STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1040

State of Minnesota,
Respondent,

vs.

John Joseph Hare,
Appellant.

Filed February 18, 2025
Affirmed in part, reversed in part, and remanded
Larson, Judge

Anoka County District Court
File No. 02-CR-22-1107

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

Brad Johnson, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Reyes, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

In this direct appeal following a jury trial, appellant John Joseph Hare challenges his convictions for second-degree intentional murder and second-degree unintentional felony murder. Hare argues that: (1) Respondent State of Minnesota failed to prove his

guilt beyond a reasonable doubt; (2) the district court abused its discretion when it admitted some, but not all, of a series of voicemails; and (3) the district court incorrectly entered convictions for both guilty verdicts. Hare raises additional arguments in a supplemental brief. Because Hare's warrant of commitment incorrectly reflects convictions for both second-degree intentional murder and second-degree unintentional felony murder, we reverse in part and remand. We otherwise affirm.

FACTS

On February 23, 2022, D.N. (the decedent) was discovered dead in his Coon Rapids home. The state charged Hare, the decedent's neighbor and friend, with second-degree intentional murder, under Minn. Stat. §§ 609.19, subd. 1(1), .11, subd. 4 (2020), and second-degree unintentional murder while committing a felony, under Minn. Stat. § 609.19, subd. 2(1) (2020). The facts below were elicited at a jury trial on these charges.

On the night of February 20, 2022, Hare placed thirteen calls to his ex-girlfriend, H.C. (ex-girlfriend), and left a series of voicemails. A voicemail left at 10:01 p.m. recorded Hare asking ex-girlfriend for help:

> Call me back please. This is very, very important. I do need your help. I need you to call me. In a very, very important way. Please call me. Pineapple. Red Pineapple.[1] Mayday. Mayday, mayday, mayday. Red Pineapple.

A voicemail left at 10:10 p.m. had a similar theme:

> Hey, um, can you call me back please, as soon as possible. It's pretty important. Right, right now, please. Red

[1] Ex-girlfriend testified that "pineapple" was a "safe word" that she and Hare used if they needed an argument to stop. Ex-girlfriend also testified that she did not know what "red pineapple" meant, but that "Red" was Hare's nickname for her.

> Pineapple. Red Pineapple. It's the biggest red pineapple you'll ever find. Red Pineapple. Right now. Red pineapple. I mean this from the bottom of my heart, red pineapple. Please.

Another voicemail, left at 10:11 p.m., also recorded Hare asking ex-girlfriend for help:

> Hey, f--king call me, or I swear to God. F--king call me. What the f--k? I need your f--king help right now. Call me. Mayday, mayday, mayday. F--king red pineapple. What the f--k, dude. Call me, I'm f--king, I swear to God. I've got a f--king red pineapple right here in front of me. Red f--king pineapple.

A voicemail left at 10:15 p.m. contained a message from Hare to ex-girlfriend, as well as background dialogue between Hare and the decedent:

> HARE: Hey Red, um, look, I need your help. It's really important. Please call me. I've, I don't know how to save this person. He, I don't know what to do (inaudible) d--n. [Ex-girlfriend], this person is not doing good. Please call me. He tried to commit suicide, I, I don't know what to do.
>
> [DECEDENT]: No, I didn't.
>
> HARE: Yeah, you did, you b--tard.
>
> [DECEDENT]: No, I didn't.
>
> HARE: Hey, please call me. This guy's f--king, what the f--k's wrong with you, dude? Why would you do that, and why would you even call me to help you? You're f--king tripping man. F--k. Why would you do this to yourself?

Finally, a voicemail left at 10:23 p.m. recorded a conversation between Hare and the decedent, apparently as the result of an accidental dial. In relevant part, the voicemail contains the following dialogue:

HARE: I don't know what the f--k. How am I supposed to help you? You're f--king bleeding all over me (inaudible) f--k man. You're f--king, God d--nit. Don't die on me, man. F--k.

[DECEDENT]: I'm not dying. (Inaudible)

HARE: Yeah, you're, you're, you're f--king leaking everywhere. You even f--king bled on me dude. What the f--k's wrong with you? (Inaudible) you're not supposed to commit suicide. It's against the f--king rules. Yeah, all the sudden you're f--king fine man. S--t. Get up, and let's go. I'll take you to the hospital, man. What's wrong with you?

[DECEDENT]: I'm not going to the hospital.

HARE: You have to go to the hospital; you're f--king bleeding everywhere. And you f--king tried committing suicide. What the f--k's wrong with you, you son of a b--ch? F--k. Man, get up here. . . .

