

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1522**

Dametrios Ratheal Adrian Moore, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 18, 2020
Affirmed
Hooten, Judge**

Ramsey County District Court
File No. 62-CR-15-8313

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

John Choi, Ramsey County Attorney, St. Paul, Minnesota; and

Adam E. Petras, Special Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Connolly, Judge; and Hooten, Judge.

S Y L L A B U S

A violation of the rule announced in *State v. Dexter*, 269 N.W.2d 721 (Minn. 1978), which prevents the misuse of impeachment evidence, does not occur unless the party who called the witness was aware that the witness would recant before the witness took the stand.

O P I N I O N

HOOTEN, Judge

In this appeal from the denial of postconviction relief from convictions for aiding and abetting second-degree murder, attempted murders, and assaults, appellant Dametrius Moore makes six challenges to the postconviction court's decision and argues that the cumulative effect of these alleged errors warrants a new trial. We affirm the postconviction court's denial of relief.

F A C T S

On appeal from Moore's first postconviction review, the following facts are undisputed. On October 15, 2015, Moore was driving his mother's vehicle northbound across the Earl Street Bridge in St. Paul. Two other men were present in the vehicle: T.B. sat in the front passenger seat and De'Aries Collins sat in the rear driver's side passenger seat. Moore was not a member of a gang, but T.B. was a member of the West Side HIT Squad gang and Collins was a member of the Selby Siders gang. Both gangs are active on the west side of St. Paul.

Five men were walking northbound on the bridge when Moore drove past them. C.L.W.-S., A.R., and K.F. were walking some distance ahead of E.W.-S. and C.H. Three of the men, C.L.W.-S., A.R., and E.W.-S, were affiliated with the Eastside Boyz gang, a rival gang of the West Side HIT Squad and the Selby Siders. After the vehicle passed the five men, Moore turned around the vehicle and drove past the men again. Collins shot at the men seven or eight times from the backseat. One of the shots hit E.W.-S. in his back, and he died at the scene. Moore sped away after the shooting.

Testimony at trial revealed that there was an ongoing conflict between the Eastside Boyz and the Selby Siders, which had escalated after a 2012 gang-related shooting of a woman affiliated with the Selby Siders and the West Side HIT Squad gangs. Every year on October 14, the date of her death, members of the Selby Siders and the West Side gangs gathered for a memorial where she was killed—the east side of St. Paul.

A few days after the shooting on the bridge, Moore admitted to the police that he had been driving the vehicle during the shooting, but told police that he did not know Collins intended to shoot at the men. The state charged Moore with 20 counts, including four counts related to the death of E.W.-S.: (1) murder in the second degree for the benefit of a gang; (2) aiding and abetting second-degree murder; (3) aiding and abetting second-degree murder for the benefit of a gang; and (4) aiding and abetting second-degree murder while committing a felony. The state also charged Moore with four counts for his conduct against each of the other four men present on the bridge: (1) aiding and abetting attempted second-degree murder for the benefit of a gang; (2) aiding and abetting attempted second-degree murder; (3) aiding and abetting second-degree assault for the benefit of a gang; and (4) aiding and abetting second-degree assault with a dangerous weapon.

Twenty-six witnesses were called at the trial. Relevant to this appeal, the state called the following witnesses to testify: C.L.W.-S.; a gang expert; J.G., an inmate who shared a cell with Moore; and a sergeant who investigated the homicide and received a handwritten letter from J.G. Additionally, the state presented numerous exhibits. Relevant to this appeal, the state presented the letter that J.G. gave to the sergeant, which was written from J.G.'s perspective and stated that J.G. witnessed the shooting and saw Moore interact with

Collins after they returned to Moore's home. The district court also allowed the state, over Moore's objection, to present a music video from YouTube, which depicted Moore, a rapper and known gang member named TarXan, and another individual. After the state rested, Moore called five witnesses and testified himself. Moore's primary defense was that he did not know Collins was going to shoot at the men as he drove the vehicle on the bridge. Moore intended to call two witnesses to testify that they had heard Collins say that he was the shooter and that Moore did not know that Collins was going to shoot at the men on the bridge, but the district court excluded these witnesses from testifying.

The jury found Moore guilty of all 20 counts. The district court sentenced Moore to 358 months in prison for aiding and abetting the second-degree murder of E.W.-S. The district court also sentenced Moore for attempted second-degree murder for the benefit of a gang for his conduct against each of the other four men on the bridge. Moore received 151 months for the crime against K.F., 162 months for the crime against A.R., 179 months for the crime against C.L.W.-S., and 179 months for the crime against C.H. All sentences were to be served concurrently.

