N.W.2d 347, 361 (Minn. 2022). When there is evidence of juror misconduct, a district court may, in its discretion, "summon the jurors and permit an examination in the presence of counsel for all interested parties and the [district court] under proper safeguards." *Schwartz*, 104 N.W.2d. at 303. To obtain a *Schwartz* hearing, a defendant must establish a prima facie case of jury misconduct by submitting "sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979). A party may impeach a verdict by "establishing that a juror gave false answers during voir dire that concealed prejudice or bias toward one of the parties." *Pulczinski*, 972 N.W.2d at 361; *see* Minn. R. Crim. P. 26.03, subd. 20(6) (incorporating Minn. R. Evid. 606(b)).

"The [district] court need not, however, blindly accept the assertions submitted by defense counsel." *Larson*, 281 N.W.2d at 484. And if a defendant had the opportunity to question a juror and prevent a juror from serving, then a district court does not abuse its discretion by denying a *Schwartz* hearing, even if there is a basis to hold a hearing. *See Stofflet*, 281 N.W.2d at 498.

In the fact section of Chauvin's initial brief to this court, he alleges that juror 52 gave false responses on his jury questionnaire by failing to disclose his participation in the August 2020 March on Washington, D.C. But Chauvin does not brief the issue in the one-paragraph argument section, where he asserts only in passing that juror 52's "[n]egative impressions of the MPD and involvement in anti-police protests . . . would have justified removal for cause." Moreover, despite noting in his facts section that, in a posttrial interview, juror 96 expressed concern for her safety depending on the trial result, Chauvin does not even mention juror 96 in the brief's argument section. The supreme court has stated that issues alluded to in the brief but not addressed in the argument section are forfeited. *See McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998). Nevertheless, Chauvin's claims also fail on the merits for the reasons identified below.

First, juror 96 served as an alternate, whom the district court dismissed and who therefore did not participate in deliberations. *See State v. Hallmark*, 927 N.W.2d 281, 300-01 (Minn. 2019) (noting claim of juror bias fails against juror not impaneled); *State v. Barlow*, 541 N.W.2d 309, 313 (Minn. 1995) (concluding defendant not deprived of right to fair and impartial jury when "neither alternate juror participated in the jury's deliberations or decision").

Second, Chauvin's claim that juror 52 falsely concealed his participation in the August 2020 March on Washington is contradicted by the record. The jury questionnaire that was sent to prospective jurors asked whether there was "anything else the judge and attorneys should know about you in relation to serving on this jury" and whether the prospective jurors or anyone close to them had participated in "any of the demonstrations or marches against police brutality that took place in Minneapolis after [] Floyd's death." Juror 52 responded "no" to both questions truthfully. Neither question was the type of "probing question[]" that would elicit a specific response disclosing the juror's participation in the march on Washington. *See Pulczinki*, 376 N.W.2d at 535 ("proper remedy for teasing out potential juror bias during voir dire is for lawyers to ask probing questions of the juror"); *see also State v. Beer*, 367 N.W.2d 532, 535 (Minn. 1985) (defense counsel failed to "ask the right question at voir dire to elicit [specific] information"); *see also State v. Benedict*, 397 N.W.2d 337, 340 (Minn. 1986) (concluding district court properly denied *Schwartz* hearing request because defendant failed to "ask the sort of clear question that, absent a lack of credibility on the juror's part, necessarily would have elicited the disclosure that the foreman withheld").

Similarly, Chauvin's claim that juror 52 falsely denied in voir dire his negative views of the MPD is inconsistent with the record. Juror 52 made his negative impressions of the MPD, the police, and the criminal-justice system clear during voir dire. He stated that MPD officers are more likely to use force against Black people, strongly disagreed that police treat Black people and White people equally, and that "Blacks and other minorities do not receive equal treatment as Whites in the criminal justice system."

Chauvin also places heavy emphasis on statements juror 52 made after trial. But the supreme court has cautioned that "alleged statements of jurors reported in newspapers must be viewed skeptically." *Larson*, 281 N.W.2d at 484. It further noted that "a *Schwartz* hearing is not warranted every time a newspaper article can be read as revealing the possibility of jury misconduct." *Id.* at 485 (concluding district court acted within its discretion by determining newspaper articles and defense counsel's affidavit did not establish prima facie case of jury misconduct).

To the extent that Chauvin argues that juror 52's "negative impression of the MPD" and "involvement in anti-police protests" arising from Floyd's death would have justified removal for cause, Chauvin was given 18 peremptory strikes during the jury selection and had three remaining, which he could have used to prevent juror 52 from serving. He did not do so. Minnesota caselaw is clear that a district court does not abuse its discretion by denying a *Schwartz* hearing when a defendant had an opportunity to question a juror and prevent a juror from serving. *See Stofflet*, 281 N.W.2d at 498. Otherwise, after waiting to see if a verdict is unfavorable, a defendant could claim information should have been disclosed in voir dire and thereby undermine the judicial process. *State v. Henderson*, 355 N.W.2d 484, 486 (Minn. App. 1984).

Because Chauvin had the opportunity to question all the jurors thoroughly and had sufficient preemptory strikes to prevent juror 52 from serving on the jury, we conclude that the district court did not abuse its broad discretion by denying Chauvin's request for a *Schwartz* hearing.