. . . .

HARE: [Decedent] are you trying to breakdance or what? D--nit. Alright. (Inaudible) Alright, um, hold on. F--k, now we're both f--king (inaudible). God d--nit. You want a shot of vodka or something?

[DECEDENT]: No.

HARE: No. Alright, I don't [know] what to do dude. I mean, I can't stay here with you, you're gonna be an a--hole.

Ex-girlfriend eventually answered one of Hare's calls. Hare told ex-girlfriend that he had blood on him, wanted her to come help him, and was at the decedent's home. When ex-girlfriend arrived at the decedent's home, the decedent was still alive, lying on the kitchen floor with Hare standing above him. Ex-girlfriend testified that there was blood "all over the floor, all over the counters. And [the decedent] was covered head to waist in

blood. And [Hare] had blood all across him." Ex-girlfriend could not see any wounds on the decedent. Hare told ex-girlfriend that the decedent tried to commit suicide. The decedent responded, "No I didn't. You kicked my a--." Ex-girlfriend understood the decedent to be referring to Hare. The situation scared ex-girlfriend, and she ran to her car.

Hare followed ex-girlfriend and entered her car. Hare asked ex-girlfriend to take him home. Ex-girlfriend and Hare entered Hare's home. Ex-girlfriend tried to leave, but Hare stopped her. Ex-girlfriend asked Hare if she could get a drink of water and, when she did, she ran to her car and drove away.

At around 11:30 p.m., Hare placed a video call to his daughter (daughter). Hare told daughter that bad people were after him, and he needed help. Hare also told daughter that "sometimes in life people gotta take out the f--king trash." In response to daughter asking if she could "know who's gone," Hare said, "[a]bsolutely not . . . [b]ecause they're a bad person." Hare also talked to daughter's mother (co-parent) and said, "bad people were after him because something bad had happened" and "a bad man had died."

On February 22, 2022, after leaving a duffle bag with a neighbor, Hare took a taxi to the airport and boarded a flight to Denver. The following day, at around 10:00 a.m., the decedent's sister and brother-in-law arrived at the decedent's home to check on him. The decedent's brother-in-law entered the home and saw the decedent dead, lying on the floor with "blood everywhere." He called 911.

Law enforcement arrived shortly thereafter. They found the decedent lying on his back in the living room with blood on his body and face. Blood was on the floor around the decedent, as well as on the floor in the kitchen and smeared on appliances. Detectives

were called to the scene. They noted signs of a violent assault and a hammer on the floor several feet from the decedent's body. After obtaining a search warrant for the property, the detectives processed the scene.

The detectives determined that the scene was not indicative of suicide. There were no signs of forced entry, but there were signs of disturbance. Namely, there was a knocked-over plant and a hole in the wall consistent with the impact of a body. Blood stains in a "spatter" pattern were found on the ceiling, blinds, molding, and near the decedent's body, meaning that force was applied to the blood, and the blood moved through the air and landed on a surface.

DNA tests were performed on the hammer found at the scene. That testing revealed that the blood on the head of the hammer belonged to the decedent. The grip of the hammer's handle contained a mixture of DNA from three individuals. The major male profile of the mixture matched the decedent. Hare was a possible contributor to the mixture. However, the mixture was greater than one billion times more likely—the highest level of support for inclusion—to have originated from the decedent, Hare, and an unknown, unrelated individual, than from three unknown, unrelated individuals.

Two cell phones were discovered at the scene. Law enforcement quickly confirmed that the decedent owned the first cell phone. After obtaining a search warrant authorizing a forensic examination of the second cell phone, law enforcement unlocked the cell phone, put it on airplane mode, and removed its SIM card. Law enforcement later performed a "mock 911 call" to assist in identifying the owner of the second cell phone. The investigation uncovered that Hare owned the second cell phone.

Law enforcement also executed a search warrant at Hare's residence. Hare's washing machine contained several pairs of jeans with a strong smell of bleach. A stain on one pair of jeans, as well as a substance on a light switch, tested presumptively positive for blood.[2] A swab of the blood found on the light switch at Hare's home revealed DNA belonging to three individuals. The major male profile of the mixture matched the decedent, and Hare was a possible contributor to the mixture. However, the mixture was greater than one billion times more likely to have originated from the decedent, Hare, and an unknown, unrelated individual than from three unknown, unrelated individuals.