Moore filed a direct appeal in 2017, but later dismissed it voluntarily. He then petitioned for postconviction relief in 2018. The postconviction court denied his petition, and Moore appealed.

ISSUES

- I. Did the postconviction court abuse its discretion when it determined that the district court did not err by permitting the state to continue questioning J.G. after he denied making statements to the police, and when it allowed the state to question police about those out-of-court statements?

- II. Did the postconviction court abuse its discretion when it determined that the district court did not err in admitting the letter given to police by J.G.?
- III. Did the postconviction court abuse its discretion when it determined that the prosecutor did not commit misconduct in closing arguments?
- IV. Did the postconviction court abuse its discretion when it determined that the district court did not err when it admitted a YouTube music video of Moore and other individuals?
- V. Did the postconviction court abuse its discretion when it determined that the district court did not err when it excluded two defense witnesses from testifying?
- VI. Did the postconviction court abuse its discretion when it determined that the district court did not err when it permitted the state to call a gang expert witness?

ANALYSIS

We review the denial of a petition for postconviction relief for an abuse of discretion. *Caldwell v. State*, 853 N.W.2d 766, 770 (Minn. 2014). “A postconviction court abuses its discretion when it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (quotation omitted).

- I. **The postconviction court did not abuse its discretion when it determined that the district court did not err when it permitted the state to continue questioning J.G. after he recanted and the district court then permitted the state to question police about J.G.’s out-of-court statements.**

Appellate courts “will not reverse evidentiary rulings absent a clear abuse of discretion.” *Miles v. State*, 840 N.W.2d 195, 204 (Minn. 2013). “The defendant has the burden on appeal of proving both that the trial court abused its discretion by admitting the evidence and that the defendant was thereby prejudiced.” *State v. Chomnarith*, 654 N.W.2d 660, 665 (Minn. 2003). Reversal is warranted only when the admission of

evidence is erroneous and “substantially influenced the jury’s decision.” *State v. Loving*, 775 N.W.2d 872, 879 (Minn. 2009).

The state called J.G. as a witness. During the police investigation, a sergeant of the St. Paul Police Department had received information that J.G., who was in jail, wanted to speak with him about E.W.-S.’s murder. J.G. shared a cell with Moore. In an interview, J.G. told the sergeant that Moore “is not innocent at all, period.” J.G. claimed that Moore had given him a letter written, but not signed, by Moore purportedly for the purpose of having J.G. compose his own letter supporting Moore’s singular defense: Moore did not know that Collins planned to shoot at the men. J.G. gave Moore’s letter to the sergeant. Both J.G. and Moore’s fingerprints were found on the letter. J.G. also told the sergeant that he subsequently wrote his own letter on Moore’s behalf regarding the incident, which was consistent with the letter that Moore had given him. J.G. signed this second letter and gave it to Moore’s attorney. But J.G. later stated that he was coerced into writing this second letter.

J.G. told the sergeant that on the night of the shooting he was at a party at Moore’s duplex with Moore, Collins, and T.B., and had been near the bridge when the shooting occurred. He stated that, after the shooting, Moore and Collins argued. Inconsistent with his version of the incident as set forth in the second letter, J.G explained that Moore yelled at Collins because Collins was supposed to get out of the car to shoot at the men on the bridge but had not, and that the argument ended when Collins pulled a gun on Moore.

However, at trial, when the state questioned J.G. about these interactions, J.G., contrary to his prior assertions, denied everything that he had told the sergeant and that he

had written the letter. Instead, J.G. testified that he first met Moore while in custody and had never met him before. When J.G. denied telling the sergeant anything about the night of the shooting, the defense objected to any continuing questioning by the state, and the matter was discussed outside the hearing of the jury.

The district court overruled the defense's objection, finding that the state's continued questioning of J.G. was proper impeachment evidence "under the rules" and noted that the jury would be given a cautionary instruction that impeachment evidence is not substantive evidence. The following instruction was given to the jury before J.G.'s examination resumed:

You have just received evidence and you may continue to receive evidence concerning a statement that [J.G.] is alleged to have made sometime before testifying here. This evidence is admitted only for the light it may cast on the truth of [J.G.'s] testimony at this trial. You must not consider the statement as evidence of the facts referred to in the statement.

The state proceeded to ask J.G. detailed and specific questions about his prior statements to the sergeant, which J.G. denied making. The state showed J.G. the first letter, which he said he did not recognize despite the fact that his fingerprints were on the letter. The state also showed J.G. the second letter with his signature, but J.G. denied writing it.

