STATE OF MINNESOTA

IN SUPREME COURT

A22-0303

Hennepin County | Anderson, J.

State of Minnesota,

Respondent,

vs.

Filed: July 19, 2023
Office of Appellate Courts

Xavier Demond Gilleylen,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. The State presented sufficient evidence to prove beyond a reasonable doubt that defendant committed premeditated murder.

2. The district court did not violate defendant's constitutional right to confront witnesses by preventing defense counsel from telling the jury that before accepting a plea

agreement, the testifying codefendant faced a mandatory life sentence without the possibility of release, when the district court allowed extensive cross-examination about other aspects of the plea agreement and sufficiently communicated the potential bias of the codefendant.

3. Although the district court may have erred by not identifying the testifying codefendant as an accomplice in its jury instructions, the unobjected-to error did not affect defendant's substantial rights.

4. The district court did not abuse its discretion by giving a jury instruction that limited the jury's use of evidence that was admitted to test the thoroughness of the investigation conducted by law enforcement.

5. Because defendant failed to establish more than one trial error, his cumulative effect argument fails.

6. The district court erred by entering a judgment of conviction for second-degree intentional murder because this offense is a lesser-included offense of first-degree premeditated murder, an offense for which defendant was also convicted.

Affirmed in part, reversed in part, and remanded.

O P I N I O N

ANDERSON, Justice.

Appellant Xavier Demond Gilleylen appeals convictions of first-degree premeditated murder and second-degree intentional murder following a jury trial. Gilleylen argues that the evidence was insufficient to prove the element of premeditation for the first-degree murder offense and that he was deprived of a fair trial because the

district court committed reversible error in managing the trial and the jury instructions. Because the State presented sufficient evidence and the district court did not commit any error requiring reversal regarding the first-degree premeditated murder count, we affirm the conviction of first-degree premediated murder. We reverse and remand to the district court, however, because the district court erred in entering a conviction for the lesser-included offense of second-degree intentional murder.

FACTS

On November 9, 2019, Dionte Hubbard was fatally shot in a Minneapolis alley. Following a police investigation, the State alleged the following facts. At the time of the shooting, Dayton Robinson was driving a Honda Accord with Gilleylen in the back seat and a third occupant in the front passenger seat. Gilleylen shot at a Chevy Impala driven by Hubbard. A car chase ensued and both vehicles crashed. Gilleylen then got out of the Accord, chased Hubbard, and fatally shot Hubbard in the head. The subsequent police investigation led to the arrest and charging of Gilleylen and Robinson. The front seat passenger was a suspect, but never charged. Two other initial suspects were also ruled out by police in the process of arresting and charging Gilleylen and Robinson. First, when the police arrived at the scene, they arrested J.W., a person walking in the neighborhood, but later released him after determining that he had an alibi for the time of the shooting. Second, during the course of their investigation, the police located the firearm used in the shooting a few blocks from the crime scene and determined that the magazine of the firearm had a partial fingerprint that matched the known fingerprint of C.J., but he could not be placed at the scene of the shooting.

Based on the police investigation, a grand jury indicted Robinson and Gilleylen with first-degree premeditated murder, Minn. Stat. § 609.185(a)(1) (2022), and second-degree intentional murder, Minn. Stat. § 609.19, subd. 1(1) (2022), alleging both principal and accomplice liability. *See* Minn. Stat. § 609.05 (2022) ("A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime."). The mandatory sentence for the first-degree premediated murder offense is life in prison without the possibility of release. Minn. Stat. § 609.106, subd. 2 (2022).

Pursuant to a plea agreement, Robinson pleaded guilty to an amended charge of aiding an offender after the fact, Minn. Stat. § 609.495, subd. 3 (2022). In accordance with the plea agreement, Robinson would receive a sentence of 60 months in prison.

Gilleylen pleaded not guilty and demanded a jury trial. Before trial, defense counsel provided the State with written notice that Gilleylen intended to assert an alternative-perpetrator defense, listing three possible alternative perpetrators: Robinson, J.W., and the front seat passenger of the Accord. Defense counsel did not list C.J. as a possible alternative perpetrator.