A medical examiner performed the decedent's autopsy and determined that the decedent had preexisting medical conditions, but they did not cause his death. Rather, the decedent's preexisting medical conditions did not "help him survive [his] injuries." The medical examiner determined the decedent's manner of death was homicide, and his cause of death was multiple blunt- and sharp-force injuries. A DNA test performed on the decedent's fingernail clippings revealed that they contained a male DNA profile matching the decedent and no one else.

Hare was arrested in Nye County, Nevada. Law enforcement from Anoka County, Minnesota, then traveled to the Nye County jail to investigate and execute a search warrant. Law enforcement first spoke with Hare on February 28, 2022, and Hare invoked his right to an attorney. Law enforcement immediately stopped asking Hare questions. Thereafter,

[2] Presumptive tests are an investigative tool that allow law enforcement to determine whether a substance may contain blood. Presumptive tests are not confirmatory because they also yield positive results for some animal blood.

Hare made a few remarks about his extradition and asked how to contact an attorney. On March 1, 2022, while collecting DNA evidence from Hare pursuant to a warrant, Hare spontaneously discussed the events of February 20, 2022. Law enforcement immediately told Hare that any discussion of the case would have to take place at another time, after Hare's rights had been explained and waived.

After the state charged Hare with second-degree intentional murder and second-degree unintentional felony murder, Hare requested a contested omnibus hearing at which he moved to suppress: (1) the statements he made at the Nye County jail on the basis that he had not been properly *Mirandized*[3] and had invoked his right to counsel and (2) evidence obtained through the search of his cell phone on the ground that the search exceeded the scope of the search warrant. The district court denied Hare's motion.[4]

Prior to trial, both parties filed motions in limine. The state moved to introduce the 10:01 voicemail, 10:10 voicemail, 10:11 voicemail, and 10:15 voicemail.[5] Hare's trial counsel countered that, if the state admitted those voicemails, Minn. R. Evid. 106 and the rule of completeness required the state to play the 10:23 voicemail as well. The district

[3] To protect a defendant's right against self-incrimination, law enforcement must implement "procedural safeguards" prior to subjecting the defendant to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). This includes informing the defendant of the right to remain silent and have an attorney present. *Id.* at 478-79. Once these procedural safeguards have been implemented, a defendant has been *Mirandized*.

[4] The state introduced video and audio recording of the statements Hare made at the Nye County jail at trial.

[5] The state also moved to introduce a voicemail left on ex-girlfriend's phone at 10:05 p.m., but the state did not play this voicemail at trial.

court disagreed and did not require the state to play the 10:23 voicemail under rule 106 or the rule of completeness.[6]

At the end of trial, the jury found Hare guilty of both second-degree intentional murder and second-degree unintentional murder while committing a felony, and the district court entered convictions for both counts. The district court then sentenced Hare to 391 months in prison, with 419 days credit for time served, for the second-degree intentional murder conviction. The disposition set forth on the warrant of commitment reflects convictions for both counts.

Hare filed a notice of appeal, and we granted Hare's motion to stay the appeal to pursue postconviction relief. Hare thereafter filed a motion to supplement the record in district court to include the 10:23 voicemail and its transcript. The district court granted Hare's motion. We then reinstated Hare's appeal.

DECISION

Hare raises several challenges to his convictions. First, Hare argues the state presented insufficient evidence to prove beyond a reasonable doubt that he caused the decedent's death. Second, Hare asserts that the district court abused its discretion when it did not require the state to play the 10:23 voicemail under rule 106. Third, Hare contends the district court failed to comply with Minnesota law when it entered convictions for both second-degree intentional murder and second-degree unintentional felony murder. *See*

[6] The state also moved to exclude the 10:23 voicemail as self-serving hearsay. The district court deferred ruling on that motion. At trial, Hare did not seek to admit the 10:23 voicemail.

Minn. Stat. § 609.04 (2020). And, finally, Hare raises a number of issues in his pro se supplemental brief, including ineffective assistance of counsel, prosecutorial misconduct, unlawful search of his cell phone, and failure to properly administer *Miranda* warnings. We address each argument in turn below.

I.

Hare argues the state presented insufficient evidence to support his convictions. The state bears the burden "of proving beyond a reasonable doubt every element of a charged offense in a criminal trial." *State v. Pakhnyuk*, 926 N.W.2d 914, 919 (Minn. 2019). To be found guilty of second-degree intentional murder, the state must prove that Hare: (1) "cause[d] the death of a human being" and (2) did so "with intent to effect the death of that person or another, but without premeditation." Minn. Stat. § 609.19, subd. 1(1). To be found guilty of second-degree unintentional felony murder, the state must prove that Hare: (1) "cause[d] the death of a human being" and (2) did so "without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting." Minn. Stat. § 609.19, subd. 2(1). Here, Hare contends the state did not present sufficient evidence to prove the first element of either crime—that he caused the decedent's death.