III. This court need not consider Chauvin's challenge to the unadjudicated third-degree murder charge.

Chauvin argues that his conviction of third-degree murder must be vacated under *State v. Noor*, 964 N.W.2d 424 (Minn. 2021), because his actions were directed against one person, Floyd. However, although the jury found Chauvin guilty of third-degree murder, the district court did not convict Chauvin of or sentence him for that offense. We therefore decline to address this issue. *See State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) (declining to address arguments raised related to criminal charges not formally adjudicated).

IV. A police officer can be convicted of second-degree unintentional felony murder for causing the death of another when the officer uses unreasonable force constituting third-degree assault to effect a lawful arrest.

Chauvin argues that (1) convicting a police officer of felony murder based on assault, which is a general-intent crime, creates strict liability and (2) police officers are authorized to use force when arresting a resisting suspect and thus cannot be convicted of second-degree unintentional felony murder involving third-degree assault. We disagree.

The state asserts that Chauvin did not raise this argument before the district court. Even so, he has not forfeited the issue because the challenge involves the sufficiency of the state's evidence to prove an element of the crime, specifically, the mental-state element for second-degree unintentional murder. *See State v. Pakhnyuk*, 926 N.W.2d 914, 918-19 (Minn. 2019) (declining to apply forfeiture doctrine to a sufficiency-of-the-evidence challenge).

To determine whether Chauvin can be guilty of second-degree unintentional felony murder based on third-degree assault as the underlying offense, we must interpret the statute of which he was found guilty. *See State v. Irby*, 967 N.W.2d 389, 393-96 (Minn. 2021) (construing text of wrongfully obtaining assistance statute). This is a question of statutory interpretation that this court reviews de novo. *See State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017); *see also Pakhnyuk*, 926 N.W.2d at 920.

A. Convicting a police officer of second-degree felony unintentional murder based on third-degree assault does not create a strict-liability crime.

Second-degree unintentional felony murder requires proof that the offender caused death, without intent, "while committing or attempting to commit a felony offense." Minn. Stat. § 609.19, subd. 2(1). The state alleged third-degree assault as the underlying felony. Assault requires proof of "(1) an act done with intent to cause fear in another of immediate bodily harm or death [assault-fear]; or (2) the intentional infliction of or attempt to inflict bodily harm upon another [assault-harm]." Minn. Stat. § 609.02, subd. 10 (2018). The term "bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." *Id.*, subd. 7 (2018). Third-degree assault requires additional proof that the victim suffered substantial bodily harm, defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." Minn. Stat. §§ 609.223, subd. 1, .02, subd. 7a (2018).

Assault-harm is a general-intent crime, which only requires the offender to intend to do the prohibited physical act. *State v. Fleck*, 810 N.W.2d 303, 308-12 (Minn. 2012).

"[A]ssault statutes do not require a finding by the jury that a defendant intended to cause a specific level of harm." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007), *overruled on other grounds by Fleck*, 810 N.W.2d 303. In *State v. Dorn*, the supreme court considered whether "*Fleck* erroneously established a strict-liability standard for even friendly consensual touching." 887 N.W.2d 826, 830 (Minn. 2016). The supreme court concluded that the assault-harm standard does not impose strict liability because "a defendant must intend the act that makes [their] conduct a battery; in other words, [they] must intentionally apply force to another person without [their] consent." *Id.* at 831.

Under these definitions, second-degree unintentional felony murder based on third-degree assault is not a strict-liability offense, as Chauvin argues, because it requires the actor to intend to commit the act of applying force to the victim's body. If that act inflicts substantial bodily harm on the victim, then the actor has committed a third-degree assault. And if the victim dies while the actor is committing or attempting to commit the felony assault, then the actor is guilty of felony murder. *See State v. Larsen*, 413 N.W.2d 584, 587 (Minn. App. 1987), *rev. denied* (Minn. Dec. 2, 1987).

B. A police officer can be guilty of second-degree unintentional felony murder for causing the death of another by using unreasonable force constituting third-degree assault to effect a lawful arrest.

A police officer is only authorized to use *reasonable* force in effecting a lawful arrest. *See* Minn. Stat. § 609.06, subd. 1(1) (2018); *see also Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (holding peace officer's use of force is properly analyzed under Fourth Amendment and must be "objectively reasonable under the totality of the circumstances").

When a defendant "flees or forcibly resists arrest, the officer may use all necessary and lawful means to make the arrest." Minn. Stat. § 629.33 (2018). When a police officer uses unreasonable force in effecting a lawful arrest, however, that use of force is no longer authorized under section 609.06, and the officer can be liable for assault. Accordingly, we hold that a police officer can be convicted of second-degree unintentional felony murder for causing the death of another when the officer uses unreasonable force constituting third-degree assault to effect a lawful arrest.

Here, the state proved every element of second-degree felony murder beyond a reasonable doubt: Chauvin (1) caused Floyd's death; (2) without the intent to cause his death; and (3) while using unreasonable force by restraining Floyd in a prone position and kneeling on his neck for a protracted period of time, which constituted the underlying felony of third-degree assault. *See State v. Hage*, 595 N.W.2d 200, 204 (Minn. 1999) (stating that due process requires state to prove every element of crime beyond a reasonable doubt).

V. The district court did not plainly err with its jury instructions, and any alleged error would have been harmless beyond a reasonable doubt.

Chauvin alleges that the district court improperly instructed the jury (1) that the state did not need to prove that he intended to inflict substantial bodily harm to establish that he committed third-degree assault; (2) on the authorized use of force by a police officer; (3) on the reasonable force used by a police officer; and (4) by not instructing that third-degree assault must present a "special danger to human life." We are not convinced.