The state later recalled the sergeant to testify. The sergeant testified that he received a call from the jail indicating that J.G. wanted to speak with him about E.W.-S.'s murder. When the sergeant began testifying about the substance of J.G.'s statements, the defense objected to the testimony as hearsay. The district court overruled the objection and allowed the sergeant to testify as to J.G.'s prior statements to him. The state offered the first letter

purportedly written by Moore that J.G. allegedly gave to the sergeant, and the defense again objected. The district court overruled the objection but gave the jury another limiting instruction that the content of the writings were not to be used as substantive evidence of any factual issue in the case but to allow the jury to ascertain the author of the first letter.

In his postconviction petition, Moore alleged that the state violated *State v. Dexter*, which precludes calling a witness for the sole purpose of impeaching that witness. 269 N.W.2d at 721–22. The postconviction court ruled that no *Dexter* violation occurred when the district court allowed the state to continue questioning J.G. because J.G.’s recantation was a surprise both to the state and the defense. The postconviction court also noted that it is presumed that the jury followed the district court’s jury instructions regarding impeachment evidence.

On appeal, the parties agree that the state did not know that J.G. would recant his prior statements to police when called to testify. However, Moore argues that the district court should have sustained the defense’s objection to the questioning once it was clear that J.G. had chosen to recant. Moore raises three arguments. First, he argues that a *Dexter* violation occurred, relying on the language of *State v. Ortlepp* that, when it is clear that a witness recants early on in his testimony, “there is a large risk that the jury, even if properly instructed, will consider the prior statement as substantive evidence.” 363 N.W.2d 39, 43 (Minn. 1985). Second, Moore argues that under Minn. R. Evid. 801(d)(1)(A), prior inconsistent statements can only be admitted substantively if the prior statements were made under oath, and that J.G.’s prior statements constituted substantive evidence and therefore were inadmissible hearsay. Third, Moore argues that the sergeant’s testimony

significantly damaged Moore’s case because no cautionary instruction was given during the sergeant’s testimony. We address each argument in turn.

A. No Dexter violation occurred.

A *Dexter* violation occurs when impeachment evidence is misused. *Dexter*, 269 N.W.2d at 721–22; *see also Ortlepp*, 363 N.W.2d at 42.

For example, the problem arises when a prosecutor calls a witness who has given a prior statement implicating the defendant, but that witness has since retracted the statement and signified an intent to testify in defendant’s favor if called by the prosecutor. If the prosecutor is permitted to call this witness and use the prior statement for impeachment purposes, there is a large risk that the jury, even if properly instructed, will consider the prior statement as substantive evidence.

Ortlepp, 363 N.W.2d at 42–43.

In *State v. Carter*, a nonprecedential, unpublished opinion of this court,¹ we considered whether a *Dexter* violation occurred when the witness “gave the prosecutor no reason to predict that he would change his story after he took the stand.” A17-0412, 2018 WL 700244, at *2 (Minn. App. Feb. 5, 2018), *review denied* (Minn. Apr. 25, 2018). We determined that no *Dexter* violation occurs when the witness has not “signified an intent” to recant and testify for the defense. *Id.* This holding is supported by the *Dexter* doctrine itself, which is based upon a scenario in which a prosecutor *intentionally* calls a witness solely for impeachment purposes. *See Ortlepp*, 363 N.W.2d at 43 (“The prosecutor *knew*

¹ *See* Minn. Stat. § 480A.08, subd. 3(c) (2018) (“Unpublished opinions of the court of appeals are not precedential.”); *City of St. Paul v. Eldredge*, 788 N.W.2d 522, 527 (Minn. App. 2010), *aff’d*, 800 N.W.2d 643 (Minn. 2011) (stating “unpublished cases may have persuasive value”).

that [the witness]’s testimony was not going to be helpful and yet he called him for the purpose of getting his prior statement before the jury under the guise of impeachment.” (emphasis added)). Although we acknowledge that Carter is nonprecedential, we find the reasoning persuasive. We therefore hold that unless a witness signifies an intent to recant prior to taking the stand, no *Dexter* violation occurs.

In this case, there is no dispute that J.G.’s recantation on the stand was a surprise that neither the state nor the defense anticipated. As the postconviction court noted, defense counsel referred to J.G.’s testimony as perjury. When it is clear from the record that the primary purpose for calling a witness is “to get the recanted statement in front of the jury,” there is a misuse of Minn. R. Evid. 607, which allows a party to impeach its own witness. *State v. Hodges*, 384 N.W.2d 175, 184 (Minn. App. 1986), *aff’d*, 386 N.W.2d 709 (Minn. 1986). Because the state was unaware that J.G. would recant, and there is insufficient evidence in the record to show that the state called J.G. for the sole purpose of impeaching him, no *Dexter* violation occurred.