"When evaluating the sufficiency of the evidence, appellate courts carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Griffin*, 887 N.W.2d

257, 263 (Minn. 2016) (quotation omitted). "The evidence must be viewed in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict." *Id.* "The verdict will not be overturned if the fact-finder, upon application of the presumption of innocence and the State's burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense." *Id.*

We must first determine whether the evidence used to sustain the verdict was direct or circumstantial. *See State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016). Direct evidence is "based on personal knowledge or observation and . . . if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *Id.* (quotation omitted).

Hare does not address the appropriate standard of review, but the state acknowledges that it relied on circumstantial evidence to prove that Hare caused the decedent's death. Indeed, most of the evidence the state presented required the jury to make inferences from the facts. *See Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) ("When the direct evidence of guilt on a particular element is not alone sufficient to sustain the verdict, however, we apply a heightened two-step standard, which we have called the circumstantial-evidence standard of review."). Therefore, we apply the circumstantial-evidence test.

When applying the circumstantial-evidence test, we conduct a heightened two-step inquiry. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). First, we identify the

circumstances proved. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). In doing so, "we defer to the jury's acceptance of the proof of these circumstances" and "assume that the jury believed the State's witnesses and disbelieved the defense witnesses." *Id.* at 598-99 (quotations omitted). Second, we determine if the circumstances proved, viewed "as a whole," are "consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 599 (quotation omitted). In this step, we do not defer "to the fact finder's choice between reasonable inferences." *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010) (quotation omitted). "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. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted).

Beginning with the first step, the state proved the following circumstances at trial: (1) Hare left ex-girlfriend a series of voicemails on the night of February 20, 2022, including one wherein Hare describes being with someone he did not "know how to save" and the decedent is heard in the background denying that he attempted suicide; (2) ex-girlfriend observed decedent alive, lying on the kitchen floor "covered head to waist in blood," with Hare standing above him; (3) Hare told ex-girlfriend that the decedent attempted suicide, to which the decedent responded that he did not attempt suicide and that Hare had "kicked his a--"; (4) Hare left the decedent's home with ex-girlfriend when the decedent was still alive; (5) Hare told daughter on the night of February 20, 2022, that bad people were after him and that he needed help; (6) Hare told daughter that "sometimes in life people gotta take out the f--king trash"; (7) in response to daughter asking if she could

"know who's gone," Hare said, "[a]bsolutely not . . . [b]ecause they're a bad person"; (8) Hare thereafter told co-parent that "bad people were after him because something bad had happened" and "a bad man had died"; (9) Hare flew to Denver on February 22, 2022; (10) after the decedent was found dead in his home on February 23, 2022, law enforcement arrived at the scene; (11) law enforcement did not believe the scene was indicative of suicide; (12) law enforcement observed signs of disturbance at the scene, but not forced entry; (13) law enforcement identified blood-spatter patterns at the scene on the ceiling, blinds, molding, and near the decedent's body, indicating force had been applied to the blood and the blood moved through the air; (14) law enforcement discovered a hammer at the scene; (15) blood on the head of the hammer belonged to the decedent; (16) the DNA mixture on the grip of the hammer's handle was greater than one billion times more likely to have originated from the decedent, Hare, and an unknown, unrelated individual, than from three unknown, unrelated individuals; (17) when law enforcement executed a search warrant at Hare's home, they discovered blood on a light switch where the DNA mixture was greater than one billion times more likely to have originated from the decedent, Hare, and an unknown, unrelated individual than from three unknown, unrelated individuals; (18) law enforcement also found several pairs of jeans smelling of bleach in Hare's washing machine, one of which had a stain that tested presumptively positive for blood; and (19) the medical examiner determined that the decedent's manner of death was homicide caused by multiple blunt- and sharp-force injuries.

Moving to the second step, we discern that the circumstances proved, viewed as a whole, are consistent with the rational hypothesis that Hare caused the decedent's death.

The decedent's manner of death, Hare's presence at the decedent's home while the decedent was suffering from his injuries, the DNA evidence, the blood-spatter evidence, the voicemail wherein the decedent states he did not attempt suicide, the decedent's statement to ex-girlfriend that Hare "kicked his a--," Hare's statements to ex-girlfriend, daughter, and co-parent, and Hare fleeing Minnesota immediately after the decedent's death all support the rational hypothesis that Hare caused the decedent's death.

