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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Ronald Ezel SCOTT, Appellant.

A16–0557

Filed February 5, 2018

Review Denied April 25, 2018

Hennepin County District Court, File No. 27–CR–15–1803

Attorneys and Law Firms

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Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

***1** Appellant challenges his convictions of controlled-substance crimes on the ground that the district court abused its discretion by (1) making several evidentiary rulings, (2) admitting an unavailable witness's jail-call statements, (3) excluding defense-witness testimony, (4) admitting impeachment evidence, and (5) denying a pretrial motion to suppress evidence seized from an allegedly unlawful traffic stop. In his pro se supplemental and reply briefs, appellant also asserts claims of ineffective assistance of counsel, prosecutorial misconduct, judicial bias, and that the district court erred in its evidentiary rulings. We affirm.

FACTS

In January 2015, two Minneapolis police officers were patrolling a high-crime neighborhood when they observed a slow-moving vehicle approach a woman standing on the street. When the vehicle turned into an alley, the woman followed. After the officers also turned into the alley, they observed the woman get into the backseat of the vehicle.

The driver of the vehicle drove down the alley at an above-average speed and turned right onto a street, at which point the officers observed that none of the occupants was wearing a seatbelt. The officers signaled the vehicle to pull over. The driver stopped but then started driving away. Moments later, the driver pulled over again and stopped. The officers approached the vehicle in a parallel fashion with their guns drawn but pointed toward the ground. The officers holstered their guns upon reaching the passenger- and driver-side windows.

One officer saw marijuana sitting on passenger D.P.'s lap, so the officer ordered D.P. out of the vehicle, put him in handcuffs, and brought him around the back of the vehicle. Meanwhile, appellant Ronald Ezel Scott threw something between the driver seat and driver door. The officers ordered Scott out of the vehicle and conducted a pat-down search, recovering more than $4,500 in cash from inside Scott's jacket. When an officer tried to handcuff Scott, Scott broke free and ran from the scene. After giving chase, the officers found Scott hiding underneath a vehicle parked on a different street and arrested him. The officers seized more than 9 grams of methamphetamine, 5 grams of powder cocaine, 13 grams of cooked cocaine, latex rubber gloves, a scale, and clear plastic baggies from the vehicle.

The state charged Scott with first-degree cocaine sale in violation of Minn. Stat. § 152.021, subd. 1(1) (2014); second-degree cocaine possession in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2014); second-degree methamphetamine possession in violation of Minn. Stat. § 152.022, subd. 2(a)(1); and second-degree methamphetamine

sale in violation of Minn. Stat. § 152.022, subd. 1(1) (2014).

Before trial, Scott moved to suppress all evidence, arguing that the officers used excessive force by drawing their guns for a seatbelt violation. The district court denied Scott's motion. The state noticed its intent to impeach Scott with three prior felony drug convictions and Scott's parole status. The district court excluded two of the convictions but admitted the third in addition to Scott's parole status.

*2 R.F., an acquaintance of Scott's who was not present at the scene on the night of his arrest, filed an affidavit through Scott's counsel admitting liability for the drugs:

> On Monday, January 19, 2015, at approximately 7:15–7:35 PM I went to drop my vehicle off to my friend, Ronald Scott, so that he could go and work out. I then had another individual pick me up and give me a ride home. The car was parked on the 35th block of Portland Ave in South Minneapolis, I left my keys in the visor for [Scott] to retrieve in order to use the vehicle. As time went by (I would say 30–45 minutes) I checked my purse for a black "blood pressure" pouch which contained cocaine and methamphetamine inside. When I noticed that I didn't have the pouch on me I immediately phoned [Scott] and received no answer. I remember calling him numerous times to let him know I had left those contents, so he could quickly return my car. I never got a response. I then used one of my friend's cars to drive back over to South Minneapolis in hopes that he didn't already pick the vehicle up and he did, I also went to the gym where he generally works out and he was not there either. The next morning I learned that he had been pulled over in my vehicle which contained my drugs in it.

At trial, Scott maintained that the drugs belonged to R.F., introduced R.F.'s affidavit as evidence, and called J.A., D.P., and R.F in support. J.A. testified that Scott was carrying a large amount of cash because he was buying a used vehicle from J.A. that day. D.P. attempted to offer an explanation as to why Scott fled from the police. But the prosecutor objected on relevancy grounds, and the district court sustained the objection. R.F. testified consistent with her affidavit. But as soon as R.F. finished testifying, the state arrested her for aiding an offender. Both sides rested, and R.F. spent the weekend in jail.

Before closing arguments on Monday, the prosecutor moved to reopen the state's case in order to rebut R.F.'s testimony. The prosecutor advised the district court and appellant's counsel that, during two jail calls recorded the same day that R.F. testified, she said on the phone to someone familiar with Scott's trial, "[W]e had an agreement," "I kept my end of the bargain," and "[H]e said [he] was not going to hang [me] like Cookie." The prosecutor argued that these statements established that R.F. lied about owning the drugs so as to take the fall for Scott. Scott moved for a continuance in order to listen to the tapes, which the district court granted.

The following morning, the district court granted the state's motion to re-open its case. Scott again requested a continuance, but the district court denied the motion.

When the prosecutor called R.F. in rebuttal, she invoked her Fifth Amendment privilege against self-incrimination. The prosecutor offered the jail calls as statements against R.F.'s penal interest. Scott's counsel objected, arguing that R.F.'s unavailability violated Scott's confrontation rights. After concluding that the jail calls were not testimonial, the district court admitted them into evidence. The prosecutor subsequently distributed copies of the transcripts, played the calls in their entirety, and argued during closing that R.F. took the fall for Scott. The jury convicted Scott on all four counts. This appeal follows.

DECISION

I.

A. Admission of R.F.'s Jail Calls

*3 Scott first argues that the district court deprived him of a fair trial and abused its discretion by admitting the jail

calls as statements against R.F.'s penal interest, reasoning R.F.'s statements were "an attempt at self-exculpation." "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

In two jail calls recorded the same day that R.F. testified, she made several statements to another person who was familiar with Scott's trial. R.F. said in one call, "Like we had an agreement man," and in another call, "I kept my end of the bargain," "I don't think he gonna get mad, cause I swear to God ... he said, you know I'm ... not going to hang you like Cookie right?" and "[Y]ou watch Empire, right?" R.F. also expressed overall discontent with her attorney, Scott's attorney, and Scott, complaining about the need to testify on a Friday, getting arrested after stepping down from the witness stand, and being held in jail over the weekend. Over Scott's objection, the district court admitted the jail calls as statements against R.F.'s penal interest.

Hearsay, which is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," Minn. R. Evid. 801(c), is inadmissible unless an exception applies, Minn. R. Evid. 802. One exception is for statements made against a declarant's penal or pecuniary interest. Minn. R. Evid. 804(b)(3).

> The rule states that if a declarant is unavailable, a statement is admissible if, at the time of its making, it "so far tended to subject the declarant to civil or criminal liability ... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."
>
> *State v. Morales*, 788 N.W.2d 737, 762 (Minn. 2010) (quoting Minn. R. Evid. 804(b)(3)).

Before admitting a statement under Minn. R. Evid. 804(b)(3), a district court must (1) determine that the declarant is unavailable to testify; (2) conclude that the statement, at the time of its making, so far tended to subject the declarant to civil or criminal liability that a reasonable person in the declarant's position would not have made the statement unless believing it to be true; and (3) scrutinize the statement so as to avoid violating the Confrontation Clause.[1] *Id.*

[1] At the time of Scott's trial in 2015, Minn. R. Evid. 804(b)(3) provided that a statement offered *to exculpate the accused* was "not admissible unless corroborating circumstances clearly indicate [its] trustworthiness." *Ferguson v. State*, 826 N.W.2d 808, 813 (Minn. 2013) (quotation omitted). Minn. R. Evid. 804(b)(3) was amended, effective 2016, to provide that a statement offered *in a criminal case* is not admissible unless corroborating circumstances clearly indicate its trustworthiness. *See* Minn. R. Evid. 804 2016 advisory comm. cmt. Rules of evidence are "applicable to any trial held after the effective date of the amendment." *State v. Friend*, 385 N.W.2d 313, 319 (Minn. App. 1986), *review denied* (Minn. May 22, 1986). Because Scott's trial was in 2015, we apply the pre–2016–amendments version of Minn. R. Evid. 804(b)(3). And because the statement was not offered to exculpate the accused—Scott—the corroborating circumstances requirement does not apply.