This court reviews a district court's jury instructions for an abuse of discretion. *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019). "[A] district court abuses that discretion if its jury instructions confuse, mislead, or materially misstate the law." *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). Jury instructions are reviewed "as a whole to determine whether the instructions accurately state the law in a manner that can be understood by the jury." *Id.*

A. The district court did not plainly err by instructing the jury that the state did not need to prove that Chauvin intended to inflict substantial bodily harm.

Chauvin argues for the first time on appeal that the district court misstated the law when it "implied that the state need not prove that Chauvin intended to inflict substantial bodily harm upon George Floyd." We disagree.

The district court instructed the jury as follows on third-degree assault:

> Second, defendant inflicted substantial bodily harm on George Floyd. It is not necessary for the State to prove that the defendant intended to inflict substantial bodily harm, or knew that his actions would inflict substantial bodily harm, only that the defendant intended to commit the assault and that George Floyd sustained substantial bodily harm as a result of the assault.

Because Chauvin's proposed jury instructions did not request a more specific instruction on the intent element, we review his claim for plain error. *See State v. Pendleton*, 725 N.W.2d 717, 730 (Minn. 2007) (noting that unobjected-to jury instructions are reviewed for plain error). To establish plain error, Chauvin must demonstrate (1) error (2) that is plain and (3) that affected his substantial rights. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). If these three requirements are met, this court may correct

the error "only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quotation omitted). An error is plain if it is clear or obvious, which is typically established if the error contravenes caselaw, a rule, or a standard of conduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

As discussed in section IV, an assault based upon the intentional or attempted infliction of bodily harm is a general-intent offense and requires only that the state prove that a defendant "intended to do the physical act," and not "that the defendant meant to . . . cause a particular result." *Fleck*, 810 N.W.2d at 309. We therefore conclude that the district court did not plainly err by giving the jury an instruction consistent with caselaw.

B. The district court did not plainly err by instructing the jury on the authorized use of force by a police officer.

Chauvin argues that the district court misstated the law because its jury instruction "departed substantially" from section 629.33, which provides in relevant part that a police officer "may use all necessary and lawful means" to arrest a suspect who flees or forcibly resists arrest. We disagree.

Prior to instructing the jury on the elements of the charged offenses, the district court instructed the jury on a police officer's authorized use of reasonable force:

> No crime is committed if a police officer's actions were justified by the police officer's use of reasonable force in the line of duty in effecting a lawful arrest or preventing an escape from custody.

Because Chauvin did not request the inclusion of language from section 629.33 in his proposed instructions to the district court, we review this claim for plain error. *See Pendleton*, 725 N.W.2d at 730.

Chauvin provides no caselaw or other authority supporting the proposition that the language of section 629.33 must be included in a jury instruction on the authorized use of force, and neither are we aware of any. Moreover, the district court also instructed the jury that "[t]he defendant is not guilty of a crime if he used force as authorized by law," which conveys the substance of section 629.33 that, so long as an officer's use of force is reasonable, the officer is authorized to use necessary means to effect an arrest of a resisting suspect. Chauvin has failed to demonstrate either error by the district court or that any error is plain. *See Ramey*, 721 N.W.2d at 302.

C. Any alleged error by the district court when instructing the jury on the authorized use of force would have been harmless beyond a reasonable doubt.

Chauvin argues that the district court's jury instruction on the reasonable use of force "materially misstated the law" because it failed to state that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). We disagree.

After instructing the jury that a police officer may lawfully use "reasonable" force to effect an arrest, the district court instructed the jury on how to evaluate the reasonableness of Chauvin's use of force:

> The kind and degree of force a police officer may lawfully use in executing his duties is limited by what a reasonable police officer *in the same situation* would believe to be necessary. Any use of force beyond that is not reasonable. To determine if the actions of the police officer were reasonable, you must look at those facts which a reasonable officer *in the same situation would have known at the precise moment* the officer acted with force. You must decide whether the officer's actions were objectively reasonable in light of the totality of the facts and circumstances confronting the officer, and without regard to the officer's own subjective state of mind, intentions, or motivations.

(Emphasis added.) Because Chauvin requested the inclusion of the *Graham* language in his proposed jury instructions, and the district court declined, we review the issue under the harmless-error standard. *State v. Babcock*, 685 N.W.2d 36, 42 (Minn. App. 2004), *rev. denied* (Minn. Oct. 20, 2004). "An error in jury instructions is not harmless and a new trial should be granted if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *State v. Kuhnau*, 622 N.W.2d 552, 558-59 (Minn. 2001).

We discern no error by the district court because there is no meaningful difference between the instructions given and Chauvin's proposed instructions. The district court's instructions made clear that the correct perspective for the jury is (1) that of a "reasonable police officer in the same situation" (2) based upon what a reasonable officer would have known "at the precise moment the officer acted with force." Even if we were to assume error, it was harmless beyond a reasonable doubt because the requested inclusion of the *Graham* language would not have altered the district court's explanation of the law to the jury or affected the jury's verdict.

D. Any alleged error by the district court by not instructing the jury that an underlying offense of third-degree assault must involve a special danger to human life would have been harmless beyond a reasonable doubt.

Chauvin argues that the district court abused its discretion by failing to instruct the jury that the underlying offense of third-degree assault must "involve a special danger to human life." We are not persuaded.

Chauvin's proposed jury instructions regarding the elements of second-degree unintentional murder included the following: "Fourth, [ ] a 'special danger to human life' must have been caused by the underlying felony, in turn determined by the circumstances under which the felony was committed." The state objected to the inclusion of this language, and the district court declined to include it in its final instructions. Because Chauvin preserved this claim in his proposed instructions to the district court, we review it under the harmless-error standard. *Kuhnau*, 622 N.W.2d at 558-59.