Hare does not contest that the circumstances proved are consistent with the rational hypothesis that he caused the decedent's death. Instead, he contends the circumstances proved are consistent with a rational hypothesis except that of guilt—specifically, that something else caused the decedent's death. To support his argument, Hare emphasizes that the decedent was alive when he left the decedent's home, the decedent had preexisting medical conditions that contributed to his death, and Hare's DNA was not found under the decedent's fingernails. We are not persuaded.

The autopsy indicated that multiple blunt- and sharp-force injuries caused the decedent's death. And the medical examiner who performed the autopsy specifically opined that the decedent's preexisting medical conditions did *not* cause his death but rather did not "help him survive [his] injuries." And while Hare's DNA was not found under the decedent's fingernails, DNA testing revealed Hare's DNA on the grip of the hammer found in the decedent's home to the highest level of support for inclusion. Therefore, the circumstances proved are inconsistent with a rational hypothesis that something other than Hare caused the decedent's death.

For these reasons, we conclude that the evidence presented at trial was sufficient to prove Hare caused the decedent's death beyond a reasonable doubt.

II.

Hare argues that the district court abused its discretion when it did not require the state to play the 10:23 voicemail under rule 106.[7] We review objected-to evidentiary rulings for an abuse of discretion. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Tapper*, 993 N.W.2d 432, 437 (Minn. 2023) (quotation omitted).

Under rule 106, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." The Minnesota Supreme Court has outlined a two-factor analysis (the *Dolo* factors) for applying rule 106:

> Rule 106 applies when the proposed additional material (1) relates to the facts offered in an excerpt of a recorded statement or writing and (2) is necessary to correct a misleading or distorted impression of the facts created by the

[7] Hare also argues that the district court abused its discretion when it excluded the 10:23 voicemail because the rule of completeness required its admission. Rule 106 is "more limited than the rule of completeness," which applies to conversations. *Dolo v. State*, 942 N.W.2d 357, 364 n.5 (Minn. 2020) (citing *State v. Mills*, 562 N.W.2d 276, 286 n.8 (Minn. 1997)). But the rule of completeness does not create "an absolute right to have an entire conversation admitted into evidence." *Id.* Rather, it allows for the admission of the remainder of a conversation "if it bears upon the admission of the admitted excerpt." *Id.* (quotation omitted). Here, because the 10:23 voicemail is a separate conversation between Hare and the decedent, rather than part of the conversations recorded by the other voicemails, the rule of completeness does not require its admission.

> admitted excerpt or writing. That is, the substance of the admitted excerpt or writing must so inaccurately or unfairly distort the evidentiary facts that it requires immediate correction of its *content* by admitting the additional material.

Dolo, 942 N.W.2d at 365 (citation omitted). "Rule 106 . . . addresses the *timing* of when certain additional material is admitted. The rule does not govern its admissibility—in fact, the additional material must be independently admissible." *Id.* at 364.

We conclude the district court did not abuse its discretion when it denied Hare's motion to require the state to play the 10:23 voicemail because Hare has not shown the 10:23 voicemail satisfies the second *Dolo* factor. Here, the other voicemails contained messages from Hare to ex-girlfriend asking ex-girlfriend for help. In contrast, the 10:23 voicemail recorded a conversation between Hare and the decedent. Thus, we conclude that admitting the 10:23 voicemail was not necessary to correct the content of the admitted voicemails, as a message documenting a separate conversation between Hare and the decedent does not shed light on the content of the messages from Hare asking ex-girlfriend for help.

Hare disagrees, first arguing the 10:23 voicemail was necessary because "the state repeatedly characterized [the decedent's] statements on the voicemails as 'dying declarations.'" But the record shows the state used the phrase "dying declarations" only once during trial and, when it did, the statement appears to reference the decedent's in-person statement to ex-girlfriend that Hare "kicked [his] a--."

Hare also argues that the district court focused improperly on what it believed to be Hare's motive in seeking admission of the 10:23 voicemail, rather than the content of the

voicemail, in making its rule 106 determination. Again, the record belies Hare's argument. While the state suggested to the district court that Hare had purposefully recorded this conversation to "lay[] out a potential defense," the district court did not acknowledge this argument in making its decision. The district court, instead, focused on the difference in content between the 10:23 voicemail (which recorded a separate conversation between Hare and the decedent) and the admitted voicemails (which recorded Hare asking ex-girlfriend for help).

For these reasons, we conclude the district court did not abuse its discretion when it denied Hare's motion to admit the 10:23 voicemail under rule 106.