***4** As to the second step, the supreme court concluded in *Morales* that a declarant's self-incriminating statements are admissible if, "in light of all the surrounding circumstances, they are sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," even if the statements also incriminate the accused. *Id.* at 763 (quotations omitted). The supreme court reasoned that the declarant's statements, although implicating the defendant in the crime, were truly inculpatory and not attempts to "shift blame or curry favor," *Williamson v. United States*, 512 U.S. 594, 603, 114 S.Ct. 2431, 2436 (1994), "secure a plea bargain in exchange for informing on accomplices" or "lessen his culpability," *Morales*, 788 N.W.2d at 765. "Instead, [the declarant] was conversing with a friend, without any expectation that his statements could be used to 'curry favor' with law enforcement." *Morales*, 788 N.W.2d at 765.

Here, R.F. said, "We had an agreement," discussed holding up her end of a "bargain," and told the person on the phone that Scott was not going to "hang [her] like Cookie," referencing the television show *Empire*. In *Empire*, "the audience learns that Lucious and Cookie were both involved in drug dealing, and that Cookie pled guilty so that Lucious could pursue his music career and take care of their children." *See Tanksley v. Daniels*, No. 16–CV–0081, 2017 WL 1735257, at *9 (E.D. Pa. Apr. 28, 2017) (describing the plot for *Empire* within

copyright-infringement context). Scott maintains that R.F. made these statements as a way to lessen her culpability. We disagree.

The district court determined that R.F. did not make those statements as a way to minimize her culpability. Rather, R.F. was "conversing with a friend, without any expectation that [her] statements could be used to 'curry favor' with law enforcement." *Morales*, 788 N.W.2d at 765. R.F.'s statements are self-incriminating as evidence of perjury or aiding an offender. *See* Minn. Stat. §§ 609.48, subd. 1 (criminalizing the making of a false material statement "in or for an action, hearing or proceeding of any kind in which the statement is required or authorized by law to be made under oath or affirmation"), .495, subd. 3(a) (criminalizing "intentionally aid[ing] another person whom the actor knows or has reason to know has committed a criminal act, by ... providing false or misleading information about that crime ... or otherwise obstructing the investigation or prosecution"), subd. 4(a) (criminalizing "assum[ing] responsibility for a criminal act with the intent to obstruct, impede, or prevent a criminal investigation") (2014). In light of all surrounding circumstances, the statements, at the time of their making, so far tended to subject R.F. to criminal penalty such that a reasonable person in her position would not have made those statements had they not been true. *Morales*, 788 N.W.2d at 767; *see State v. Usee*, 800 N.W.2d 192, 199 (Minn. App. 2011) (concluding that the district court did not err in admitting statement subjecting declarant to criminal liability equally with the defendant); *see also* Fed. R. Evid. 804 1972 advisory comm. cmt. ("[A] statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as [a statement] against interest .... On the other hand, the same words spoken ... to an acquaintance[ ] would have no difficulty in qualifying.").

But instead of analyzing each individual statement in the jail calls, the district court admitted the jail calls in their entirety. In *State v. Ford*, the Minnesota Supreme Court adopted the United States Supreme Court's rule from *Williamson* for determining which statements meet the Minn. R. Evid. 804(b)(3) hearsay exception. 539 N.W.2d 214, 227 (Minn. 1995). "In *Williamson v. United States*, the Supreme Court concluded that the word 'statement,' as used in the statement-against-interest exception ... should be narrowly construed as 'a single declaration or remark' rather than an entire confession narrative." *Morales*, 788 N.W.2d at 763. "*Williamson* provides that the appropriate analysis under Rule 804(b)(3) does not consider whether an entire confession is, on balance, against the declarant's interest .... Rather, courts must analyze whether individual declarations or remarks within a confession or conversation are each against the declarant's interest." *Id.* (citations omitted). The supreme court concluded in *Ford* that the district court abused its discretion for failing to conduct a *Williamson* analysis on the record but determined that the error was harmless. 539 N.W.2d at 227.

***5** The supreme court has at least twice concluded that a district court erred for failing to parse out non-self-incriminating statements before admitting a statement under Minn. R. Evid. 804(b)(3). *See State v. Keeton*, 589 N.W.2d 85, 89 (Minn. 1998); *Ford*, 539 N.W.2d at 227; *see also State v. Jones*, 556 N.W.2d 903, 909 n.4 (Minn. 1996) ("Prior to [the Minnesota Supreme Court's] adoption, in *Ford*, of the *Williamson* reasoning, a Minnesota trial court was under no obligation to attempt to parse out a witness' or co-defendant's statement to separate inculpatory from noninculpatory portions of the statement."). As in *Keeton*, "nothing in the record indicates that the trial court applied the *Williamson* analysis in determining that the entire statements were admissible." 589 N.W.2d at 89; *see also Ford*, 539 N.W.2d at 227 (concluding same). The district court therefore plainly erred by failing to conduct a *Williamson* analysis and not analyzing each individual statement in the jail calls.

Having concluded the district court erred, we must determine if that error was harmless. Scott maintains that admission of the jail calls undermined his most compelling defense evidence because the jail calls gave the jury "a reason to discount [R.F.'s] testimony" and gave the prosecutor "ammunition to argue there was an agreement between [R.F.] and Scott, she was taking the fall for him, and they had a scheme or plan."

"An error is harmless if there is no reasonable possibility that it substantially influence[d] the jury's decision." *State v. Taylor*, 869 N.W.2d 1, 14 (Minn. 2015) (alteration in original) (quotation omitted). The prosecutor introduced evidence that Scott was the driver, exhibited furtive movements, and threw something between the door and seat which later turned out to be the drug bag. Minnesota law provides that the "presence of a controlled substance in a passenger automobile permits the fact finder to infer knowing possession of the controlled

substance by the driver or person in control of the automobile when the controlled substance was in the automobile." Minn. Stat. § 152.028, subd. 2 (2014). Scott also evaded handcuffs, broke free from the officers, and fled from the scene, all of which is "evidence of consciousness of guilt." *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008). In addition, a person may also "constructively possess contraband jointly with another person." *State v. Ortega*, 770 N.W.2d 145, 150 (Minn. 2009). Even if the jury believed R.F.'s testimony, the jury could still have convicted Scott of the controlled-substance sale and possession crimes. Where the "weight of the evidence is so great that it justifies the verdict regardless of the erroneous admission, [the Minnesota Supreme Court has] concluded the erroneous admission was harmless." *Ford*, 539 N.W.2d at 227. Because there is no reasonable probability that the district court's failure to parse the jail call statements substantially influenced the jury's decision, the district court's error is at most harmless.

B. Scott's Mid–Trial Motion for a Continuance

Scott also argues that the district court abused its discretion by denying his mid–trial motion for a continuance. A ruling on a request for a continuance is within the district court's discretion, and a conviction will not be reversed for denial of a motion for a continuance unless the denial is a clear abuse of discretion. *State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987). On appeal, we consider "the circumstances before the [district] court at the time the motion [for a continuance] was made to determine whether the [district] court's decision prejudiced [the] defendant by materially affecting the outcome of the trial." *State v. Turnipseed*, 297 N.W.2d 308, 311 (Minn. 1980).

***6** In response to the prosecutor's motion to reopen the state's case, the district court continued the trial for one day. That evening, the district court emailed counsel:

> To expedite things for tomorrow, I intend to allow the state to reopen but they will not be able to impeach [R.F.] with jail calls pursuant to the Rules of Evidence 613 because a witness cannot be impeached by extrinsic evidence. She is not a party opponent which is the exception. If the state wants to further impeach the witness she must be present on the witness stand and have an opportunity to explain before she is impeached with a prior inconsistent statement. Her lawyer should be there to advise her. See you all at 8:45 in the morning.

The following morning, Scott's counsel requested a one-day continuance because he had not listened to or investigated the calls. The district court denied the motion. Scott now argues that the district court's email can reasonably be interpreted as the district court ruling that the jail calls were inadmissible for any reason and, as a result, his counsel did not listen to the calls. We disagree. Considering the circumstances, including that the district court had already continued the trial in response to this issue, the district court did not abuse its discretion by denying Scott's additional request for a continuance.