Although the term "special danger to human life" does not appear in the language defining second-degree unintentional murder under section 609.19, subdivision 2(1), the Minnesota Supreme Court has concluded that it is a required element of the underlying offense in certain cases. *State v. Anderson*, 666 N.W.2d 696, 699-701 (Minn. 2003). In *Anderson*, the state charged the appellant with second-degree unintentional murder based on the underlying felonies of unlawful firearm possession and possession of a stolen firearm. *Id*. at 697. The supreme court concluded that these offenses could not support the murder charge because they were not inherently dangerous. *Id.* at 701. It reached this conclusion by relying on *State v. Nunn*, 297 N.W.2d 752, 753-54 (Minn. 1980), which

interpreted an earlier version of the same statute. *Id.* The *Nunn* court found that a felony must "involve some special danger to human life," both inherently and in the manner in which the offense was committed, to qualify as an underlying offense for unintentional murder. *Id.* The *Anderson* court concluded that this requirement survived the statutory amendment, which occurred only a year after *Nunn*, and that the district court properly dismissed the murder charge because firearm-possession offenses are not inherently dangerous to human life. 666 N.W.2d at 701.

Even assuming error, which we do not conclude, it would have been harmless. As previously noted, third-degree assault requires the infliction of substantial bodily harm, which clearly and inherently involves a "special danger to human life." *See* Minn. Stat. § 609.223, subd. 1. Moreover, Chauvin committed the underlying third-degree assault in a manner that involved a special danger to human life by kneeling on Floyd's neck for a prolonged period of time. Thus, had the jury been instructed that they were to determine whether third-degree assault posed a "special danger to human life" to be an underlying felony for unintentional murder, there is no reasonable doubt that the verdict would have been the same.

VI. The state did not present cumulative evidence on reasonable use of force.

Chauvin claims that testimony from seven witnesses regarding the reasonableness of his use of force constituted cumulative evidence requiring reversal. We are not persuaded.

We review a district court's evidentiary rulings, including the decision to admit expert testimony, for an abuse of discretion. *State v. Garland*, 942 N.W.2d 732, 742 (Minn.

2020). Because Chauvin challenged the testimony of the state's expert witness Professor Seth Stoughton as cumulative at trial and raised this issue in a motion for a new trial, the harmless-error analysis applies. *See State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016).

Generally, "[a]ll relevant evidence is admissible." Minn. R. Evid. 402. But even relevant evidence may be excluded to avoid "needless presentation of cumulative evidence." Minn. R. Evid. 403. When determining whether to admit expert testimony, a district court considers whether it "will assist the trier of fact to understand the evidence or determine a fact in issue," Minn. R. Evid. 702, and whether the subject "is within the knowledge and experience of a lay jury," *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980). In addition, our supreme court has cautioned that "expert testimony [should] be carefully monitored in criminal cases so that a jury is not dissuaded from exercising its own independent judgment." *State v. DeShay*, 669 N.W.2d 878, 885 (Minn. 2003).

The challenged testimony came from five members of the MPD and two outside experts. First, Chauvin's direct supervisor D.P. described the MPD policy governing the use of maximal restraint technique (MRT) using a hobble, which is a device used to control a subject's hands and feet when a suspect is kicking or acting out aggressively. D.P. testified that "restraining somebody or [placing] them on their chest or stomach for too long" can compromise their breathing, causing positional asphyxia[7] even when the pressure is from the subject's own body with no additional pressure being applied. MPD

[7] Asphyxia refers to a lack of oxygen or excess of carbon dioxide in the body that results in unconsciousness or death. Positional asphyxia is a form of asphyxia that occurs when someone's position prevents the person from breathing adequately.

policy therefore requires officers to roll a suspect into "the side recovery position" to avoid positional asphyxia. Next, the head of the MPD homicide unit, R.Z., testified that MPD policy instructs that once a suspect is handcuffed and becomes less combative, officers may have them sit on the curb to calm them down. MPD Chief M.A. explained how Chauvin's conduct violated MPD policies. Inspector K.B., who oversaw the training program at MPD, gave a detailed description of MPD's training structure which covers, in part, use of force, the dangers of positional asphyxia, assessment of a situation, and medical aid. According to K.B., the dangers of positional asphyxia are known throughout the department, and MPD does not train its officers to place a knee on a subject's neck or to restrain them in the prone position for as long as Chauvin restrained Floyd. Finally, J.M. testified to the training that Chauvin received, including that officers should not deploy more force than necessary.

As for the two outside experts, Professor Stoughton studies the regulation of policing. After reviewing the videos and documents, Professor Stoughton compiled a nearly 300-page comprehensive report. At trial, he explained that an officer's use of force must be reasonable from the time the force is first used and throughout the entire duration. He testified that there were two components of Chauvin's use of force: (1) the knee over Floyd's neck and (2) the prone restraint. In his opinion, the unreasonable force began when the officers restrained Floyd in a prone position and when Chauvin pressed his knee into Floyd's neck. Sergeant Jody Stiger is an employee of the Los Angeles Police Department and has extensive experience in analyzing use-of-force incidents. Stiger described the methodology under which Chauvin's conduct was examined and clarified terms such as

"force" and "threat" for the jury. Stiger opined that Chauvin's use of force against Floyd became unreasonable and "excessive" once Floyd was on the ground and ceased resisting.