At trial, the State presented eyewitness testimony—including Robinson's testimony—and other evidence to establish the following facts. Robinson was driving the Accord, with another passenger in the front and Gilleylen in the back seat. When Robinson pulled up next to a Chevy Impala driven by Hubbard, Gilleylen began shooting at the Impala. The Accord and Impala sped down the street and crashed. Hubbard then fled the crashed Impala, running past the Accord and into an alley. The occupants of the Accord

also fled. Gilleylen first ran away from the Accord and then back towards it. When Hubbard ran by the Accord, Gilleylen shot five times as he followed Hubbard. At one point as Gilleylen was shooting, he took a shooter's stance, aimed, and shot Hubbard. Gilleylen fled as Hubbard laid in an alley until assistance arrived. Hubbard suffered two gunshot wounds—one to his head and the other to his right index finger.

Surveillance cameras captured footage of parts of the incident, but the fatal shooting occurred beyond the view of the cameras. No firearm was found on Hubbard's body, but police found eight discharged cartridge casings, some located where the car chase began and others in the alley. Police determined that the eight discharged cartridge casings were all fired from a firearm that the police found a few blocks away.

Other evidence also tied Gilleylen to the Accord at the time of the shooting. The owner of the Accord testified that she and Gilleylen purchased the Accord together, Gilleylen used the car the most, and the car was in Gilleylen's possession on the day of the shooting. Her testimony was corroborated by the fact that police found Gilleylen's school supplies and a phone associated with Gilleylen in the backseat of the crashed Accord. She also testified that Gilleylen and Robinson were supposed to meet up with her the day of the shooting to help her move a friend, but they never showed up. After the shooting, Gilleylen contacted her to tell her to report the Accord as stolen. Additionally, analysis of cell phone data showed the phone associated with Gilleylen traveled with Robinson's phone and the phone of the front seat passenger the afternoon of the shooting.

Robinson, the only witness who identified Gilleylen as present at the shooting, testified that he was driving the Accord, and Gilleylen instructed him to pull up next to the

Impala at a stop sign. Gilleylen shot at the Impala. When Robinson heard the gun shots, he stepped on the gas, and eventually crashed the Accord into another car. After getting out of the Accord, Robinson ran into an alley. Gilleylen, who was running down the alley behind Robinson, continued to shoot. Gilleylen and Robinson then ran to the home of an acquaintance where the police later found the gun used in the shooting.

During Robinson's testimony, the district court limited defense counsel's cross-examination regarding the sentence of life without the possibility of release that he faced before he accepted the State's plea offer. The court was concerned that a discussion of Robinson's possible life sentence would "identify the sentence that the defendant is facing" and noted that "[s]entencing is not a proper consideration for the jury and it should not be admitted either directly or indirectly."[1] Defense counsel objected to the limitation. In the alternative, defense counsel argued that, at a minimum, he should be allowed to ask Robinson whether his plea agreement reduced the sentence he was facing before the agreement by 95 precent. The court permitted defense counsel to cross-examine Robinson using the claim that Robinson's deal was "a 95 percent discount" and "a significant discount or agreement."

The district court also limited defense counsel's use of a photograph of C.J. in defense counsel's cross-examination of police investigators. When defense counsel stated that he intended to cross-examine the police investigators about a photograph of C.J. that

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[1] *See State v. Chambers*, 589 N.W.2d 466, 474 (Minn. 1999) (explaining that "sentencing is not a proper consideration for the jury").

investigators showed to certain eyewitnesses,[2] the State objected. The State argued that any evidence related to C.J. was irrelevant because the written notice that Gilleylen provided the State regarding Gilleylen's alternative-perpetrator defense did not list C.J. as an alternative perpetrator. Moreover, Gilleylen could not place C.J. at the scene of the crime, which is one of the requirements for the admission of alternative-perpetrator evidence. The State did acknowledge, however, that the court had already admitted, over the State's objection, C.J.'s partial fingerprint on the gun magazine that matched the known fingerprint of C.J. In response to the State's argument, defense counsel reaffirmed that Gilleylen did not intend to argue that C.J. was an alternative perpetrator. Nevertheless, defense counsel argued that the proposed cross-examination regarding C.J.'s photograph was relevant to whether the police conducted a thorough investigation. After considering the parties' arguments, the district court allowed defense counsel to cross-examine the investigator about the photograph but prohibited defense counsel from showing the photograph to the jury. Thus, the investigator was asked about the partial fingerprint and photograph.