II.

Scott argues that the district court deprived him of his constitutional right to put forth a complete defense and abused its discretion by excluding D.P.'s testimony. We review the district court's decision to exclude D.P.'s testimony for abuse of discretion. *Amos*, 658 N.W.2d at 203. Although a "defendant has the constitutional right to present a complete defense," that right is not absolute. *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). The accused "must comply with established rules of procedure and evidence," *State v. Richards*, 495 N.W.2d 187, 195 (Minn. 1992) (quotation omitted), and courts may "limit the scope of a defendant's arguments to ensure that the defendant does not confuse the jury with misleading inferences," *Atkinson*, 774 N.W.2d at 589.

At trial, D.P. testified at length concerning the traffic stop, the events leading to it, and the officers' actions toward him and Scott. On direct-examination, Scott's counsel asked D.P. what concerned him during the traffic stop. D.P. began to testify that he feared for his safety because of recent police shootings of unarmed black men. The prosecutor objected. Scott argued that D.P.'s response explained why Scott fled from the police. The district court concluded that D.P. could testify as to "what he did, to what he saw and to what he observed" but could not testify as to "what was going on in the world" because it

was "not relevant to whether ... or not [Scott] was guilty of anything."

We agree with the district court. D.P.'s frame of mind on police shootings of unarmed black men is irrelevant to proving or disproving Scott's frame of mind. *See* Minn. R. Evid. 401 (defining relevant evidence as "evidence having 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"); *see also State v. Lee*, 282 N.W.2d 896, 901 (Minn. 1979) ("Whether evidence of past events and practices objected to on the ground of relevancy is admissible is a decision within the discretion of the trial court."). We, therefore, conclude that the district court acted within its discretion by excluding D.P.'s testimony on recent police shootings.

III.

*7 Scott argues that the district court abused its discretion by admitting evidence of his 2012 felony drug-possession conviction and his parole status as impeachment. "We will not reverse a district court's ruling on the impeachment of a witness by prior conviction absent a clear abuse of discretion." *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011) (quotation omitted). Prior-conviction evidence is admissible under Minn. R. Evid. 609(a)(1) if the crime is a felony "and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect" by considering five factors: (1) the impeachment value of the prior crime, (2) the date of conviction and defendant's subsequent history, (3) the similarity of past crime and charged crime, (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue. *State v. Jones*, 271 N.W.2d 534, 537–38 (Minn. 1978). "[A] district court should demonstrate on the record that it has considered and weighed the *Jones* factors." *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006). But because the district court is in "a unique position" to assess and weigh the *Jones* factors, "it must be accorded broad discretion." *State v. Hochstein*, 623 N.W.2d 617, 625 (Minn. App. 2001). Whether the probative value of the prior conviction outweighs its prejudicial effect is a matter within the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985).

Here, the district court engaged in a thorough *Jones* analysis, concluding that the prosecutor could not impeach Scott with a 2002 third-degree controlled-substance possession conviction because it was too old or a 2012 first-degree controlled-substance sale because it was too similar, but could impeach Scott with a 2012 third-degree controlled-substance possession conviction because of the importance of Scott's testimony, the centrality of credibility, and its recency.

The supreme court has held that "any felony conviction is probative of a witness's credibility, and the mere fact that a witness is a convicted felon holds impeachment value." *Hill*, 801 N.W.2d at 652. Even if the third factor weighed against admitting the conviction, "[d]epending on the particular facts of the case, the trial court may assign different weights to different factors." *See Hochstein*, 623 N.W.2d at 625. And if "credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *Swanson*, 707 N.W.2d at 655. The district court therefore did not abuse its broad discretion by admitting Scott's 2012 drug possession crime as impeachment evidence.

Scott also argues that the district court prevented him from testifying and erred by admitting impeachment evidence on Scott's parole status. We disagree. Scott chose not to testify. *See State v. Ihnot*, 575 N.W.2d 581, 587 (Minn. 1998) (concluding that defendant was not kept from testifying but instead chose not to testify based on impeachment evidence). And a defendant's probationary status is admissible as impeachment evidence to show a motive to lie. *State v. Johnson*, 699 N.W.2d 335, 338–39 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). The district court did not abuse its discretion by these rulings.

IV.

Scott contends that the district court abused its discretion by denying his motion to suppress all evidence seized during the traffic stop. We review the factual findings underlying a district court's pretrial order on a motion to suppress evidence for clear error and the district court's legal determinations de novo. *Ortega*, 770 N.W.2d at 149. When a defendant challenges a police officer's use of force, we determine if the officer's actions were "objectively unreasonable." *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865,

1872 (1989). The analysis requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396, 109 S.Ct. at 1872. "[T]he use of force reasonable under the circumstances will be permitted without a showing of probable cause when force is necessary for the protection of the investigating officers and the degree of force used [was] reasonable." *State v. Balenger*, 667 N.W.2d 133, 139 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003). On review, we will not "engage in second-guessing." *Id.* at 141.

***8** Scott argues that the officers "had no reason to suspect the occupants were armed or presented a threat." In its order denying Scott's motion to suppress evidence, the district court stated that

> even though the initial stop was for a seat belt violation, the officers had reasonable concerns for their safety because the stop took place at night where there was little ambient lighting, in a high crime area, after the vehicle stopped briefly and then continued to drive around the corner. These actions allowed the officers to approach the vehicle with guns removed from their holsters, but not pointed at the suspects.

Considering the circumstances, the officers' actions of pointing their guns toward the ground while approaching the vehicle and holstering the guns as they arrived at the front windows were objectively reasonable. *See* *State v. Munson*, 594 N.W.2d 128, 137 (Minn. 1999) (concluding that officers' actions "approaching the [car] with weapons drawn, removing the occupants from the [car], frisking them, placing them in the back seat of squad cars and even handcuffing them briefly until it was determined they were not armed" were reasonable); *Balenger*, 667 N.W.2d at 141 (determining that officer who grabbed a person by the jersey acted reasonably when officer "harbored a reasonable suspicion that [the person] was armed, reasonably feared for his safety and the safety of the public at large, and used an amount of force that was proportionate to the initial justification for the stop"). The district court did not abuse its discretion by denying Scott's motion to suppress evidence obtained from the traffic stop.

V.

In his pro se supplemental and reply briefs, Scott alleges that (1) his trial counsel was ineffective because his counsel failed to assert an impossibility defense, request jury instructions on circumstantial evidence, request that R.F.'s jail calls be redacted, object to the calls as hearsay, or object to an upward durational departure for sentencing; (2) R.F.'s jail calls were inadmissible hearsay, lacked foundation, and were testimonial; (3) the prosecutor injected her own credibility during closing argument; (4) the district court exhibited racial bias toward Scott by discussing the plot for *Empire*; (5) the police did not have an adequate basis for the traffic stop; and (6) the drugs lacked a proper chain of custody. After thoroughly considering Scott's pro se arguments, we conclude that they are without merit.

Affirmed.

All Citations

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Tommy Ray MORGAN, Sr., Appellant.

No. A15–1466.
|
Aug. 15, 2016.

St. Louis County District Court, File No. 69DU–CR–14–1710.

Attorneys and Law Firms

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

Considered and decided by RODENBERG, Presiding Judge; PETERSON, Judge; and BJORKMAN, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge.

***1** On appeal from his multiple convictions arising from a home invasion, appellant Tommy Ray Morgan, Sr., argues that the district court improperly determined that alternative-perpetrator evidence was inadmissible, and that it erroneously denied his request for a special jury instruction concerning the reliability of eyewitness-identification testimony. We affirm.

FACTS

At around 11:00 p.m. on May 17, 2014, a male intruder broke the side door of J.A.M.'s house, entered, and appeared in her bedroom doorway. The intruder was wearing a black hooded sweatshirt, black pants, a nylon stocking over his face, and white latex gloves. He demanded that J.A.M. give him jewelry and money. J.A.M. told the intruder where one of her purses was located, and she gave him a jewelry box and her cell phone. The intruder stole two purses, the jewelry box and contents, and the cell phone.