Each witness offered a distinct perspective on the central issue of use of force. Rather than duplicating each other's testimony, they collectively painted a comprehensive picture that helped the jury to evaluate the reasonableness of Chauvin's use of force. Furthermore, the district court preemptively guarded against cumulative evidence by specifically instructing the state not to ask "every officer what [they] would have done differently," which, as the district court noted, might be cumulative. We therefore conclude that the district court did not abuse its broad discretion by allowing the state to present seven witnesses on the use-of-force issue.

VII. The district court did not abuse its discretion by excluding a presentation slide from MPD training materials.

Chauvin argues that the district court abused its discretion by excluding a slide from an MPD training presentation because it lacked proper foundation. We are not convinced.

"[A] decision on sufficiency of foundation is within the discretion of the [district] court." *McKay's Family Dodge v. Hardrives, Inc.*, 480 N.W.2d 141, 147 (Minn. App. 1992) (quotation omitted), *rev. denied* (Minn. Mar. 26, 1992). An appellant must show both an abuse of discretion and prejudice. *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *rev. denied* (Minn. Oct. 29, 2008). Prejudice exists when "the error substantially influenced the jury's decision." *State v. Loving*, 775 N.W.2d 872, 879 (Minn. 2009).

Before trial, the state moved in limine to exclude a presentation slide from MPD training materials for lack of proper foundation. This slide contains text describing the MRT and a photo of three men performing the MRT by restraining an individual in a prone position on the ground. Because Chauvin could not show that he received the training shown on this slide, the district court appropriately granted the state's motion to exclude the evidence for lack of foundation.

Further, Chauvin cannot demonstrate that the exclusion of the slide prejudiced him. The text on the slide explicitly instructed the officers to "[p]lace the subject in the recovery position to alleviate positional asphyxia" when using MRT. As a result, even if admitted, the evidence would have further shown that Chauvin failed to follow the MPD training and used unreasonable force. Chauvin's argument fails.

VIII. The district court did not abuse its discretion by excluding the out-of-court statement made by M.H., a passenger in Floyd's car before the incident.

Chauvin asserts that the district court abused its discretion by excluding M.H.'s out-of-court statement to law enforcement. We are not persuaded.

"[Appellate courts] review a district court's evidentiary rulings for [an] abuse of discretion, even when, as here, the defendant claims that the exclusion of evidence deprived him of his constitutional right to a meaningful opportunity to present a complete defense." *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). "Even if an objection was made and a district court abused its discretion," we will not reverse if the exclusion of evidence was harmless beyond a reasonable doubt. *Id.*

Shortly after Floyd's death, M.H. went to Texas where he was apprehended based on existing warrants. Agents from the Minnesota Bureau of Criminal Apprehension travelled to Texas and conducted a recorded interview of him on June 2, 2020. At trial, Chauvin initially sought to subpoena M.H. to testify about Floyd's use of drugs, Floyd's behavior in Cup Foods and in the car before the officers arrived, and Floyd's physical condition earlier that day, including how M.H. observed that Floyd suddenly fell asleep in the car. M.H. invoked his Fifth Amendment privilege, which the district court honored. Chauvin moved to admit the recording of the interview under Minn. R. Evid. 804(b)(3) as a statement against penal interest or under the residual exception to the hearsay rule, Minn. R. Evid 807. The district court denied the motion.

On appeal, Chauvin challenges the district court's determination that M.H.'s recorded statement was inadmissible under Minn. R. Evid. 804(b)(3) only. Generally, an out-of-court statement made by a nonparty and offered to prove the truth of the matter asserted is inadmissible hearsay. Minn. R. Evid. 801(c), 802. However, an exception exists when a declarant makes a statement against penal interest. Minn. R. Evid. 804(b)(3). To qualify under this exception, (1) the declarant must be unavailable to testify at trial; (2) the statement must be so incriminating when made that "a reasonable person in the declarant's position would not have made the statement unless believing it to be true"; and (3) the admission of the statement cannot violate the Confrontation Clause. *State v. Tovar*, 605 N.W.2d 717, 723 (Minn. 2000) (quotation omitted).

Here, M.H.'s invocation of his Fifth Amendment rights made him unavailable to testify at trial. *See State v. Irlas*, 888 N.W.2d 709, 712-13 (Minn. App. 2016). On the

second requirement, however, the district court found that M.H. did not make the statement to the police against his penal interest. To the contrary, the transcript of the interview shows that he specifically denied giving a fake $20 bill to Floyd or providing drugs to Floyd. While M.H. referenced drug deals on the street, he said nothing specific as to time, date, location, or persons involved that would clearly subject him to criminal liability. A reasonable person in M.H.'s position would not have believed that these statements would subject him to criminal liability. We therefore conclude that the district court did not abuse its discretion by excluding M.H.'s out-of-court recorded statement.

IX. The district court did not abuse its discretion by denying Chauvin's motion for a new trial based on alleged prosecutorial misconduct.

Chauvin asserts that his conviction must be reversed because the state engaged in prosecutorial misconduct at trial. We are not persuaded.

In a posttrial motion for a new trial, Chauvin alleged that the state engaged in prosecutorial misconduct by (1) violating discovery disclosure rules; (2) failing to prepare witnesses; (3) making improper arguments in closing and rebuttal arguments; and (4) influencing Dr. Baker's autopsy report. The district court found that Chauvin "failed to demonstrate that the [state] ha[d] engaged in prosecutorial misconduct" and denied the motion.