Following the close of evidence, the district court, in instructing the jury, provided three instructions that are relevant here. First, the court instructed the jury about evaluating testimony and the "believability of witnesses." In doing so, the court specified that the jury could consider, among other factors, whether a witness will "gain or lose if this case is decided in a certain way." Second, the court instructed the jury that it needed to determine

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[2] In the photograph, C.J.'s hairstyle matched the descriptions of the shooter provided by certain eyewitness, which described the shooter as having "dreadlocks or braids."

whether Robinson was an accomplice. The court explained that if the jury found that Robinson was an accomplice, the jury could rely on Robinson's testimony only if his testimony was corroborated by other evidence. Third, the court instructed the jury that certain testimony (specifically, testimony regarding C.J.'s fingerprint and photograph, and testimony regarding the description of the shooter and an identification of J.W. from non-testifying witnesses) could be used only to test the thoroughness of the police investigation. Although defense counsel did not object to the first two instructions, he did object to the third instruction. The district court overruled the objection.

The jury found Gilleylen guilty of first-degree premeditated murder and second-degree intentional murder. The court entered judgments of conviction for both offenses, but sentenced Gilleylen only for the first-degree premeditated murder conviction, imposing the mandatory sentence of life in prison without the possibility of release.

On direct appeal, Gilleylen makes five arguments. We consider each argument in turn, as well as whether Gilleylen could be convicted of both first-degree premeditated murder and second-degree intentional murder.

ANALYSIS

I.

Gilleylen first argues that the State failed to prove beyond a reasonable doubt that he premeditated the killing of Hubbard, and thus his conviction of first-degree murder must be reversed. We disagree.

"[W]e view the evidence in a light most favorable to the verdict and assume the fact-finder disbelieved any testimony conflicting with that verdict," in determining whether

sufficient evidence supports the jury's guilty verdict. *State v. Chomnarith*, 654 N.W.2d 660, 664 (Minn. 2003). We will not overturn a verdict "if, giving due regard to the presumption of innocence and to the prosecution's burden of proving guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty of the charged offense." *Id.*

In evaluating the sufficiency of circumstantial evidence, we apply a two-step process. *State v. Hassan*, 977 N.W.2d 633, 640 (Minn. 2022). Step one involves identifying "the circumstances proved." *Id.* In doing so, we "winnow down the evidence presented at trial" to a "subset of facts" that is consistent with the jury's verdict and "disregard evidence that is inconsistent with the jury's verdict." *State v. Harris*, 895 N.W.2d 592, 600–01 (Minn. 2017). The jury is "the sole judge of credibility" and " 'is free to accept part and reject part' of the testimony of a particular witness." *Hassan*, 977 N.W.2d at 640 (quoting *Coker v. Jesson*, 831 N.W.2d 483, 492 (Minn. 2013)). Second, we analyze "whether 'the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis other than guilt.' " *State v. Balandin*, 944 N.W.2d 204, 213 (Minn. 2020) (quoting *State v. Leake*, 699 N.W.2d 312, 319 (Minn. 2005)). A defendant may not rely on "conjecture" or "speculation" to set aside a verdict. *See State v. Al-Naseer*, 788 N.W.2d 469, 480 (Minn. 2010).

Gilleylen challenges the sufficiency of the evidence that the killing was premeditated. To be guilty of first-degree murder, a person must "cause[] the death of a human being with premeditation and with intent to effect the death of the person or of another." Minn. Stat. § 609.185(a)(1). As defined by the Legislature, premeditation

"means to consider, plan or prepare for, or determine to commit, the act referred to prior to its commission." Minn. Stat. § 609.18 (2022).