As the intruder was leaving, he threw a vase at J.A.M., striking her in the face. The intruder had J.A.M.'s cell phone, and she did not have a land telephone line, so she went to her neighbor's house to call 911. An ambulance took J.A.M. to the hospital. J.A.M. suffered numerous cuts and fractures to her face, internal bleeding on her brain, and damage to her right tear duct. She underwent numerous procedures to address her injuries.

Sometime after the robbery, appellant knocked on the door of his cousin's home and offered to sell her some jewelry. [1] Appellant's cousin, T.D., declined appellant's offer. As appellant was leaving, however, he dropped a gold ring with a diamond. On May 19, T.D. took that ring to Duluth Police Officer Michael Erickson and told him about appellant having offered to sell her some jewelry. Officer Erickson brought the ring to J.A.M, who immediately identified it as her mother's wedding ring.

1 The testimony at trial and record evidence is inconsistent concerning the exact timeline of events, including the precise date of appellant's jewelry-sale offer. Appellant does not argue, however, that the evidence is insufficient to support his convictions. And the precise dates of T.D.'s involvement are unnecessary to support the jury's verdicts. We view the facts concerning T.D.'s involvement in the light most favorable to the jury's verdicts. *See State v. Fox*, 868 N.W.2d 206, 223 (Minn.2015) (viewing the facts in the light most favorable to the jury's verdict in a challenge to the sufficiency of the evidence).

On May 20, 2014, J.A.M. told Duluth Police Sergeant Matthew McShane that there had been fraudulent transactions on credit and debit cards that were stolen during the home invasion. Sergeant McShane obtained security footage from a convenience store and a bank automated teller machine (ATM) where the fraudulent transactions took place. Upon reviewing the footage from the convenience store, Sergeant McShane learned that C.J., later determined to be another cousin of appellant, used J.A.M's credit card to make a

purchase. Footage from the ATM showed a male with a tattoo on his neck. The man thrice attempted to use J.A.M.'s debit card to withdraw money from her bank account. All three withdrawal requests, for $4,000, $400, and $160, were declined.

Also on May 20, 2014, police officers executed a search warrant at C.J.'s residence, where appellant was also residing. The officers found J.A.M.'s property, including her credit cards, purses, jewelry, and cell phone. Some of J.A.M.'s credit cards and paperwork were found near appellant's medical paperwork. Another man, E.B., was using J.A.M.'s cell phone when the officers arrived. The officers found other evidence in the home, including two white, latex gloves that contained only E.B.'s DNA and an ATM receipt indicating that an incorrect personal ID had been entered.

*2 On May 21, 2014, Investigator David Decker of the Duluth Police Department interviewed appellant's sister, K.M., who said that she and appellant were staying at C.J.'s home on the night of May 17. K .M. told Investigator Decker that appellant was in and out of the apartment throughout the evening, but returned shortly after midnight with several purses, credits cards, jewelry, and a driver's license of "an older white woman with blonde hair wearing a green shirt." This description matched J.A.M.'s physical appearance. Appellant told K.M. that he got the items by kicking in a door.

On May 22, 2014, Investigator Decker interviewed C.J., who was not home during the search of her residence. C.J. said appellant returned to her apartment in the early morning hours of May 18 with the stolen items. Appellant told C.J. that "this is how I'm going to pay you back." C.J. recalled that the first names on the cards matched the names of J.A.M. and J.A.M.'s husband. She also said that appellant returned alone and was wearing a black hooded sweatshirt. C.J. said that appellant broke into a house on the street where J.A.M. lived to get the items.

Also on May 22, 2014, appellant made a statement to Sergeant McShane. Appellant said that he was in Superior, Wisconsin, during the home invasion and the entire weekend after that. When officers interviewed appellant, they searched him and found a package containing 0.084 grams of heroin in his front pocket.

The parties stipulated that appellant was wearing a required GPS ankle monitor during a period of time that included May 17, 2016. Critically, the ankle-monitor records indicate that appellant was at J.A.M.'s house at the time of the home invasion and at the ATM at the time of the unsuccessful attempts to withdraw money from J.A.M.'s account.

The state charged appellant with two counts of first-degree assault in violation of Minn.Stat. § 609.221, subd. 1 (2012), two counts of first-degree aggravated robbery in violation of Minn.Stat. § 609.245, subd. 1 (2012), one count of first-degree burglary in violation of Minn.Stat. § 609.582, subd. 1 (2012), three counts of financial transaction card fraud in violation of Minn.Stat. § 609.821, subd. 2 (2012), and one count of fifth-degree possession of a controlled substance in violation of Minn.Stat. § 152. 025, subd. 2 (2012). Appellant moved to admit alternative-perpetrator evidence of an admission by E.B. that he had kicked in doors to houses and burglarized places, and moved the district court to give a special jury instruction concerning eyewitness identification. The district court denied both motions. A jury found appellant guilty of all counts, and the district court sentenced appellant to four concurrent sentences of 132 months, 129 months, 160 months, and 28 months. This appeal followed.

DECISION

I. Alternative–Perpetrator Evidence

Appellant first argues that the district court erred in denying his request to offer evidence that an alternative perpetrator committed the assault, aggravated-robbery, and burglary offenses. We review a district court's decision to exclude alternative-perpetrator evidence for abuse of discretion. *State v. Sailee*, 792 N.W.2d 90, 93 (Minn.App.2010) *review denied* (Minn. Mar. 15, 2011). "If we determine that the [district] court erred, the conviction will still stand if the error was harmless beyond a reasonable doubt." *Id.* "The error is harmless if the jury's verdict is surely unattributable to the error." *Id.* (quotation omitted).

*3 A criminal defendant has a due-process right under the United States and Minnesota Constitutions to be treated fairly and to present a complete defense. *State v. Richards*, 495 N.W.2d 187, 191 (Minn.1992) (citing *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532 (1984)); *see* U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. This includes the right "to present evidence showing that an alternative perpetrator committed the crime with which the defendant is charged." *Sailee*, 792 N.W.2d at 93 (quotation omitted). "Alternative perpetrator evidence is admissible only

if the defendant makes a threshold showing that the evidence the defendant seeks to admit has an inherent tendency to connect the alternative perpetrator to the commission of the charged crime." *State v. Ferguson*, 804 N.W.2d 586, 591 (Minn.2011) (quotations omitted). This connection must be established beyond a "bare suspicion." *State v. Blom*, 682 N.W.2d 578, 621 (Minn.2004). If such a showing is made, the defendant may then introduce evidence of a motive or other facts that tend to prove a third party committed the crime. *State v. Atkinson*, 774 N.W.2d 584, 590 (Minn.2009).

On appeal, appellant argues that the district court erred in concluding that the proffered alternative-perpetrator evidence did not have an inherent tendency to connect E.B.[2] with the assault, aggravated-robbery, and burglary offenses. *See Ferguson*, 804 N.W.2d at 591. Except for E.B.'s statement to police that E.B. no longer goes around kicking in doors to houses and burglarizing places, all of appellant's proffered alternative-perpetrator evidence was ultimately presented to the jury. In reaching this conclusion, the district court considered as foundational evidence that only E.B.'s DNA was found on the white latex gloves found in C.J.'s home, that E.B. was using J.A.M.'s stolen phone when police searched C.J.'s home, and that E.B. had a piece of J.A.M.'s cut-up driver's license in his pocket. The district court's ruling therefore effectively excluded E.B.'s statement and prohibited appellant from presenting an alternative-perpetrator defense in connection with the other proffered alternative-perpetrator evidence.

2 In pretrial hearings, appellant also identified C.J. as a possible alternative perpetrator. The district court concluded that the evidence did not have an inherent tendency to connect C.J. to the offenses. Appellant does not argue on appeal that this was error. Therefore, we do not consider whether evidence that C.J. was a possible alternative perpetrator was properly excluded. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn.App.1997) (explaining that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997). We only address appellant's alternative-perpetrator argument concerning E.B.