Moore nevertheless argues that the state should have been precluded from asking J.G. further questions once it was clear that he had recanted. But because our appellate courts have not expanded the *Dexter* doctrine to include situations in which the prosecutor does not know before calling a witness that the witness will recant, the district court did not err by allowing the state to continue questioning J.G.

B. J.G.’s testimony was admitted for impeachment purposes only.

Moore argues that testimony by J.G. and the sergeant was improperly admitted for substantive purposes.

“Under our rules of evidence, a prior inconsistent statement is not hearsay if the statement was given under oath at a trial, hearing, or other proceeding when the declarant testifies and is subject to cross-examination concerning the statement.” *State v. Thames*, 599 N.W.2d 122, 125 (Minn. 1999) (citing Minn. R. Evid. 801(d)(1)(A)). A statement not given under oath is inadmissible for substantive purposes and “may only be admitted under Rule 607 for impeachment purposes.” *Id.*

In this case, J.G.’s out-of-court statements to the sergeant were not made under oath. Therefore, to be admissible, they must have been properly admitted for impeachment purposes only. See Minn. R. Evid. 607 (providing that “[t]he credibility of a witness may be attacked by any party, including the party calling the witness”). The postconviction court held that J.G.’s out-of-court statements were admitted for impeachment purposes.

On the stand, J.G. vehemently denied that he made any statements to the sergeant regarding his knowledge of the shooting. J.G. admitted that he met with the prosecutors and the sergeant the week prior to trial, but stated that the sergeant promised J.G. that he could reduce time from his sentence if he testified for the state. J.G. also testified that the sergeant “was giving information and everything, pretty much for me to agree with.” Despite this, J.G. further denied making any of the alleged prior statements. Therefore, J.G.’s statements regarding his knowledge of the shooting were clearly out-of-court statements admissible under Minn. R. Evid. 607, and the postconviction court did not err by determining that J.G.’s statements were properly admitted for impeachment purposes.

Because we have determined that J.G.’s statements were properly admitted under Minn. R. Evid. 607, and no error occurred, we need not address whether Moore was

prejudiced by the admitted testimony. *See Chomnarith*, 654 N.W.2d at 665 (providing that, on appeal, the defendant must show that the district court abused its discretion and that the defendant was prejudiced).

II. The postconviction court did not abuse its discretion when it determined that the district court did not err when it admitted the first letter allegedly written by Moore and given to police by J.G.

In a related issue, Moore argues that the district court abused its discretion when it admitted into evidence the first letter, purportedly written by Moore, that J.G. allegedly gave to the sergeant. Although unsigned, the letter was written from J.G.'s perspective and stated that J.G. went to the party on the night of the shooting to buy marijuana from Moore. The letter stated that J.G. left the party to walk to a convenience store. As he began walking back to the party, he saw E.W.-S. and the other four men walking across the bridge. The letter stated J.G. heard gun shots, started to run back to Moore's home, and saw a black vehicle speed away from the bridge. The letter stated that when J.G. returned to Moore's home, he saw Moore get out of the driver's seat of the same black vehicle from the bridge, while yelling aggressively at Collins and asking him why he shot at the men on the bridge. The letter concluded by stating that Collins pointed a gun at Moore and threatened to kill him if he reported what happened. The postconviction court ruled that the letter was properly admitted and that the jury could reasonably find that Moore wrote the letter and gave it to J.G., thus constituting evidence of his consciousness of guilt.

Because this is an evidentiary matter, we review the district court's admission of the evidence for an abuse of discretion. *Miles*, 840 N.W.2d at 204. We reverse only when the

admission of evidence is erroneous and “substantially influenced the jury’s decision.” *Loving*, 775 N.W.2d at 879.

At trial, the state introduced the letter to show that Moore wrote the letter, inviting the jury to compare the handwriting in the letter to the handwriting found in Moore’s notebook.² Moore objected, arguing that the letter did not need to be admitted into evidence because the sergeant could testify that he received a letter from J.G. The district court ruled that the letter was admissible because the sergeant could authenticate it, it was admissible as either a letter written by Moore or by J.G., and it was relevant as the state could show “depending on what the jury believes about who wrote it . . . that the defendant, Dametrius Moore, attempted to tamper with a witness in the case.” The letter was admitted into evidence during the sergeant’s testimony, and the district court gave the following instruction: “The content of these writings are not to be used by you as substantive evidence of any factual issue in this case. The purpose of admitting this letter is to allow you, as the jury, to ascertain, if possible, the author of the letter.”