"[P]remeditation is 'generally proven through circumstantial evidence,' and is often inferred from the totality of circumstances surrounding the killing." *State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008) (quoting *Leake*, 699 N.W.2d at 319). We "examine the circumstantial evidence in accord with the three categories of evidence our precedent recognizes as relevant to an inference of premeditation: planning activity, motive, and the nature of the killing." *Id.* at 313. "Premeditation does not require proof of extensive planning or preparation, nor does it demand that a specific time period elapse for deliberation." *State v. Cox*, 884 N.W.2d 400, 412 (Minn. 2016). But the State must "establish that there was *some* appreciable passage of time between a defendant's formation of the intent to kill and the act of killing, and that during this time defendant deliberated about the act." *Id.* "While evidence of motive is relevant, it is unnecessary to a finding of premeditation." *Id.* When considering planning activity, we evaluate the defendant's actions prior to the actual killing. *Hughes*, 749 N.W.2d at 313; *State v. Petersen*, 910 N.W.2d 1, 7–8 (Minn. 2018) (collecting decisions). As for the nature of the killing, we consider "the number of times the defendant used the weapon, the deliberate placement of wounds at vital areas of the victim's body, the infliction of gunshot wounds at close range, and a defendant's concern with escape rather than aiding the victim." *State v. Holliday*, 745 N.W.2d 556, 563–64 (Minn. 2008) (citations omitted).

Here, the circumstances proved are as follows. Robinson drove Gilleylen and the front seat passenger in a Honda Accord the day of the shooting. While driving, they came

upon a Chevy Impala driven by Hubbard. Gilleylen instructed Robinson to drive up to the Impala. As Robinson drove towards the Impala, Gilleylen shot at the Impala three times. A car chase ensued and resulted in both cars crashing. Gilleylen left the Accord, first running away from the Accord, then running back to it. Hubbard left the Impala and ran past the Accord down the sidewalk and then into an alley. Gilleylen chased Hubbard. At one point, Gilleylen stopped, took a shooter's stance, aimed, and fired at Hubbard, hitting Hubbard in the back of the head. Gilleylen followed his shot, and Hubbard, into the alley where Hubbard's body was found. Gilleylen then immediately fled and hid the gun. Police did not find a gun on Hubbard's body, and all eight discharged cartridge casings recovered at the scene were fired from the same gun.

As a whole, the circumstances proved regarding planning and the nature of the killing support the jury's verdict that Gilleylen acted with premeditation, and these circumstances proved do not support a contrary inference. First, Gilleylen remained near the crashed vehicles and then chased Hubbard as Gilleylen fired his weapon. *See State v. Vang*, 774 N.W.2d 566, 583 (Minn. 2009) (stating that evidence that the defendant chased the victim, took aim, and fired nine shots supported the jury's determination of premeditation); *see also State v. Amos*, 347 N.W.2d 498, 501 (Minn. 1984) (determining that a finding of premeditation was supported when the defendant had grabbed a gun, ran across a street, and shot his victim); *State v. Richardson*, 393 N.W.2d 657, 665 (Minn. 1986) (concluding that there was sufficient evidence to support premeditation when the "defendant had to make the decision to chase after [the victim] and fire the last two or three shots"). Second, that one of the shots fired by Gilleylen hit Hubbard in the back of

the head supports a finding of premeditation when considering that Gilleylen took a shooter's stance and aimed as he fired his gun at Hubbard. *See Holliday*, 745 N.W.2d at 563 (identifying "the deliberate placement of wounds at vital areas of the victim's body" as evidence of nature of the killing). Third, Gilleylen immediately fled the scene, hid the gun, and did not provide aid to Hubbard, who had fallen after he was shot in the head. *See State v. McArthur*, 730 N.W.2d 44, 50 (Minn. 2007) (noting that "a defendant's concern with escape rather than with rendering aid to the victim" is relevant to analyzing the nature of the killing). Fourth, Gilleylen fired a total of eight shots, and we have recognized that "the number of times the defendant used the weapon" is relevant to assessing the nature of the killing. *See State v. Moua*, 678 N.W.2d 29, 41 (Minn. 2004).