In *Ferguson*, the Minnesota Supreme Court concluded that "the alternative perpetrator foundational evidence ... was sufficient to allow Ferguson to present an alternative perpetrator defense." 804 N.W.2d at 592. To satisfy the inherent-tendency requirement in that case, Ferguson offered the following evidence: (1) that someone told police that a man by the name of C.J. shot the victim; (2) that the alternative perpetrator's initials were C.J.; (3) that the alternative perpetrator was listed as C.J. in the victim's cell-phone contacts; (4) that the alternative perpetrator had a tattoo of the letters C.J. on his arm; (5) that the alternative perpetrator spoke to the victim on the phone three days before the shooting; (6) that the alternative perpetrator's physical description was similar to witnesses' descriptions of the shooter; (7) that the alternative perpetrator had a car matching some of the descriptions of the car seen at the crime scene; and (8) that the alternative perpetrator was arrested for unlawful possession of a firearm approximately five months before the shooting, but was not in custody at the time of the shooting. *Id.* at 591.

***4** In reaching its conclusion in *Ferguson*, the supreme court distinguished *Atkinson*, "in which [it] noted that evidence of an alternative perpetrator's presence at the scene of the crime is insufficient on its own to create an inherent tendency connecting the alternative perpetrator to the crime." *Id.* at 592 (citing *Atkinson*, 774 N.W.2d at 590). In *Atkinson*, the defendant sought to satisfy the inherent-tendency requirement with evidence that the alternative perpetrator was at the scene of the crime and had a tattoo similar to the shooter's tattoo. 774 N.W.2d at 591. The supreme court considered *Atkinson* a "close question," but ultimately factored in the victim's identification of the defendant as the shooter to conclude that, taken together, the defendant's evidence did not satisfy the inherent-tendency requirement. *Id.* at 591–92.

Here, the facts that E.B. was using J.A.M.'s cell phone and had a piece of her cut-up driver's license in his pocket does not have an inherent tendency to connect him to the commission of the offenses. Testimony established that appellant brought the stolen items back to C.J.'s home and that multiple people were present in C.J.'s home after the offenses and handled the stolen property. The facts do not inherently tend to put E.B. in J.A.M.'s home. *See Ferguson*, 804 N.W.2d at 592 (relying on evidence indicating alternative perpetrator was at the scene of the crime to support conclusion that alternative-perpetrator defense was appropriate); *but see Atkinson*, 774 N.W.2d at 590–92 (concluding that, without more, evidence that alternative perpetrator was at the location where the crime

took place was insufficient to link alternative perpetrator to the commission of the crime).

Appellant also argues that E.B.'s DNA on the white latex gloves links him to the crime. That pair of gloves was the only one that police found at C.J.'s residence, although C.J. told Investigator Decker that she and her mother kept some "rubber gloves" in the home for cleaning. But J.A.M.'s description of the clothing and physical appearance of the intruder matched that of appellant, including a distinct facial feature—an upturned eyebrow—that she could see under the nylon stocking on his head. And J.A.M. also indicated that the intruder was a "short" man, maybe 5′ 4″ tall, which is consistent with appellant's height. E.B. is 6′ 1″ tall. There was only one known intruder at J.A.M.'s home, and appellant's GPS monitor recorded that, despite his claims of having been in Superior, he was at the house at the time of the break-in.

Taken together, the facts relied on by appellant do not have an inherent tendency to link E.B. to the commission of the assault, aggravated-robbery, and burglary offenses. Accordingly, the district court acted within its discretion in denying appellant's request to introduce alternative-perpetrator evidence.

Even if the district court had admitted the alternative-perpetrator evidence, we are convinced that the jury would not have reached a different verdict. *See Sailee*, 792 N.W .2d at 93 ("The error is harmless if the jury's verdict is surely unattributable to the error.") (quotation omitted). The jury heard through testimony that E.B.'s DNA was the only DNA found on the white latex gloves found at C.J.'s home, that E.B. was using J.A.M.'s cell phone when police searched C.J.'s home, and that E.B. had a piece of J.A.M's cut-up driver's license in his possession. The jury therefore knew most of the facts that appellant sought to present to support his alternative-perpetrator defense regardless of the district court's ruling on the admission of E.B.'s statement that E.B. no longer kicks in doors to complete burglaries.

***5** Even if there was error, which we conclude there was not, it was harmless because "an average jury" would have reached the same verdict if it had considered the additional alternative-perpetrator evidence. *See* *State v. Post*, 512 N.W.2d 99, 102 (Minn.1994) (noting that an error is harmless beyond a reasonable doubt where, even with "the damaging potential of the evidence fully realized, an average jury (*i.e.*, a reasonable jury) would have reached the same verdict"). The other evidence against appellant was strong: J .A.M.'s description of the appearance and clothing of the intruder which matched appellant; appellant's GPS-monitor records placed him at J.A.M.'s home at the time of the offenses (when he claimed to have been elsewhere); testimony that appellant left and returned alone the night of the offense; and testimony that appellant told K.M. he had gotten the stolen items by kicking in a door.

The district court acted within its discretion in excluding proffered alternative-perpetrator evidence. And the error, if any there had been, would be harmless.

II. Jury Instruction

Appellant also argues that the district court erred in denying his request for a special jury instruction concerning the reliability of eyewitness identification. Jury instructions are entrusted to the district court's discretion, and a district court's refusal to give a requested instruction will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn.1996). The focus of our analysis is on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn.2001).

In *State v. Lindsey*, the Minnesota Supreme Court affirmed the district court's denial of a defendant's request for a one-and-a-half page, single-spaced instruction concerning eyewitness identification. 632 N.W.2d 652, 661–62 (Minn.2001). In *Lindsey*, the district court denied the request, and instead, it instructed the jury using the pattern jury instruction. *Id.* at 662; *see* 10 *Minnesota Practice*, CRIMJIG 3.19 (1990). The supreme court noted that the district court correctly "equated the proposed instruction to defense counsel's closing argument and noted that it could potentially distract the jury from making findings beyond a reasonable doubt." *Lindsey*, 632 N.W.2d at 662. The supreme court also concluded that the pattern jury instructions "convey[ ] the relevant aspects of witness identification to the jury." *Id.*

Here, the district court denied appellant's requested four-page, single-spaced instruction concerning the reliability of eyewitness identification. The district court denied the request after explaining that

> the issues with eyewitness identification ... are addressed through

> direct and cross-examination. The proposed jury instruction is long. It's five [sic] pages. It's single-spaced. Yes, Counsel has the right and the Court can agree to alter a JIG sometimes to tailor it to a specific case, but this isn't altering it, this is completely rewriting it, and I am neither in a position to create new case law, nor new criminal procedure, nor trial procedure.... [T]here's a lot in here, they talk about research, but that's a lot to put before a jury and it's not appropriate.

***6** As in *Lindsey,* the district court here instructed the jury using the pattern jury instruction, which has not changed from the version of which the supreme court approved in *Lindsey. Compare* 10 *Minnesota Practice,* CRIMJIG 3.19 (2015), *with* 632 N.W.2d at 662 (quoting 10 *Minnesota Practice,* CRIMJIG 3.19 (1990).

Appellant does not attempt to distinguish *Lindsey* on appeal, but instead only argues that "given the advances in social sciences ... it was an abuse of discretion to deny the requested jury instruction." Appellant relies on a Massachusetts case to argue that "the science underlying the [pattern] jury instruction ... has advanced to the point where Minnesota's pattern jury instruction on witness identification is inadequate." The Minnesota Supreme Court, however, has never held that the relevant pattern jury instruction is inadequate or misstates the law. And there is no other Minnesota authority for appellant's proposed instruction. Reversal would require us to change the law, which exceeds our proper role. *See Tereault v. Palmer,* 413 N.W.2d 283, 286 (Minn.App.1987) (explaining that public-policy arguments to modify existing law are within the purview of the Minnesota Supreme Court or the legislature, and not this court), *review denied* (Minn. Dec. 18, 1987).

The jury instruction given by the district court correctly states Minnesota law. The district court acted within its discretion.

Affirmed.

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Jeffery Dale TREVINO, Appellant.

No. A14–0252.
|
March 30, 2015.
|
Review Denied June 30, 2015.

Ramsey County District Court, File No. 62–CR–13–1455.

Attorneys and Law Firms

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Considered and decided by BJORKMAN, Presiding Judge; JOHNSON, Judge; and REYES, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge.

***1** Appellant challenges his felony-murder conviction and sentence, arguing that (1) the district court abused its discretion in instructing the jury on circumstantial evidence, (2) the evidence is insufficient to sustain his conviction, (3) third-degree assault cannot serve as the predicate felony for his conviction, and (4) the district court erred as a matter of law by imposing an aggravated sentence based solely on concealment of a body. We affirm.