During the state’s closing argument, the state referred to the letter, saying:

[Moore] tried to get [J.G.] to lie to the police, and, you know, the one piece of testimony that is so clearly corroborated by this latent fingerprint, he continues to deny, right? His fingerprints are on this letter. He wrote this letter, and yet, no matter what, he refused to even concede that. Because what does it show? It shows that he is trying to manipulate. He’s trying to show his consciousness of guilt, to try to get someone else to say something on his behalf.

² The state presented a notebook found inside Moore’s vehicle.

Moore argues that the letter was only admitted for impeachment purposes and that the jury could not consider it for its substance. But this is inconsistent with the district court's ruling that the letter was admitted for the jury to ascertain the author of the letter. If the jury believed that the letter was written by Moore, and there was ample evidence to believe that it was, then the jury could reasonably infer that Moore was attempting to influence a witness. The letter was properly authenticated when the sergeant testified that he received it from J.G. and properly placed it into evidence. Based on the sergeant's testimony that the handwriting appeared similar to the handwriting found in Moore's notebook and that Moore's fingerprints were found on the letter, the jury could reasonably infer that the author of the letter was Moore. The state was not precluded from arguing that Moore wrote the letter and that the existence of the letter was evidence of his consciousness of guilt. *See State v. Leake*, 699 N.W.2d 312, 328 (Minn. 2005) (providing that parties may "argue reasonable inferences from the facts presented at trial").

For the foregoing reasons, we conclude that the postconviction court did not abuse its discretion when it determined that the letter was properly admitted because it was authenticated and relevant. Furthermore, the unobjected-to statements made by the state during its closing argument were not improper. The state's comments highlighted reasonable inferences that the jury could make based on the evidence.

III. Although the prosecutor misstated the law, the postconviction court did not abuse its discretion when it determined that Moore's substantial rights were not affected by the prosecutor's statement on the presumption of innocence.

Moore argues that the prosecutor committed misconduct when she stated during closing argument that Moore was "no longer entitled to [the] presumption [of innocence]."

Moore did not object to the prosecutor’s alleged misconduct. We review unobjected-to prosecutorial misconduct claims under the modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). We use a three-prong test to review an unobjected-to error: (1) there must be an error; (2) the error must be plain; and (3) the error must affect substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)

“The presumption of innocence is a basic component of the fundamental right to a fair trial.” *State v. Bowles*, 530 N.W.2d 521, 529 (Minn. 1995). “It is improper for a prosecutor to misstate the presumption of innocence in a criminal case.” *Finnegan v. State*, 764 N.W.2d 856, 863 (Minn. App. 2009), *aff’d on other grounds*, 784 N.W.2d 243 (Minn. 2010). In *State v. DeVere*, the supreme court warned that “the prosecutor, to be fully safe, should try to adhere as closely as possible to the normal statement of the presumption.” 261 N.W.2d 604, 606 (Minn. 1977).

The criminal jury instructions about the presumption of innocence provide that:

The defendant is presumed innocent of the charge made. This presumption remains with the defendant unless and until the defendant has been proven guilty beyond a reasonable doubt. . . . The burden of proving guilt is on the State. The defendant does not have to prove innocence.

10 *Minnesota Practice*, CRIMJIG 3.02 (2018).

In *State v. Trimble*, we held that a prosecutor erred by misstating the presumption of innocence. 371 N.W.2d 921, 926 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985). In *Trimble*, the prosecutor suggested that the presumption of innocence is lost when “a large amount of evidence is presented” and thus the presumption of innocence “depend[s] on [the] quantity” of the evidence presented. *Id.* But, we noted that the relevant

question is how the jury evaluates the evidence presented, not the quantity of evidence presented. *Id.* While we determined that the prosecutor’s characterization of the presumption of innocence in *Trimble* was incorrect, we did not reverse the conviction because the district court correctly instructed the jury on the presumption and the defense argued against the prosecutor’s theory, thus the defendant could not show prejudice. *Id.*

In this case, the prosecutor stated in closing:

The defendant started this trial the way every criminal defendant starts every trial, with a complete presumption of innocence. But at the end of the State’s case, now that all of the evidence is in, and as you begin deliberations, he’s no longer entitled to that presumption.