Gilleylen argues that the circumstances proved support a reasonable inference that he acted impulsively in the heat of a chaotic incident. His argument is unavailing because it fails to focus on reasonable inferences that can be drawn from the circumstances proved as a whole, and instead focuses on the lack of extensive planning and motive. But as explained earlier, the State is not required to show extensive planning or motive to prove premeditation. *Cox*, 884 N.W.2d at 412. Rather, the State need only establish that "there was *some* appreciable passage of time between a defendant's formation of the intent to kill and the act of killing, and that during this time defendant deliberated about the act." *Id.*

Gilleylen also makes various arguments regarding why he had a gun in the Accord—reasons that he contends had nothing to do with Hubbard. The circumstances proved, however, show that Gilleylen took the gun from the Accord, ran towards Hubbard, took a shooter's stance, aimed, and fired the gun at Hubbard several times, killing Hubbard

with a shot to the head. Consequently, even if Gilleylen did not place the gun in the Accord as part of a plan to kill Hubbard, only one reasonable inference can be drawn from the actions he took after the Accord crash—specifically, that Gilleylen deliberated about the act of killing Hubbard for some appreciable amount of time.

Gilleylen also relies on Robinson's testimony that he thought someone in the Impala was returning fire, along with physical evidence showing the window of the Accord was damaged. The parties disputed whether the physical evidence supported Robinson's testimony. According to the State, the damage was caused by Gilleylen shooting the gun. According to Gilleylen, it was caused by someone else shooting at the individuals in the Accord. Because the testimony and physical evidence that Gilleylen was responding to others shooting at the Accord are inconsistent with the jury's guilty verdict, this evidence is not part of the circumstances proved. Thus, we disregard this evidence that Gilleylen relies on in our sufficiency analysis. *See Hassan*, 977 N.W.2d at 641 ("To the extent that [the defendant] invokes evidentiary inconsistencies, even inconsistencies in the testimony of one witness, we must resolve those inconsistencies in favor of the jury's verdict.").

Gilleylen further argues that the nature of the killing could be equally consistent with the inference that he did not deliberately plan to murder Hubbard. He contends that the fact that a bullet struck Hubbard in the back of the head is not indicative of careful aim and that the eight shots fired by Gilleylen is consistent with the theory that Gilleylen thought someone was shooting at him. These arguments are not persuasive.

Gilleylen does not explain how chasing Hubbard, taking a shooter's stance, aiming, firing, and fleeing as Hubbard fell to the ground after Gilleylen fired eight times reasonably

leads to an inference of a lack of premeditation because of confusion and chaos. *See State v. Cooper*, 561 N.W.2d 175, 180 (Minn. 1997) (noting the fact that the defendant "fired at [the victim] at least twelve separate times and was then only concerned with fleeing the scene as quickly as possible" as support for the conclusion that "the only rational hypothesis to be drawn from the evidence was that the killing was premeditated"). The circumstances proved support a reasonable inference of premeditation and fail to support a reasonable inference of impulsivity or some other non-premeditation theory. The State provided sufficient evidence of premeditation.

II.

We turn next to Gilleylen's contention that the district court violated the Confrontation Clause by limiting defense counsel's cross-examination of codefendant Robinson. Gilleylen argues that the jury could not understand the extent of Robinson's bias and motivation to fabricate his testimony without knowing that, if convicted of the crimes he had been charged with before accepting a plea deal, Robinson faced life in prison without the possibility of release.

District court evidentiary rulings are subject to an abuse of discretion standard on review. *Miles v. State*, 840 N.W.2d 195, 204 (Minn. 2013). But we use a de novo review standard in determining whether the admission of evidence violates a defendant's rights under the Confrontation Clause. *State v. Sutter*, 959 N.W.2d 760, 764 (Minn. 2021). If we conclude that a violation did occur, we then must determine whether the error was harmless beyond a reasonable doubt. *Id.* at 768. For an error to be harmless beyond a reasonable

doubt, the jury's verdict must be "surely unattributable" to the error. *State v. Courtney*, 696 N.W.2d 73, 80 (Minn. 2005).