Further, even if the district court had abused its discretion, we conclude that any error was harmless beyond a reasonable doubt. *See State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). "An error in excluding evidence is harmless only if [we are] satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence had been fully realized, a reasonable jury would have reached the same verdict." *State v. Olsen*, 824 N.W.2d 334, 340 (Minn. App. 2012) (quotation omitted), *rev. denied* (Minn. Feb. 27, 2013). There are three reasons we conclude the jury would have reached the same verdict even if the 10:23 voicemail had been admitted.

First, the statements in the 10:23 voicemail that could be construed to support Hare's innocence also appear in the admitted voicemails. For example, in the 10:23 voicemail, Hare states that the decedent tried to commit suicide. But Hare makes a similar statement in the 10:15 voicemail.

Second, while Hare characterizes the 10:23 voicemail as illustrating that he was a concerned friend, we do not agree with this characterization. While the decedent is obviously suffering from the injuries he sustained, Hare talks to him in a harsh tone and insults him on more than one occasion. Hare also criticizes the decedent for getting blood on Hare, threatens to leave the scene, asks the decedent if "[he's] trying to breakdance or what," and offers the decedent a shot of vodka. None of these statements portray Hare as concerned or seeking to help the decedent.

Third, other evidence introduced at trial undercuts any exculpatory effect the 10:23 voicemail may have had. The decedent's manner of death, Hare's presence at the decedent's home while the decedent was suffering from his injuries, the DNA evidence, the blood-spatter evidence, Hare's statements to ex-girlfriend, daughter, and co-parent, Hare leaving the decedent without calling emergency services, and Hare fleeing Minnesota immediately after the decedent's death all contradict any remedial impact Hare's expressions of concern may have had. And the suggestion that the decedent injured himself is disproved by the autopsy.

For these reasons, we conclude that, even if the district court abused its discretion when it excluded the 10:23 voicemail, the exclusion was harmless beyond a reasonable doubt.

III.

Both parties agree that the district court erred when it entered convictions for both guilty verdicts. We review this issue de novo. *State v. Bonkowske*, 957 N.W.2d 437, 443 (Minn. App. 2021).

Under Minn. Stat. § 609.04, subd. 1, a criminal defendant "may be convicted of either the crime charged or an included offense, but not both." Section 609.04 also "bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). The proper procedure for district courts "when the defendant is convicted on more than one charge for the same act is for the [district] court to adjudicate formally and impose sentence on one count only," retaining the guilty verdicts on remaining charges, but not formally adjudicating them. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). "When [the] official judgment order states that a party has been convicted of or sentenced for more than one included offense," we reverse and remand with instructions to vacate the erroneous conviction. *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999); *State v. Crockson*, 854 N.W.2d 244, 248 (Minn. App. 2014), *rev. denied* (Minn. Dec. 16, 2014).

We agree with the parties that Hare's guilty verdicts for second-degree intentional murder, under Minn. Stat. § 609.19, subd. 1(1), and second-degree unintentional murder while committing a felony, under Minn. Stat. § 609.19, subd. 2(1), are multiple guilty verdicts under different subdivisions of the same statute for acts committed during a single behavioral incident. *See Jackson*, 363 N.W.2d at 760. Thus, the district court did not follow the proper *LaTourelle* procedure when it convicted Hare of both second-degree

murder counts. Accordingly, we reverse and remand for the district court to vacate the conviction for second-degree unintentional felony murder, leaving the underlying guilty verdict intact, and to issue a new warrant of commitment consistent with this opinion.

IV.

Hare raises a number of challenges in his supplemental brief. He argues: (1) he received ineffective assistance of counsel; (2) the prosecutor engaged in misconduct; (3) law enforcement exceeded the scope of the warrant to search his cell phone; and (4) law enforcement failed to properly *Mirandize* him. We address each argument in turn.

A. Ineffective Assistance of Trial Counsel

Hare argues that he received ineffective assistance of counsel because his trial counsel: (1) did not introduce the 10:23 voicemail; (2) did not cross examine ex-girlfriend; (3) did not call a witness who told law enforcement she heard fighting in the decedent's home; (4) did not introduce pictures of Hare taken after his arrest showing that he was uninjured; and (5) failed to specify with particularity the grounds for suppression in the motion to suppress. We review these claims de novo. *Dobbins v. State*, 788 N.W.2d 719, 728 (Minn. 2010).