The State has the burden of proof, and we gladly accept this burden, to prove each and every essential element that the Judge read to you beyond a reasonable doubt.

The postconviction court ruled that this did not constitute plain error, and even if it had, Moore’s substantial rights were not affected.

The statements made by the prosecutor are troublesome. They were not only unartful, but constitute a misstatement of the law. A defendant is presumed innocent “unless and until the defendant has been proven guilty beyond a reasonable doubt.” CRIMJIG 3.02. The prosecutor stated that Moore lost the presumption “as [the jury] begin[s] deliberations.” But, only once the jury reaches the conclusion that a defendant is guilty beyond a reasonable doubt has the presumption been lost. Because the prosecutor’s statement, “at the end of the State’s case, now that all of the evidence is in, and as you begin deliberations, he’s no longer entitled to that presumption,” was a misstatement of the law, we hold that the prosecutor’s statement constitutes plain error.

While we determine that the statement was plain error, the prosecutor's misstatement of the law does not require reversal. The district court properly instructed the jury on the presumption of innocence, specifically stating that the presumption remains "unless and until the defendant has been proved guilty beyond a reasonable doubt." Additionally, after the prosecutor misstated the standard, the prosecutor's next statement discussed the state's high burden of proof—guilt beyond a reasonable doubt. The prosecutor's misstatement of the law was one statement contained within 57 pages of the entire closing argument. Because the district court properly instructed the jury on the presumption of innocence—an instruction we presume the jury followed, *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005)—and the prosecutor's statement likely did not play "a substantial part in influencing the jury to convict," *Trimble*, 371 N.W.2d at 927, the prosecutor's statement does not require reversal.

Because Moore's substantial rights were not affected by the prosecutor's misstatement of the presumption of innocence, we affirm the postconviction court's decision denying the petition on this ground.

IV. The postconviction court did not abuse its discretion when it determined that the district court did not err when it admitted a YouTube music video of Moore and other individuals.

Moore argues that the YouTube video played for the jury was irrelevant and prejudicial and was therefore erroneously admitted into evidence.

Under Minn. Stat. § 609.229, subd. 2 (2014), a person is guilty of committing a crime for the benefit of a gang if that person "commits a crime for the benefit of, at the

direction of, in association with, or motivated by involvement with a criminal gang, with the intent to promote, further, or assist in criminal conduct by gang members.”

The postconviction court ruled that the video was relevant to show that Moore was associated with known gang members, stating:

While the lyrics of the rap song do not prove that [Moore] engaged in any criminal activity, the video shows [Moore], TarXan, and other rappers flashing gang signs and wearing the color red (which is associated with the West Side gangs). This evidence contradicts [Moore]’s position that he was an unwitting person used by gang members to assist in the commission of crimes and that he was simply in the wrong place at the wrong time on the night of the murder.

The rules of evidence require relevant evidence to “be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Minn. R. Evid. 403. Moore argues that the video was unfairly prejudicial because the lyrics contained references to guns, illicit drugs, misogyny, and violence and only served to show him in “an unflattering light.”

The district court found that the video was relevant to the state’s case that Moore, contrary to his assertion, was involved with gang members. The gang expert witness testified that Moore wearing red, displaying gang signs, and appearing in the video was evidence that Moore associated with gang members on a regular basis. The expert also testified that the video was “consistent with the advertising and promoting of West Side HIT Squad.” While we agree that the content of the video is prejudicial, we conclude that the postconviction court did not abuse its discretion in finding that the video was not unfairly prejudicial or that such unfair prejudice *substantially outweighed* the probative

value of the video. In order to prove that Moore committed crimes for the benefit of a criminal gang, the state must show that he committed those crimes “in association with” a criminal gang. Minn. Stat. § 609.229, subd. 2. We conclude that the postconviction court did not abuse its discretion when it determined that the YouTube video was not erroneously admitted into evidence.

V. The postconviction court did not abuse its discretion when it determined that the district court did not err in excluding the testimony of two defense witnesses.

Moore challenges the postconviction court’s ruling that the testimony of two defense witnesses was properly excluded at trial. Moore wanted to call two witnesses to testify at trial that they had heard Collins say that he was the shooter and that Moore did not know that Collins was going to shoot at the men on the bridge. The state objected to the admission of the testimony based on hearsay. The district court ruled that the statement that Collins was the shooter was admissible under Minn. R. Evid. 804(b)(3) as a statement against interest. But the district court ruled that the other statement that Moore did not know Collins was going to shoot at the men did not fall under the same exception and thus excluded that statement. The postconviction court held that the district court did not err in excluding part of the two defense witnesses’ testimony.