The Confrontation Clauses of the United States Constitution and the Minnesota Constitution provide the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; Minn. Const. art. I, § 6. We apply the same analysis under both Confrontation Clauses. *Holliday*, 745 N.W.2d at 564.

As to cross-examination, "the Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)); *see also State v. Dobbins*, 725 N.W.2d 492, 505 (Minn. 2006). The right to confront witnesses "is not violated by limitations on cross-examination so long as the jury is presented with sufficient information from which to appropriately draw inferences as to the witness's reliability." *State v. Ferguson*, 742 N.W.2d 651, 657 (Minn. 2007). When we have "upheld restrictions on cross-examining codefendants about the number of years that their sentences were reduced by pleading guilty," we considered whether the district court allowed cross-examination "on other aspects of the plea agreement." *State v. Yang*, 774 N.W.2d 539, 553 (Minn. 2009). Thus, whether a limitation on a defendant's right to cross-examine his codefendant violates a defendant's right to confront witnesses depends on the particular facts of the case.

For example, in *Yang* we applied the principle articulated in *Ferguson* that the right to confront witnesses " 'is not violated by limitations on cross-examination so long as the

jury is presented with sufficient information from which to appropriately draw inferences as to the witness's reliability.' " *Yang*, 774 N.W.2d at 553 (quoting *Ferguson*, 742 N.W.2d at 657). In *Yang*, the defendant was found guilty of 12 criminal counts. *Id.* at 551. He was sentenced to two life terms for premeditated murder for the benefit of a gang under aiding and abetting theories of criminal liability and four 186-month sentences for attempted premeditated murder for the benefit of a gang under aiding and abetting theories of criminal liability. *Id.* We upheld the decision of the district court to restrict the defendant from "inquiring into the exact number of months or percentage of reduction of [testifying] codefendants' sentences under their respective plea agreements." *Id.* at 553. Two of the codefendant witnesses were charged with the same crimes as the defendant but received significant benefit from plea bargains. *Id.* One witness testified:

> that he was charged with the same crimes as [defendant], that he pleaded guilty to one count of second-degree murder, one count of second-degree assault, and one count of committing a crime for the benefit of a gang, that his sentence was 32 years, which was a "good deal" and considerably less jail time.

Id. The other "was allowed to plead guilty to aiding an offender after the fact, and a crime committed for the benefit of a gang" in exchange for his testimony. *Id.* "When asked if his sentence was a 'pretty good deal,' [this witness] stated that he 'wouldn't know.' " *Id.*

We concluded that "the jury had sufficient information about [the] codefendants' plea agreements to assess their credibility and that the district court did not err in restricting cross-examination," because "[t]he jury knew that the codefendants received considerably less jail time in exchange for their testimony." *Id.* Comparing the cross-examination in *Yang* with what the district court allowed during Robinson's cross-examination here, we

conclude that the right of Gilleylen to confront his codefendant was not violated because the jury was presented with sufficient information from which to appropriately draw inferences as to his codefendant's reliability. *See id.*

Here, codefendant Robinson was indicted for first-degree premeditated murder under an aiding and abetting theory of criminal liability. Police interviewed Robinson twice. Robinson later claimed he fabricated "90 percent" of his story in the first interview. Robinson then provided another interview after he struck a deal with the State that would reduce his sentence to 5 years in prison in exchange for cooperating with the State, waiving his right to remain silent, and testifying truthfully.

Gilleylen's counsel argued to the district court before opening statements, and again before Robinson testified, that Gilleylen should be able to say that Robinson was facing a life sentence before his deal with the State. The district court, however, prohibited Gilleylen from "seeking to impeach the co-defendant with the specific length of sentence that the co-defendant was facing." The district court reasoned that "it would . . . identify the sentence that the defendant is facing, and . . . [s]entencing is not a proper consideration for the jury, and it should not be admitted either directly or indirectly." The court permitted Gilleylen to impeach Robinson during cross-examination by allowing Gilleylen to describe Robinson's deal as a "95 percent discount" and a "significant discount or agreement." The court also allowed Gilleylen to identify the charges Robinson was facing before the deal and the charges to which he ultimately pleaded guilty.