A criminal defendant has a constitutional right to the effective assistance of counsel. *Fort v. State*, 861 N.W.2d 674, 677 (Minn. 2015). A reviewing court evaluates an ineffective-assistance-of-counsel claim using the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (citing *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013)). "To prove ineffective assistance of counsel, a defendant must show that (1) his attorney's performance

fell below an objective standard of reasonableness, and (2) a reasonable probability exists that the outcome would have been different, but for counsel's errors." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017) (quotations omitted); *see also Strickland*, 466 U.S. at 687-88, 692. "[T]here is a strong presumption that counsel's performance was reasonable, and [appellate courts] do[] not review matters of trial strategy or the particular tactics used by counsel." *State v. Hokanson*, 821 N.W.2d 340, 358 (Minn. 2012). Trial strategy includes choosing which witnesses to call and what information to present to the jury. *Allwine v. State*, 994 N.W.2d 528, 538-39 (Minn. 2023).

We conclude that Hare's first four criticisms of his trial counsel all fall within the purview of nonreviewable trial strategy. And the record belies Hare's fifth contention. While it is true that the prosecutor at one time threatened to move for denial of the motion to suppress on the basis that trial counsel did not specify the grounds for suppression, the record demonstrates that, in response to that correspondence, trial counsel filed an amended motion to remedy the deficiency. Therefore, trial counsel's performance did not fall below an objective standard of reasonableness.

For these reasons, we conclude Hare did not receive ineffective assistance of trial counsel.

B. Prosecutorial Misconduct

Hare argues that he is entitled to a new trial because the prosecutor engaged in misconduct when he: (1) refused to play the 10:23 voicemail during the trial; (2) withheld

Brady evidence;[8] and (3) provided evidence to defense counsel after trial had started. "The overarching concern regarding prosecutorial misconduct" is that it may deprive a defendant of a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). A prosecutor engages in misconduct by violating "clear or established standards of conduct" such as "rules, laws, orders by a district court, or clear commands in this state's case law." *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quoting *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007)).

When a defendant does not object to alleged prosecutorial misconduct, we apply a modified plain-error standard of review. *Ramey*, 721 N.W.2d at 302. Under this standard, the defendant bears the burden to show an "(1) error, (2) that is plain." *Id.* A plain error is one that is "clear or obvious," meaning it "contravenes case law, a rule, or a standard of conduct." *Id.* (quotation omitted). If the defendant does so, the burden shifts to the state to prove the error did not affect the defendant's substantial rights, meaning "there is no reasonable likelihood that the absence of the misconduct . . . would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). "To evaluate the effect on substantial rights, we consider various factors, including the pervasiveness of improper suggestions and the strength of evidence against the defendant." *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017) (quotation omitted). If the state cannot satisfy this burden,

[8] *Brady* evidence refers to material evidence that is favorable to the defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The state's failure to disclose *Brady* evidence violates the defendant's constitutional right to due process. *Id.*

we determine whether to address the error "to ensure fairness and the integrity of the judicial proceedings." *Ramey*, 721 N.W.2d at 298 (quotation omitted).

Beginning with the 10:23 voicemail, the prosecutor's decision not to play it was in accord with the district court's decision to deny Hare's motion under rule 106 and the rule of completeness. Because conduct in accord with a district court order is not misconduct, *see Fields*, 730 N.W.2d at 782 (stating that "misconduct results from violations of . . . orders by a district court"), we do not discern that the prosecutor erred.

With regard to the alleged *Brady* evidence, Hare contends the prosecutor withheld audio from the "mock 911 call." The record belies Hare's claim. A law-enforcement officer testified at trial that, after obtaining a search warrant to forensically process Hare's cell phone, he placed the "mock 911 call" from the cell phone to determine the number associated with it. This testimony does not suggest that any audio exists from this call and, in fact, it seems unlikely that audio of this call exists since the call's only purpose was to identify the number associated with the cell phone. Thus, we do not discern the prosecutor erred because nothing in the record suggests that audio from the call exists.

As for the materials disclosed during trial, Hare notes that the prosecutor disclosed discovery materials after trial began and asserts that his trial counsel did not have adequate time to review the materials. We conclude that, even if this was an error, the late disclosure of the materials did not affect Hare's substantial rights. The record shows that the late-disclosed materials were received on February 6-7, 2023. On February 6, 2023, the district court ruled on the parties' motions in limine. Voir dire took place from February 7, 2023, through February 10, 2023. And nothing in the record shows that Hare's trial counsel

indicated he did not have time to review the materials during the voir dire process before the state called its first witness on February 13, 2023.

For these reasons, we conclude Hare is not entitled to a new trial on the basis of prosecutorial misconduct.