Minn. R. Evid. 804(b)(3) provides the following exception to hearsay when the declarant is unavailable:

A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or 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. A

statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In order for Minn. R. Evid. 804(b)(3) to apply, a district court must: (1) determine whether the declarant was unavailable; (2) determine if the statements would subject the declarant to criminal liability; and (3) ensure that the statements do not violate the Confrontation Clause. *State v. Morales*, 788 N.W.2d 737, 762 (Minn. 2010).

In this case, Collins was never called as a witness, but the parties and the district court assumed that Collins would exercise his Fifth Amendment right to remain silent and therefore would be considered unavailable under Minn. R. Evid. 804(a)(1). While Collins's statement that he was the shooter would clearly subject him to criminal liability, his statement that Moore did not know about the shooting beforehand would not subject him to criminal liability. The district court properly concluded that the defense witnesses' testimony that they heard Collins say that he was the shooter was admissible as a statement against interest, while the testimony regarding Collins' statement that Moore did not know about the shooting was inadmissible as hearsay. We therefore conclude that the postconviction court did not abuse its discretion because the excluded testimony does not fall under the statement-against-interest hearsay exception.

VI. The postconviction court did not abuse its discretion when it determined that the district court did not err when it permitted the state to call a gang expert witness and did not abuse its discretion in its evidentiary rulings during the expert's testimony.

Moore argues that the postconviction court abused its discretion when it determined that there was no error in allowing the state to call a gang expert witness because: (1) the

expert's testimony was based on hearsay, (2) the expert offered conclusory legal opinions, and (3) the testimony was unnecessary and cumulative.

“[D]eterminations of an expert witness's competency and the adequacy of the foundation offered in support of expert witness testimony are matters that rest within the sound discretion of the district court and we will not reverse absent clear error.” *State v. DeShay*, 669 N.W.2d 878, 884 (Minn. 2003). Minn. R. Evid. 702 provides that an expert may testify “in the form of an opinion” if that person has “knowledge, skill, experience, training, or education” that “will assist the trier of fact to understand the evidence or to determine a fact in issue” that requires “scientific, technical, or other specialized knowledge.” The ultimate question is whether the testimony will help the jury in evaluating evidence or resolving factual issues. *DeShay*, 669 N.W.2d. at 884.

When a defendant has been charged with committing a crime for the benefit of a gang, the state “may offer expert testimony on gangs,” as long as “the testimony adds precision or depth to the jury's ability to reach conclusions about matters that are not within its experience.” *State v. Thao*, 875 N.W.2d 834, 840–41 (Minn. 2016). But “[i]f the issue can be resolved by applying principles of general or common knowledge and the jury is in as good of a position to resolve an issue as the expert, then expert testimony would be of little assistance to the jury and should not be admitted.” *DeShay*, 669 N.W.2d at 885.

A. Although the district court erroneously admitted hearsay testimony, Moore failed to show that he was prejudiced by the error.

Moore argues that the district court erroneously admitted the expert's testimony that TarXan stated to another police officer that he was a gang member. The state does not

argue that the expert's testimony was properly admitted, but argues only that it did not prejudice Moore.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Minn. R. Evid. 801(c). Hearsay is inadmissible unless it falls within an exception. Minn. R. Evid. 801, 803. “[T]he state should not be permitted to launder inadmissible hearsay evidence, turning it into admissible evidence by the simple expedient of passing it through the conduit of purportedly ‘expert opinion.’” *DeShay*, 669 N.W.2d at 886.

At trial, the prosecutor asked the expert about TarXan's position in the gang, and the expert testified that TarXan was “at the top” of the West Side HIT Squad. The prosecutor then asked about which of the nine criteria used by police to determine gang membership TarXan met. The expert stated that TarXan admitted to another officer that he was a gang member. Moore's attorney objected to the statement as hearsay; the district court overruled the objection without providing its reasoning on the record. The statement is hearsay because it was an out-of-court statement made by TarXan to someone other than the witness and was offered to prove that TarXan was a member of a gang.

Despite this error, Moore must demonstrate that he was prejudiced by admission of the statement. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). “The erroneous admission of evidence that does not have constitutional implications is harmless if there is no reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *State v. Holliday*, 745 N.W.2d 556, 568 (Minn. 2008) (quotation omitted).