Gilleylen's counsel did cross-examine Robinson extensively about conflicts between the statements he made in the interview with police before he accepted a plea deal

and the statements and testimony he provided after the deal. Gilleylen's counsel also highlighted Robinson's deal with the State. For example, defense counsel asked Robinson: "You were charged with murder in the first degree, murder in the second degree, and you struck a bargain that in exchange for your testimony against Mr. Gilleylen here, you're only going to serve five years?" Robinson answered, "Yes." Counsel also asked, "The deal that you struck here, if you end up getting the deal, if you end up testifying as you already have against Mr. Gilleylen and the County Attorney's Office determines it's truthful, you'll receive about a 95 percent reduction in a murder sentence, right?" Robinson answered, "Yes, sir."

Here, defense counsel emphasized in his opening statement that Robinson made a deal with the State that would result in a significant decrease in his sentence. The court also allowed defense counsel to cross-examine Robinson about him receiving a "95 percent reduction in a murder sentence." And defense counsel established that Robinson was charged with murder in the first degree and murder in the second degree and that as a result of the bargain he struck in exchange for his testimony, Robinson would only receive a 5-year prison sentence. Defense counsel likewise argued in closing, "Hell of a deal for first-degree murder. Heck of deal for first-degree murder. Five years."

As in *Yang*, we conclude that the information presented to the jury to evaluate Robinson's reliability was sufficient. We decline to adopt Gilleylen's proposed bright-line rule that defense counsel must be permitted to cross-examine a testifying codefendant about the fact the testifying codefendant faced a sentence of mandatory life in prison without the possibility of parole before accepting a plea deal. The district court did not

violate Gilleylen's constitutional right to confront witnesses by limiting his cross-examination of Robinson.[3]

III.

In Gilleylen's third argument, he contends that the district court erred by failing to identify Robinson as an accomplice in the jury instructions. Robinson was indicted for murder in the first-degree under an aiding and abetting theory of criminal liability. The district court did not identify Robinson as an accomplice but instead gave a general jury instruction regarding accomplice testimony, which provided the definition of accomplice and tasked the jury with determining if Robinson was an accomplice.

Gilleylen forfeited appellate review of this issue because he failed to raise the issue in the district court. *See State v. Ezeka*, 946 N.W.2d 393, 407 (Minn. 2020). But we may "consider a forfeited issue if the defendant establishes (1) an error, (2) that is plain, and (3) that affects his substantial rights." *Id.* If the defendant fails to establish that the alleged error affected his substantial rights, we need not consider the first two prongs. *State v. Mouelle*, 922 N.W.2d 706, 718 (Minn. 2019). Further, even if all three requirements are

[3] To be clear, we do not hold that a district court may never allow discussion regarding a witness's potential life sentence, especially if the court provides a cautionary instruction reminding the jury that it is not to consider sentencing. We emphasize that we have never established an inflexible rule that prohibits district courts from allowing the use of the original charge as part of a cross-examination process. Although we have explained that "[i]t has long been the rule in Minnesota that sentencing is not a proper consideration for the jury," and we affirm that rule, the decision to restrict cross-examination regarding a codefendant's original charges is a discretionary decision left with the district court depending on the circumstances. *Chambers*, 589 N.W.2d at 474.

established, we "may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Gilleylen argues it was error for the district court to fail to identify Robinson as an accomplice, the error was plain, and that his convictions must be reversed because the error affected his substantial rights. The State concedes the district court erred but argues the error was not plain, nor did it affect Gilleylen's substantial rights. We do not address the first two prongs of the plain error test because we conclude that Gilleylen failed to establish that the alleged error affected his substantial rights.