FACTS

In early 2013, appellant Jeffery Trevino and his wife Kira Steger were experiencing marital difficulties and were discussing separation or divorce. Steger also was spending a significant amount of time away from home and had begun an intimate relationship with another man, R.W.

On Thursday, February 21, Trevino and Steger met for dinner and bowling at the Mall of America, where Steger managed a clothing store. Steger exchanged text messages with R.W. throughout the evening. Afterward, Trevino and Steger returned to the house they rented on East Iowa Avenue in St. Paul. They began watching a movie around 10:00 p.m. At one point, their downstairs roommate, M.R., walked in and saw Trevino and Steger watching the movie, and then went to bed. Steger texted R.W. one last time at 11:44 p.m.

Throughout the night, a neighbor's security camera recorded activity in and around Trevino and Steger's home. Around 12:45 a.m., a light came on in the portion of the home that Trevino and Steger inhabited. Roughly a half hour later, the inside light was off and the light over the driveway came on. Within five minutes, the driveway light turned back off and the inside light came on again, remained on for more than 15 minutes, then went off. Around 2:00 a.m., Trevino drove Steger's white Chevy Cobalt to a nearby gas station, where a security camera recorded him filling the gas tank. He turned out of the gas station in the direction of I–35E, rather than driving directly home. The neighbor's security camera did not record Trevino's return, but the light inside the house went on again briefly around 4:15 a.m. No further activity was recorded until after sunrise.

Shortly after 8:00 a.m. on Friday, February 22, Trevino drove his own vehicle to the same gas station, where he purchased gas and withdrew cash from the ATM. Security footage showed Trevino wearing a dark hooded sweatshirt with a white design on the front and that he left the station in the direction of his home.

Around 9:15 a.m., Steger's car left the home and proceeded down Iowa Avenue; roughly a half hour later, a white car indistinguishable from Steger's entered the West parking ramp at the Mall of America. Shortly before 10:00 a.m., a taxi at the mall picked up a thin man in a hooded sweatshirt who asked to be taken to 424 East Iowa Avenue—an address that does not exist. The driver transported the man to Iowa Avenue and let him off just east of Trevino and Steger's residence at around 10:40 a.m. The passenger paid the $35 fare in cash. Moments later, a thin person in a dark hooded sweatshirt with a white

design on the front walked westward down Iowa Avenue and up the driveway to Trevino and Steger's residence.

***2** On Saturday, February 23, Steger was scheduled to work at 2:00 p.m. She did not report for her shift or call in, and her cell phone was off when a coworker tried to reach her; both were unusual for Steger. Trevino spoke with Steger's friends about her absence, including asking a police officer friend of hers if he should report her missing, but he did not ask Steger's family about her whereabouts. The following morning, after Steger again failed to report for work, Trevino contacted the police. He then called Steger's mother and told her that he had filed a missing-person report.

Police interviewed Trevino at home on Sunday, February 24. He stated that Steger had slept at home Thursday night, she left around 9:00 a.m. the next morning to go to the gym, and he had not heard from her since. Police subsequently learned that Steger had not been to the gym or used her cell phone since February 21.

On Monday, February 25, Steger's car was discovered in the West parking ramp at the Mall of America. It had been ticketed by mall security at 3:56 a.m. on Saturday, February 23. Police found Steger's blood in the trunk and on a trunk liner discovered on an embankment near the car. In the passenger compartment, police found a self-help divorce form and many of Steger's personal effects, but no cell phone, driver's license, credit cards, or checkbook.

That same day, police searched Trevino and Steger's home. In the master bedroom, they noticed signs that furniture had been moved and numerous apparent blood stains; subsequent testing revealed little confirmed blood but definitively matched several areas of confirmed blood to Steger's DNA profile. Police also collected the Arkansas Razorbacks sweatshirt that Trevino wore to dinner on February 21, which had been washed and air dried, and a black hooded Ecko Unltd. sweatshirt with a white design on the front; subsequent testing did not reveal blood on either item.

Police arrested Trevino on February 26. Trevino was charged with second-degree intentional murder and second-degree felony murder. He remained in custody as police continued to investigate and Steger's family searched for her body.

On March 16, Steger's grandfather found a plastic bag containing several bloody clothing items and a bloody pillow in a brushy area near Keller Lake in Maplewood; subsequent testing matched the blood on the pillow to Steger's DNA profile. Two weeks later, Steger's driver's license was found within a few miles of Trevino and Steger's home. And on May 8, Steger's body was discovered in the Mississippi River near the St. Paul dock.

Ramsey County Chief Medical Examiner Michael McGee, M.D., performed an autopsy. Dr. McGee noted that the body was in an advanced state of decomposition and had been in the water for a long time. He used dental records to identify the body as Steger's. Dr. McGee identified three traumatic injuries that preceded and led to Steger's death, though he could not determine the order in which they were sustained. First, Steger had an incision wound on the left side of her forehead, one centimeter deep and four centimeters long, which Dr. McGee opined was caused by a sharp-edged instrument. A living person with such a wound would bleed profusely, though the bleeding would stop once the person was close to death. Second, Steger suffered a broken left index finger, which likely occurred as the finger was hyperextended "during the give-and-take of an assault." Third, Steger had a v-shaped laceration between her nose and lip and corresponding internal injuries to both lips. The injuries could have been caused by someone punching Steger while wearing a ring, but "it wouldn't have been very hard because the teeth were not loosened." Dr. McGee believed it more likely that these injuries were caused by smothering with a hand or pillow. Dr. McGee concluded that Steger died "as a result of an assault on her causing the injuries that are present."

***3** To determine time of death, Dr. McGee collected and examined the contents of Steger's stomach and obtained information about the timing and contents of Steger's last known meal-her dinner with Trevino on February 21, which ended around 7:30 p.m. Dr. McGee found the fish, nut, and vegetable elements of that meal in Steger's stomach, but the meat and rice elements were no longer present. Dr. McGee did not see any of the meal in the lower portions of Steger's gastrointestinal tract. And while digestion rates vary significantly from person to person and depend on the amount and type of food consumed, scientific literature indicates that an adult generally digests a meal completely, emptying the stomach, in as little as one to two hours or up to "11 hours and some minutes."

After a nine-day trial, a jury acquitted Trevino of second-degree intentional murder but found him guilty of second-degree felony murder. He moved for acquittal, arguing

that, as presented in this case, third-degree assault is not a proper predicate offense for a charge of second-degree felony murder. The district court denied the motion and entered judgment of conviction.

The state sought an upward departure from the presumptive sentencing range of 128–180 months' imprisonment based on particular cruelty, arguing that Trevino concealed Steger's body to avoid detection, which caused her family anguish. Trevino waived his right to a sentencing jury and stipulated that if he concealed or attempted to conceal Steger's body, it would cause anguish to her family. He further agreed that those facts would justify an aggravated sentence, but argued that concealment alone does not provide a sufficient legal basis to depart. The district court found that Trevino treated Steger with particular cruelty "in that he concealed her body in an attempt to evade detection further causing extreme anguish for the victim's family." Based on that determination, the district court sentenced Trevino to 330 months' imprisonment. Trevino appeals.

DECISION

I. The district court did not abuse its discretion in instructing the jury on circumstantial evidence.

A district court has broad discretion in determining how to instruct a jury. *Gulbertson v. State*, 843 N.W.2d 240, 247 (Minn.2014). We will not reverse when jury instructions, viewed as a whole, fairly and accurately state the law in a manner that the jury can understand. *State v. Scruggs*, 822 N.W.2d 631, 642 (Minn.2012). Instructional error warrants reversal "only if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *State v. Koppi*, 798 N.W.2d 358, 364 (Minn.2011) (quotation omitted).

Trevino argues that the district court abused its discretion by denying his request for the following instruction on circumstantial evidence:

> A fact may be proven by either direct or circumstantial evidence, or by both. The law does not prefer one form of evidence over the other. *However, if you believe that the evidence in this case is solely circumstantial, the circumstances proved and the reasonable inferences from such evidence must be consistent only with the defendant's guilt and inconsistent with any rational hypothesis except that of his guilt.*

***4** (Emphasis added.) The district court instead read only the first two sentences to the jury, consistent with the pattern jury instruction, 10 *Minnesota Practice*, CRIMJIG 3.05 (5th ed.2014). Trevino argues that the additional rational-hypothesis instruction is necessary to explain circumstantial evidence fairly and accurately. *See, e.g., State v. Andersen*, 784 N.W.2d 320, 337 (Minn.2010) (Meyer, J., concurring). We are not persuaded.