We review a district court's denial of a posttrial motion for a new trial based on prosecutorial misconduct for an abuse of discretion. *State v. Smith*, 464 N.W.2d 730, 734 (Minn. App. 1991). In *State v. Caron*, the supreme court set out a two-tiered harmless-error review for objected-to prosecutorial misconduct. 218 N.W.2d 197, 200 (Minn.

1974).[8] "[I]n cases involving unusually serious prosecutorial misconduct," appellate courts consider whether it is certain beyond a reasonable doubt that the misconduct was harmless. *Id.* In cases involving less serious prosecutorial misconduct, appellate courts consider whether "the misconduct likely played a substantial part in influencing the jury to convict." *Id.* Absent clear error, we defer to the district court's factual findings. *See Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013).

A. The state did not commit prosecutorial misconduct during discovery.

On June 30, 2020, the district court issued a scheduling order setting several dates, including that all discovery be completed "on or before August 14, 2020," and "any discovery received after the deadline shall be disclosed within 24 hours to the opposing party." In December 2020, Chauvin moved to continue the trial, in part, due to discovery violations by the state. Chauvin alleged that the state engaged in discovery dumping and failed to disclose discovery timely. The district court denied a continuance on the discovery-violation grounds and found:

> The [s]tate did not engage in any intentional violations of discovery rules. Any duplication of documents or disorganization of documents is attributable to the source from which the prosecution team received the material. The [s]tate has not acted in bad faith. While the discovery is voluminous because the investigation is extensive, it appears that the [s]tate is providing discovery to the defense as quickly as possible, even if not strictly meeting the [district court's] 24-hour disclosure mandate.

[8] The supreme court has questioned whether this two-tiered approach is still good law, while declining to decide the question. *See State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010); *see also State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012).

The record supports the district court's finding that the state did not deliberately miss the court-ordered discovery deadlines or produce documents in a way that was unnecessarily disorganized. We therefore conclude that the state's mistakes during discovery disclosure did not rise to the level of prosecutorial misconduct. *See State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009) (explaining that, whereas deliberate violation of rule or practice constitutes prosecutorial misconduct, good-faith mistake or error does not rise to level of misconduct), *rev. denied* (Minn. Mar. 17, 2009).

B. The state did not commit prosecutorial misconduct by failing to prepare its witnesses, and any alleged error was harmless beyond a reasonable doubt.

"The state has a duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements." *State* v. *McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). Chauvin claims that the state violated this duty in two instances.

First, despite the district court's order banning clothing with slogans or brands in the courtroom, one of the state's witnesses wore a "Black Lives Matter" t-shirt under his white dress shirt when he testified. However, images from the trial show that the slogan was hardly visible, even when zoomed in.

Second, one of the state's witnesses, Dr. Baker, referred to federal grand jury proceedings regarding Floyd's death at trial. The challenged references occurred during the defense counsel's cross-examination of Baker, when defense counsel tried to impeach Baker with an alleged prior inconsistent statement to the grand jury:

> Q: Did you testify *extensively* about the significan[ce] of the coronary arteries and the heart disease?

> A: I'm not sure what you mean by the word "extensively," counselor. I – *if we need to pull out the transcript we can*; I'm not sure what the word "extensively" means in this context.
> Q: Okay. You talked about the issue surrounding Mr. Floyd's death regarding his coronary arteries, right?
> A Again, I have no – *I can't quote you the grand jury transcript of it.* If you'd like to pull it out, I'd be happy to refresh my memory. I'm almost certain it had to have come up.

(Emphasis added.) Defense counsel did not object but showed a document to Baker before continuing the cross-examination.

> Q: Okay. And then you testified a second time; correct?
> A: To the federal grand jury?
> Q: Yes.
> A: Yes, I did.

Contrary to Chauvin's assertion that Baker's references were unsolicited, the record shows that they occurred during cross-examination and were in direct response to defense counsel's questions about Baker's testimony before the grand jury, which Baker appeared to have only referenced to clarify the questions asked of him.

In both instances, the state's conduct can hardly be described as a deliberate violation of its duty to prepare a witness constituting prosecutorial misconduct. *See Leutschaft*, 759 N.W.2d at 418. And even were we to assume that both circumstances constituted serious prosecutorial misconduct, the errors would have been harmless beyond a reasonable doubt because neither contributed to the guilty verdict.

C. The state's objectionable remarks during closing and rebuttal argument were harmless beyond a reasonable doubt.

Chauvin argues that the state belittled the defense in the state's closing and rebuttal arguments by calling Chauvin's arguments "stories" and "nonsense" and by claiming that

Chauvin was "shading the truth." Chauvin objected to these comments on misconduct grounds at trial, which the district court overruled on the state's initial use of the word "story" but sustained the objection to its continued use. It also sustained the objection to the comment about Chauvin "shading the truth" and instructed the jury to disregard it. "The state has a right to vigorously argue its case" and its argument "is not required to be colorless." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). However, it "may not belittle the defense." *Id.* "A reviewing court considers the closing argument as a whole and does not focus on selective phrases or remarks." *State v. Taylor*, 650 N.W.2d 190, 208 (Minn. 2002). Here, the district court sustained Chauvin's objection to these comments, except for the first reference to a "story," and instructed the jury to disregard those remarks. Appellate courts assume that the jury followed the district court's instructions. *State v. Vang*, 774 N.W.2d, 566, 578 (Minn. 2009). We therefore conclude that any error was harmless beyond a reasonable doubt.