C. Cell Phone

Hare argues law enforcement conducted an unlawful search of his cell phone when they unlocked the cell phone, put the cell phone on airplane mode, removed the SIM card, and, later, placed the "mock 911 call."[9] Hare's trial counsel did not move to suppress the search of Hare's cell phone on these grounds; thus, these issues are raised for the first time on appeal. We "generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But when, as here, the issue is raised in a criminal appellant's supplemental brief, we may choose to consider it. *See Dale v. State*, 535 N.W.2d 619, 624 (Minn. 1995).

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. If a search or seizure is unlawful, any evidence obtained as a result must be suppressed. *State v. Bradley*, 908 N.W.2d 366, 369 (Minn. App. 2018). "A search pursuant to a warrant may not exceed the scope of that warrant." *State v. Soua Thao Yang*, 352 N.W.2d 127, 129 (Minn. App. 1984). "The test for determining whether a search has exceeded the scope of the warrant is one of

[9] A SIM card, also known as a subscriber-identity module, is a card that is inserted into the cell phone that enables a cell phone to connect to a cellular network.

reasonableness . . . ." *Id.* In determining whether law enforcement's conduct in executing a search warrant was reasonable, we look at the totality of the circumstances. *State v. Thisius*, 281 N.W.2d 645, 645-46 (Minn. 1978).

Here, the search warrant authorized a forensic examination of Hare's cell phone, including but not limited to "[o]pen[ing] and document[ing] any text messages or call lists . . . [w]i-[f]i network information . . . [and] [i]nternet [h]istory and usage." After obtaining the warrant, law enforcement unlocked the cell phone, put it on airplane mode, and removed its SIM card to prevent alteration of the cell phone via an outside network signal. These actions were simply the first steps in executing the search warrant—ensuring the information subject to the warrant was preserved—and, therefore, were reasonably within the warrant's scope. The "mock 911 call" also occurred after the search warrant was issued. The search warrant authorized a forensic examination "includ[ing] but not limited to . . . [p]honebook and contacts to include phone numbers." While the search warrant did not specifically authorize the placement of a "mock 911 call," law enforcement's actions appear to be reasonably within the scope of examining phone numbers to ascertain contact information.

For these reasons, we conclude law enforcement did not conduct an unlawful search of Hare's cell phone.

D. Nye County Statements

Hare finally argues the district court erred when it denied his motion to suppress on the ground that he was not read his *Miranda* rights prior to custodial interrogation. When reviewing a district court's pretrial decision on a motion to suppress, we review the district

court's legal determinations de novo and its findings of fact for clear error. *State v. Brown*, 932 N.W.2d 283, 289 (Minn. 2019).

A criminal defendant must be informed of his right to remain silent and his right to counsel prior to custodial interrogation. *Miranda*, 384 U.S. at 444; *Horst*, 880 N.W.2d at 30. Failure to administer these *Miranda* warnings renders subsequent statements by the defendant during custodial interrogation inadmissible. *Horst*, 880 N.W.2d at 30. Police conduct constitutes custodial interrogation if the defendant was (1) in custody and (2) subject to interrogation. *See State v. Edrozo*, 578 N.W.2d 719, 724 (Minn. 1998). Here, the state concedes that Hare was in custody, so the only question we must decide is whether Hare was subject to interrogation. Interrogation is defined as "express questioning or any words or actions on the part of the police . . . that . . . the police should know are reasonably likely to elicit . . . an incriminating response." *State v. Heinonen*, 909 N.W.2d 584, 589 (Minn. 2018) (quotations omitted).

The district court's findings of fact on this question are not clearly erroneous, because they comport with the evidence presented at the contested omnibus hearing. And based on those findings, we conclude that no interrogation occurred. Hare told law enforcement at the outset of their first conversation in the Nye County jail that he wanted to speak to an attorney, and law enforcement immediately stopped asking questions. The remainder of the interaction consisted of Hare making a few remarks about his extradition and asking how to contact an attorney, and law enforcement's responses were not likely to elicit an incriminating response. The next day, Hare spontaneously discussed the case while law enforcement collected DNA evidence. Law enforcement immediately told Hare

that any discussion of the case would have to take place at another time, after Hare's rights had been explained and waived. Hare's spontaneous statements during this interaction were initiated by him, and law enforcement was not required to interrupt him. *See State v. Jackson*, 351 N.W.2d 352, 356 (Minn. 1984) (holding that police officer was not required to interrupt suspect's spontaneous and volunteered statements). Law enforcement did not question Hare or otherwise say anything reasonably likely to elicit an incriminating response. Therefore, Hare was not subject to interrogation.

For these reasons, we affirm the district court's decision to deny the motion to suppress.

Affirmed in part, reversed in part, and remanded.