Moore did not explain how he was prejudiced by this error. The state argues that because there was other evidence to support a finding that TarXan was affiliated with a

gang, there was no prejudice to Moore. As the state points out, the expert had already testified that TarXan was a member of the West Side HIT Squad. Additionally, the expert testified that TarXan met three other criteria for gang membership, including being arrested with other gang members, appearing in photos and videos with other gang members, and associating with other gang members. Because there was additional support in the record to show that TarXan was a gang member, we conclude that Moore has not shown that he was prejudiced by the admission of hearsay evidence.

B. The expert did not offer conclusory legal opinions.

Moore argues that the expert erroneously offered legal conclusions.

“[W]hile ultimate opinion testimony is admissible,” an expert’s testimony that a legal definition has been met is “not helpful to the jury because it merely [tells] the jury what result to reach.” *State v. Vang*, 774 N.W.2d 566, 579 (Minn. 2009). In *Vang*, the supreme court held that a gang expert improperly was allowed to testify that members of a gang “individually and collectively engage[d] in a pattern of criminal activity, violent criminal activity, under statute 609,” because “engag[ing] in a pattern of criminal activity” was one of the three prongs of Minn. Stat. § 609.229, subd. 1 (2008), and the jury was required to determine whether the statutory definition of a “criminal gang” was met. *Id.* Because the expert testified that the third prong of the statute had been met, the supreme court concluded that the expert offered a legal conclusion. *Id.*

In this case, Moore challenges three of the expert’s statements. First, the expert testified that members of the Eastside Boyz had been involved in the following crimes: murder, robbery, assault, aggravated assault, weapons violations, narcotics violations, and

auto theft. Second, the expert testified that members of the Selby Siders had been involved in the following crimes: murder, rape, robbery, drugs, weapons violations, auto theft, assault, aggravated assault, and burglary. Third, the expert testified that members of the West Side HIT Squad had been involved in the following crimes: murder, robbery, burglary, auto theft, weapons violations, and narcotics violations.

Moore did not object to any of these statements but argues on appeal that the expert made a legal conclusion that members of these gangs were committing crimes for the benefit of the gang.

Minn. Stat. § 609.229, subd. 1 (2014), defined a criminal gang as:

[A]ny ongoing organization, association, or group of three or more persons, whether formal or informal, that:

(1) has, as one of its primary activities, the commission of one or more of the offenses listed in section 609.11, subdivision 9;

(2) has a common name or common identifying sign or symbol; and

(3) includes members who individually or collectively engage in or have engaged in a pattern of criminal activity.

The expert was not asked to determine whether one of the primary activities of the three gangs was the commission of crimes and was not asked whether the members have “engaged in a pattern of criminal activity.” Instead, the expert was asked about the crimes in which the members of the three gangs had been involved. Based on this testimony, it was still the jury’s responsibility to determine if the presented associations met the definition of “criminal gang” based on the three statutory criteria. Therefore, we conclude that the expert did not offer a legal conclusion.

C. The expert's testimony was neither unnecessary nor cumulative.

Finally, Moore argues that the expert's testimony that there was a feud between the Eastside Boyz and the Selby Siders was cumulative because C.L.W.-S. had already testified regarding the feud.

“[T]he allegation that a defendant is in a gang ought not serve as a justification for extensive expert testimony regarding criminal gangs.” *DeShay*, 669 N.W.2d at 887. But when the expert testimony will assist the jury in understanding the evidence or in determining a fact at issue, the expert's testimony is proper. *Id.* at 887–88.

In this case, C.L.W.-S. testified that he was previously an Eastside Boyz member and that the Eastside Boyz had “beef” with the Selby Siders. He also testified that the gang-related murder of a woman in 2012 caused the ongoing conflict to intensify.

The expert gave detailed testimony about the history of the conflict among the three gangs in St. Paul dating to a 2007 murder of a gang member. He also testified in greater detail about the 2012 murder of the woman and the impact that it had on the three gangs internally and on the gangs' greater conflicts. The expert testified that often violence among the gangs occurred when they had a “chance” encounter and unexpectedly ran into members of other gangs at a gas station or in an alley. Based on this record, the testimony of the expert was not merely “duplicative,” *see id.* at 888, and was helpful to the jury in determining whether Moore knew that the shooting was going to occur.

In conclusion, despite the erroneously admitted hearsay testimony, which did not prejudice Moore, we conclude that the postconviction court did not abuse its discretion when it ruled that the expert's testimony was otherwise properly admitted. We need not

address Moore's final argument that he is entitled to a new trial because of the cumulative effect of the alleged errors because we have decided that the only error—improperly admitted hearsay testimony—did not prejudice Moore.

D E C I S I O N

Because we conclude that the postconviction court did not err in the rulings, we affirm.

Affirmed.