D. Chauvin forfeited the claim that the state influenced Dr. Baker's autopsy report.

Chauvin makes a passing allegation in his brief that the state pressured Dr. Baker to alter his findings and conclusions on Floyd's death. Because Chauvin does not point to any instance in the trial record where this occurred, and he does not provide any substantive argument to support his claim, he has forfeited this issue and we will not address it. *See State v. Myhre*, 875 N.W.2d 799, 806 (Minn. 2016).

In sum, we conclude that the record supports the district court's finding that Chauvin failed to prove that the state committed prosecutorial misconduct. Even if we were to

assume serious misconduct and apply the stricter standard of review under *Caron*, we conclude that any alleged misconduct was harmless beyond a reasonable doubt. 218 N.W.2d. at 200. The district court therefore did not abuse its discretion by denying Chauvin's new-trial motion alleging prosecutorial misconduct.

X. Chauvin is not entitled to a new trial based upon the district court's failure to ensure that sidebar conferences were transcribed.

Chauvin claims that he is entitled to a new trial because the district court failed to make a stenographic record of all trial proceedings as required by Minn. Stat. § 486.02 (2022). We disagree.

A district court has the discretion to grant or deny a new trial. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). Appellate courts will not disturb the district court's decision absent a clear abuse of that discretion. *Id.*

During trial, the district court ordered the parties to make objections without argument unless invited by the court, and that sidebar conversations would be off record but that the "[p]arties may make a record later outside the presence of the jury." In a postverdict motion for a new trial, Chauvin argued that the district court's failure to order that a contemporaneous record be made of the sidebar conferences violated section 486.02, which requires a stenographic record of all trial proceedings to be transcribed, including "all objections made, and the grounds thereof as stated by counsel." The district court denied Chauvin's motion without discussion or analysis.

Even if we assume without concluding that the district court's failure to have the sidebar conferences recorded violates section 486.02, Chauvin provides no authority to

support the proposition that this erroneous absence of a record alone entitles him to a new trial. In *Hoagland v. State*, the supreme court noted that "a transcript is important to, but not always essential for, a meaningful appeal." 518 N.W.2d 531, 535 (Minn. 1994). To obtain a new trial, Chauvin must also show that the incomplete transcript prevented him from obtaining meaningful review. *State v. Whitson*, 876 N.W.2d 297, 307 (Minn. 2016). Here, Chauvin neither alleges that anything occurred in these conferences that would independently constitute error nor asserts that any of the district court's resulting rulings were improper. Accordingly, Chauvin fails to show that the incomplete record prevented him from obtaining meaningful review. We therefore conclude that the district court did not abuse its discretion by denying Chauvin's new-trial motion.

XI. The alleged cumulative errors did not deny Chauvin a fair trial.

Chauvin claims that the cumulative effect of the district court's errors deprived him of a fair trial. We disagree. The supreme court has held that, in rare cases, "the cumulative effect of trial errors can deprive a defendant of his constitutional right to a fair trial when the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Davis*, 820 N.W.2d 525, 538 (Minn. 2012) (quotation omitted). "When considering a claim of cumulative error, [appellate courts] look to the egregiousness of the errors and the strength of the State's case." *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017). In this case, we have concluded that none of the alleged errors affected the verdict when viewed separately. Viewing the alleged errors together, we reach the same conclusion. Moreover, with the multiple eyewitnesses, expert witnesses, autopsy report, and body-camera footage

of the incident, the state had a strong case against Chauvin. We therefore conclude that the alleged errors, when considered cumulatively, did not deny Chauvin a fair trial.

XII. The district court did not abuse its discretion by departing upward from the presumptive sentencing range.

Chauvin argues that the district court abused its discretion by sentencing him to 270 months in prison, an upward durational departure from the presumptive sentencing range. We are not persuaded.

A district court generally must impose a sentence within the presumptive sentencing range unless "identifiable, substantial, and compelling circumstances" support a departure. Minn. Sent'g Guidelines 2.D. (Supp. 2019). "Substantial and compelling circumstances are those demonstrating that the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Bartham*, 938 N.W.2d 257, 270 (Minn. 2020) (quotation omitted). We review a district court's decision to depart from the presumptive range for an abuse of discretion. *State v. Stanke*, 764 N.W.2d 824, 827 (Minn. 2009). Whether a particular reason for an upward departure is permissible is an issue of law that we review de novo. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *rev. denied* (Minn. July 20, 2010). If the district court has identified a proper basis to depart, then we review its decision whether to depart for an abuse of discretion. *Id.*

Under the sentencing guidelines, the presumptive sentence for Chauvin, whose criminal-history score was zero, is 150 months. Minn. Sent'g Guidelines 4.A. (Supp. 2019). The presumptive range for Chauvin's sentence is 128 months to 180 months. *Id.*

Any sentence within that range is not a departure. *See Id.* Chauvin waived his right to have a jury determine whether the facts would support a sentence enhancement under *Blakely v. Washington*, 542 U.S. 296 (2004). In its sentencing order, the district court identified two aggravating factors to support an upward departure of 270 months' imprisonment: that Chauvin treated Floyd with particular cruelty and that Chauvin abused his position of trust and authority as a police officer.