Our supreme court has repeatedly approved the CRIMJIG 3.05 instruction as an accurate statement of the law on circumstantial evidence and held that a district court is not required to give an additional rational-hypothesis instruction, particularly when, as here, the defendant does not object to the reasonable-doubt instruction. *See State v. Gassler*, 505 N.W.2d 62, 68 (Minn.1993) (citing *State v. Turnipseed*, 297 N.W.2d 308 (Minn.1980)). The *Gassler* court explained that jury instructions and standards for reviewing the sufficiency of the evidence supporting a jury's verdict are conceptually different. *Id.* And it echoed the reasoning of the United States Supreme Court that "the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." *Id.* (quoting *Holland v. United States*, 348 U.S. 121, 139–40, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954)).

We need not decide whether a district court *may* give a rational-hypothesis instruction, as Trevino urges, because the jury instructions the district court gave fairly and accurately explain circumstantial evidence. On this record, we conclude the district court did not abuse its discretion by denying Trevino's request for an additional rational-hypothesis instruction.

II. The evidence is sufficient to sustain Trevino's conviction .

When reviewing a sufficiency-of-the-evidence challenge, we carefully examine the record evidence to determine whether

the fact-finder could reasonably find the defendant guilty of the charged offense. *State v. Pratt*, 813 N.W.2d 868, 874 (Minn.2012). When a conviction is based on circumstantial evidence, we use a two-step process. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn.2013). We first identify the circumstances proved—the evidence supporting the jury's guilty verdict. *Id.* We then independently examine the reasonableness of the inferences the jury could draw from those circumstances. *Id.* at 599. "Circumstantial evidence must form a complete chain that, in view of the evidence 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. Taylor*, 650 N.W.2d 190, 206 (Minn.2002).

The evidence that Trevino committed the crime is wholly circumstantial, and there are multiple ways to interpret almost all of that evidence. But it is not this court's role to weigh the evidence, even in circumstantial-evidence cases. *State v. Stein*, 776 N.W.2d 709, 714 (Minn.2010). "[T]he jury is in the best position to evaluate the credibility of the evidence," and it has already done so. *See State v. Moore*, 846 N.W.2d 83, 88 (Minn.2014). Accordingly, when determining the circumstances proved, we "assume that the jury resolved any factual disputes in a manner that is consistent with the jury's verdict." *Id.* "There may well be testimony on behalf of the defendant as to inconsistent facts and circumstances, not conclusively proved, and which the jury may have a right to and do reject as not proved." *State v. Tschen*, 758 N.W.2d 849, 858 (Minn.2008) (quotation omitted). But we consider "only those circumstances that are consistent with the verdict." *Silvernail*, 831 N.W.2d at 599.

***5** Viewed in the light most favorable to the verdict, the evidence adduced at trial establishes the following circumstances. Steger ate her last meal before 7:30 p.m. on Thursday, February 21. She was alive until at least 11:44 p.m. that night, during which time she digested, and perhaps eliminated, a portion of her meal. But at some point before she finished digesting, likely well before 6:30 a.m. the following morning, Steger was assaulted and killed, and her body was dumped in the Mississippi River. Trevino was the only person with Steger during this time frame.

The circumstances proved include conduct by Trevino that is consistent with disposing of Steger's body and her car. Around 2:00 a.m., Trevino took Steger's car to the gas station. Instead of returning directly home, he turned in the direction of the freeway, and there was no sign of anyone in the residence until around 4:15 a .m. Less than four hours later, Trevino returned to the same gas station in his own car, now wearing his black Ecko Unltd. hooded sweatshirt, and withdrew cash. This time, he drove directly home. Around 9:15 a.m., someone drove Steger's white Chevy Cobalt down Iowa Avenue. Within the next half hour, someone drove a white Chevy Cobalt into the West parking garage at the Mall of America where Steger's car—that contained her blood—was found. A man matching Trevino's general description hailed a taxi from the mall and gave a fake address on Iowa Avenue. The passenger paid in cash, and moments later, someone wearing a sweatshirt indistinguishable from Trevino's Ecko Unltd. sweatshirt walked down Iowa Avenue directly to Trevino and Steger's home.

And the circumstances proved include Trevino's conduct between February 22 and his arrest on February 26 that points toward guilt. He forged a check from Steger's account and mailed it to their landlord on February 22, roughly one week ahead of when Trevino and Steger typically paid rent. On February 23, he contacted their landlord, gave notice that they would be moving out April 1, and immediately began cleaning the house but not packing. After Steger missed a scheduled shift at work and was uncharacteristically unavailable by phone, Trevino spoke with several of her friends about her whereabouts but did not contact her family. He contacted her mother only after filing a missing-person report. During a February 24 telephone call with Steger's sister, he referred to Steger in the past tense. And Trevino wrote down R.W.'s address and put it in his vehicle, though the two men had never met. Viewed as a whole, these circumstances not only indicate that Trevino knew Steger was dead but also suggest that jealousy over her affair with R.W. was his motive for the assault that led to her death.

We next consider whether the reasonable inferences that can be drawn from the circumstances proved are only consistent with guilt. *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn.2010). If, as here, the reasonable inferences are consistent with guilt, we consider whether they are also consistent with other hypotheses. *Id.* But competing hypotheses must be based on more than mere "conjecture" or "possibilities of innocence." *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn.2003) (quotations omitted). It is the defendant's burden to point to evidence in the record that is consistent with a rational theory other than guilt. *Taylor*, 650 N.W.2d

at 206. Reversal is not warranted if the evidence, taken as a whole, makes the defendant's theories seem unreasonable. *Id.*

*6 Trevino argues that some evidence adduced at trial—and the lack of certain evidence—supports a reasonable inference that Steger "was killed outside the home by someone else." He argues that if he killed Steger in their bedroom the night of February 21, it stands to reason that someone would have heard her scream and police would have discovered more of Steger's blood in the bedroom and on the clothes Trevino wore to dinner that night. Trevino also contends that Dr. McGee's testimony that he saw no evidence of Steger's last meal in her lower gastrointestinal tract is inconsistent with the state's theory that Steger's death interrupted her digestion. And Trevino cites evidence that Steger's cell phone was activated and sold overseas in March, while he was incarcerated. Certain aspects of this evidence—such as the cell-phone activation—do not support the jury's verdict and are thus not part of the circumstances proved from which we draw inferences. But more importantly, Trevino presents us with no more than isolated facts to support his alternative-perpetrator theory. *See* *Silvernail*, 831 N.W.2d at 599 (requiring review of circumstantial evidence "not as isolated facts, but as a whole").

Viewed in light of all of the circumstances proved, Trevino's theory requires a host of improbable factual circumstances: Trevino drove Steger's car to the gas station at 2:00 a.m. Friday morning simply because he knew she needed gas. She left for the gym around 9:00 a.m. that morning without eating or once using her phone. But before she could get to the gym, some unknown person assaulted and killed her in broad daylight, placed her bloody body in the trunk of her car, and at some point deposited her body in the Mississippi River. The killer also abandoned Steger's driver's license and various bloody personal effects within one or two miles of her residence but drove her car to the public parking garage of her workplace, roughly a half hour's drive away, and left it in time for it to be ticketed by mall security at 3:56 a.m. on Saturday. And even if *all* of these circumstances came to pass, they do not explain the numerous examples of suspicious conduct that Trevino exhibited in the days before his arrest.

Our thorough consideration of the record as a whole leads us to only one reasonable conclusion: late February 21 or early February 22, Trevino assaulted his wife, inflicting multiple sharp-and blunt-force injuries that ultimately caused her death. Accordingly, Trevino's challenge to the sufficiency of the evidence fails.

III. The district court properly convicted Trevino of second-degree felony murder based on the predicate offense of third-degree assault.

Trevino argues that his felony-murder conviction cannot be predicated on third-degree assault because (1) the state did not properly plead it as the predicate offense for the felony-murder charge and (2) third-degree assault does not pose a special danger to human life. We address each argument in turn.