To support that Chauvin committed the offense in a particularly cruel way exceeding what would be sufficient for a conviction, the district court found: (1) Chauvin pressed one knee on Floyd's neck with his other knee in Floyd's back, "all the while holding [Floyd's] handcuffed arms in the fashion [Chauvin] did for more than nine minutes";[9] (2) Chauvin "kill[ed] George Floyd *slowly* by preventing his ability to breathe when Mr. Floyd had already made it clear he was having trouble breathing"; (3) "Mr. Floyd was begging for his life [during the restraint] and obviously *terrified*[10] by the knowledge that he was likely to die," but Chauvin "remained indifferent to Mr. Floyd's pleas"; (4) Chauvin failed to render aid[11] to Floyd "after one of his fellow officers announced [that]

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[9] *See State v. Rourke*, 773 N.W.2d 913, 926 (Minn. 2009) (recognizing that particular cruelty can be found when defendant inflicts gratuitous pain on victim).

[10] *See State v. Garcia*, 302 N.W.2d 643, 647 (Minn. 1981) (affirming upward departure when defendant treated kidnap victim in particularly cruel way by driving her around for two hours "in a wild fashion" and subjecting her to psychological terror and physical abuse), *overruled on other grounds by State v. Givens*, 544 N.W.2d 774 (Minn. 1996).

[11] *See State v. Jones*, 328 N.W. 2d 736, 738 (Minn. 1983) (finding multiple grounds for departure, including failure to render aid, when defendant participated in aggravated robbery of an elderly lady and left injured victim in apartment). *But see Tucker v. State*, 799 N.W.2d 583, 587-88 (Minn. 2011) (stating that failure to provide medical aid on its own is not a sufficient basis for departure).

he was unable to detect a pulse" and Chauvin continued to "kneel on the back of Mr. Floyd's neck . . . for more than two and a half minutes"; and (5) Chauvin "prevent[ed] bystanders, including an off-duty Minneapolis firefighter, from assisting [Floyd]."[12] (Emphasis added.) Substantial evidence in the record supports the district court's findings.

The district court also determined that Chauvin abused his position of trust and authority because the relationship between Chauvin, then a police officer, and Floyd, a civilian, was "fraught with power imbalances that may make it difficult for [Floyd] to protect himself." However, we are not aware of any caselaw applying this factor to a police officer. But even if we assume without concluding that this aggravating factor does not apply, treating the victim with particular cruelty is a sufficient basis for an upward sentencing departure by itself. *See* Minn. Sent'g Guidelines 2.D.203.b(2) (listing particular cruelty in nonexclusive list of aggravating factors); *see also State v. Barthman*, 938 N.W.2d 257, 262 (upholding greater-than-double durational departure for one count of criminal sexual conduct based on aggravating factor of particular cruelty alone). Moreover, Chauvin's failure to render aid to Floyd, in conjunction with particular cruelty, can comprise multiple grounds to depart upward. *See Jones*, 328 N.W.2d at 738 (finding multiple grounds for departure, including failure to render aid). Accordingly, we may affirm the district court's sentence without relying on the aggravating factor of abuse of position if we are convinced beyond a reasonable doubt that, were we to remand the case,

[12] The district made this finding to support Chauvin's abuse of position of authority or trust. It then incorporated this finding to support the aggravating factor of particular cruelty as well.

the district court would impose the same sentence absent reliance on this factor. *Stanke*, 764 N.W.2d at 829; *see also State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010), *rev. denied* (Minn. May 18, 2010).

Even though the district court identified two aggravating factors for departure, the underlying findings supporting each factor overlapped substantially. For instance, Chauvin's prolonged use of force on Floyd causing asphyxiation and his failure to render aid are findings that the district court expressly relied on to support both aggravating factors. The district court also incorporated all of its findings that supported Chauvin's abuse of his position into the findings that supported the particular-cruelty factor and stated that it sentenced Chauvin "in consideration of all the facts presented at trial."

Finally, before determining Chauvin's sentence, the district court reviewed sentencing data in Minnesota from 2010 through 2019 and found that the average aggravated sentence for a defendant whose criminal-history score was zero and who was convicted of second-degree unintentional felony murder was 278.2 months, which is longer than the aggravated sentence Chauvin received. Given this record, we conclude that, even if we were to remand the case, the district court would impose the same sentence.

DECISION

Police officers undoubtedly have a challenging, difficult, and sometimes dangerous job. However, no one is above the law. When they commit a crime, they must be held accountable just as those individuals that they lawfully apprehend. The law only permits police officers to use reasonable force when effecting a lawful arrest. Chauvin crossed that line here when he used unreasonable force on Floyd.

We hold that, when a criminal defendant moves to change venue, continue trial, or sequester the jury alleging that publicity surrounding the trial created either actual or presumed juror prejudice, a district court does not abuse its discretion by denying the motions if it takes sufficient mitigating steps and verifies that the jurors can set aside their impressions or opinions and deliver a fair and impartial verdict. We also hold that a police officer can be convicted of second-degree unintentional felony murder for causing the death of another by using unreasonable force constituting third-degree assault to effect a lawful arrest.

In addition, we conclude that the district court did not abuse its discretion by (1) denying Chauvin's request for a *Schwartz* hearing; (2) its jury instructions; (3) allowing the state to present seven witnesses on the use-of-force issue; (4) excluding from admission a presentation slide from MPD training materials; (5) denying Chauvin's new-trial motion based on alleged prosecutorial misconduct; (6) excluding an unavailable witness's out-of-court statement; and (7) departing upward from the presumptive range under the sentencing guidelines. We further conclude that Chauvin is not entitled to a new trial based upon the district court's failure to ensure that sidebar conferences were transcribed and that any alleged cumulative error did not deny Chauvin a fair trial. Finally, we decline to address Chauvin's challenge to his third-degree-murder conviction because the district court did not convict Chauvin of or sentence him for this offense.

Affirmed.