***7 Pleading**

Due process requires that "an accused ... be adequately apprised of the charge made against him in order that he may prepare his defense." *State v. Pratt*, 277 Minn. 363, 366, 152 N.W.2d 510, 513 (1967). To satisfy this requirement, a complaint need only present the essential facts establishing probable cause to believe that an offense has been committed and that the defendant committed it. Minn. R.Crim. P. 2.01, subd. 1. A complaint "alleging a statutory offense is sufficient if the language used spells out all essential elements in a manner which has substantially the same meaning as the statutory definition." *Pratt*, 277 Minn. at 365, 152 N.W.2d at 512. "[I]t is unnecessary to identify each specific element of the crime." *State v. Dunson*, 770 N.W.2d 546, 551 (Minn.App.2009), *review denied* (Minn. Oct. 20, 2009). When a defendant objects to the sufficiency of the complaint for the first time after conviction, we will not reverse unless close examination of the entire record reveals that the defect was so substantial that it "misled the defendant as to the nature of the offense charged to the prejudice of his substantial rights." *Pratt*, 277 Minn. at 366, 152 N.W.2d at 513.

The amended complaint filed after Steger's body was recovered states a charge (unchanged from the original) of second-degree felony murder and the following factual allegations bearing on the underlying felony: Police found Steger's blood in the home, in the trunk of her car, and on a pillow discovered near the home. The autopsy revealed that Steger suffered a laceration just above her left eye, an injury to her upper lip, and a broken index finger.

Trevino did not challenge the sufficiency of the amended complaint. Nor did he object to the jury instructions expressly identifying third-degree assault as the predicate felony. And the state's case against Trevino, from Dr. McGee's testimony and autopsy photographs to the prosecutor's opening statement and closing argument, consistently described the

murder as a violent, multi-faceted assault that led to Steger's death. Trevino thoroughly cross-examined Dr. McGee about the nature and likely cause of Steger's injuries. Because nothing in this record indicates that Trevino was misled about the nature of the offense with which he was charged, we reject Trevino's due-process argument.

Special danger to human life

A person is guilty of second-degree felony murder when 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). To serve as a predicate-felony offense, the offense must involve a "special danger to human life." *State v. Smoot*, 737 N.W.2d 849, 851 (Minn.App.2007), *review denied* (Minn. Nov. 21, 2007). The elements of the predicate felony need not refer to death or bodily harm so long as they demonstrate that the offense is "inherently dangerous and poses a significant danger to human life." *Id.* We consider "both the elements of the predicate felony in the abstract and the totality of the circumstances in determining whether the predicate felony involves a special danger to human life." *State v. Anderson*, 666 N.W.2d 696, 700 (Minn.2003). Whether a particular offense is a proper predicate for felony murder is a question of law, which we review de novo. *Id.* at 698.

***8** A person is guilty of third-degree assault if they assault another person, inflicting "substantial bodily harm." Minn.Stat. § 609.223, subd. 1 (2012). Both our supreme court and this court have concluded that crimes against persons usually present special danger to human life in the abstract. *See State v. Cole*, 542 N.W.2d 43, 53 (Minn.1996) (holding that second-degree assault "forms a proper predicate felony to a felony murder conviction" because "assault is not a property crime, but a crime against the person"); *Smoot*, 737 N.W.2d at 853 (holding that felony DWI poses a special danger to human life in the abstract); *State v. Mitchell*, 693 N.W.2d 891, 895 (Minn.App.2005) (holding that felony child neglect or endangerment poses a special danger to human life in the abstract), *review denied* (Minn. June 28, 2005). The level of violence present in a third-degree assault—resulting in substantial bodily harm—easily meets the danger-to-human-life threshold in the abstract.

Trevino urges us to disregard the level of harm involved, arguing that third-degree assault poses no greater danger to human life than misdemeanor assault because the two offenses require only the same general intent. *See State v. Fleck*, 810 N.W.2d 303, 309–10 (Minn.2012) (holding that assault-harm is a general-intent crime). We are not persuaded. When determining whether an offense involves a special danger to human life, our focus is on the actor's conduct, not his intent. *See Smoot*, 737 N.W.2d at 854 (holding that predicate offense need not include a specific mens rea element). The conduct of causing another person substantial bodily harm presents a special danger to human life, regardless of whether the actor intends to cause that level of harm. Accordingly, we conclude that third-degree assault involves a special danger to human life in the abstract.

Likewise, we are persuaded that the particular third-degree assault committed here posed a special danger to human life. Trevino seeks to minimize the nature of the assault by focusing solely on Steger's broken finger. But the evidence amply establishes that Trevino also cut Steger's forehead to the bone, likely causing profuse bleeding, and either punched her in the mouth or smothered her with his hand or a pillow. Any of these acts poses an unmistakable danger to human life.

On this record, we conclude the district court did not err by convicting Trevino of second-degree felony murder based on the predicate offense of third-degree assault.

IV. The district court did not abuse its discretion by imposing an aggravated sentence based on Trevino's concealment of Steger's body.

The decision to depart from a presumptive sentence is within the district court's discretion. *State v. Stanke*, 764 N.W.2d 824, 827 (Minn.2009). A district court must impose the presumptive sentence unless there are "identifiable, substantial, and compelling circumstances" to warrant an upward departure. Minn. Sent. Guidelines 2.D.1 (2012). "Substantial and compelling circumstances are those showing that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the offense in question." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn.2009) (quotation omitted). This court will reverse only if the district court's reasons for departure are improper or there is insufficient evidence on which to base a departure. *State v. Vance*, 765 N.W.2d 390, 395 (Minn.2009).

***9** Treatment of a victim with particular cruelty is a recognized basis for departure. Minn. Sent. Guidelines

2.D.3.b(2). "[P]articular cruelty involves the gratuitous infliction of pain and cruelty of a kind not usually associated with the commission of the offense in question." *Tucker v. State*, 799 N.W.2d 583, 586 (Minn.2011) (quotations omitted). A defendant's concealment of the victim's body has been considered particularly cruel, especially when the defendant affirmatively uses the concealment to his advantage or the concealment results in disfigurement of the victim's body or further anguish to the victim's family. *State v. Shine*, 326 N.W.2d 648, 654–55 (Minn.1982); *State v. Murr*, 443 N.W.2d 833, 837 (Minn.App.1989), *review denied* (Minn. Sept. 27, 1989).

Trevino argues that concealment of a body does not constitute particular cruelty in the absence of an attempt to bargain with authorities. Trevino also asserts that concealment cannot be a basis for departure because it constitutes the separate uncharged offense of interference with a body. We rejected identical arguments in *State v. Hicks*, 837 N.W.2d 51, 62–64 (Minn.App.2013), *review granted* (Minn. Nov. 12, 2013), concluding that a murderer's concealment of his victim's body may constitute the aggravating factor of particular cruelty and does not constitute an uncharged lesser-included offense of second-degree felony murder. *Hicks* is consistent with the legislature's recognition that a murder victim's family members are also victims of that crime. *See* Minn.Stat. § 611A.01 (2012) ("The term 'victim' includes the family members, guardian, or custodian of a ... deceased person."). While Trevino disagrees with that decision, it is the controlling law unless and until our supreme court holds otherwise. *See State v. Peter*, 825 N.W.2d 126, 129 (Minn.App.2012), *review denied* (Minn. Feb. 27, 2013).

Moreover, we observe that the district court's particular-cruelty determination was not, as Trevino asserts, based solely on the concept of concealing a body. Rather, the district court expressly found that Trevino's actions were particularly cruel in light of the following facts. Trevino sought to evade detection by concealing Steger's body in the Mississippi River and staging her death as a kidnapping. To accomplish this, Trevino transported her body in the trunk of her car and used her friends to look for her. Her body remained in the river, and her whereabouts were unknown, for more than two months. During that time, Steger's family and friends experienced the anguish of searching unsuccessfully for her body and discovering evidence containing Steger's blood. By the time Steger's body was discovered, it was deteriorated to the point of being unidentifiable without forensic testing and dental-record comparison. Steger's family experienced further distress at observing her body in this state. These unchallenged factual findings support the district court's assessment that Trevino acted with particular cruelty for which he should be held responsible. Accordingly, we conclude that the district court did not abuse its discretion in imposing an aggravated sentence.

***10 Affirmed.**

All Citations

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