"A defendant's substantial rights are affected when 'there is a reasonable likelihood that the giving of the instruction in question had a significant effect on the jury verdict.' " *Ezeka*, 946 N.W.2d at 407 (quoting *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006)). Gilleylen argues that his substantial rights were affected because it is unknown whether the jury found corroborating evidence for Robinson's testimony and the jury could have erroneously concluded Robinson was not an accomplice. He argues there is a reasonable possibility that the jury would have acquitted him if it had known Robinson's testimony needed to be corroborated. We disagree.

Under Minnesota law, a criminal conviction based on accomplice testimony must be "corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Minn. Stat. § 634.04 (2022). We have explained that "corroborating evidence need only be sufficient to restore confidence in the truthfulness of the accomplice's testimony." *State v. Clark*, 755 N.W.2d 241, 256

(Minn. 2008). "Corroborative evidence need not, standing alone, be sufficient to support a conviction, but it must 'affirm the truth of the accomplice's testimony and point to the guilt of the defendant in some substantial degree.' " *State v. Reed*, 737 N.W.2d 572, 584 (Minn. 2007) (quoting *State v. Sorg*, 144 N.W.2d 783, 786 (Minn. 1966)). "We 'review the evidence just as we would on a sufficiency challenge—in the light most favorable to the prosecution, and with all conflicts in the evidence resolved in favor of the verdict.' " *State v. Smith*, 932 N.W.2d 257, 264 (Minn. 2019) (quoting *State v. Nelson*, 632 N.W.2d 193, 202 (Minn. 2001)).

The reason for an instruction on accomplice corroboration "is to ensure that the jury did not reject the corroborating evidence and base its verdict solely on the accomplice's testimony." *State v. Davenport*, 947 N.W.2d 251, 262 (Minn. 2020). We have, however, affirmed convictions when a district court did not give any accomplice instruction even though the testifying witness was clearly an accomplice. *See id.* at 260–65; *State v. Shoop*, 441 N.W.2d 475, 478–81 (Minn. 1989); *Ezeka*, 946 N.W.2d at 408–10; *State v. Barrientos-Quintana*, 787 N.W.2d 603, 610–13 (Minn. 2010).

If a district court fails to give the accomplice instruction and we review under the plain error review standard, our "substantial rights inquiry focuses on whether there is a reasonable likelihood that the jury relied solely on [the accomplice's] testimony." *Davenport*, 947 N.W.2d at 262. Our recent decisions have highlighted four non-exclusive factors in considering whether there is a reasonable likelihood that the jury relied solely on the accomplice's testimony: (1) whether the testimony of the accomplice was corroborated by significant evidence; (2) whether the accomplice testified in exchange for leniency;

(3) whether the prosecution emphasized the accomplice's testimony in closing argument; and (4) whether the court gave the jury general witness-credibility instructions. *See id.* at 262–63 (citing *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016)).

Regarding the first factor, the State presented other evidence that corroborates Robinson's testimony. The State relied on surveillance video that matched Robinson's testimony about the car chase, the number of people in each car, and each person's flight on foot. Robinson's testimony also matched where the discharged cartridge casings were found. Additionally, the State presented evidence showing that the owner of the Accord and Gilleylen shared the vehicle, Gilleylen had the car on the day of the murder, and Gilleylen and Robinson did not show up where they were expected that day. Robinson's testimony that Gilleylen was in the backseat of the Accord is further bolstered by the fact that police found a phone associated with Gilleylen and Gilleylen's school supplies in the backseat of the car. Analysis conducted by the Federal Bureau of Investigation showed the phone associated with Gilleylen as traveling with the phone of Robinson and the front seat passenger the afternoon of the shooting.

Although Gilleylen notes that there were conflicting descriptions of the shooter's clothing and hairstyle, these attacks on the sufficiency of evidence are not fatal. We have "long held that evidence is sufficient to corroborate an accomplice's testimony when it is weighty enough to restore confidence in the truth of the accomplice's testimony." *Clark*, 755 N.W.2d at 253 (citation omitted) (internal quotation marks omitted); *see also State v. Lemire*, 315 N.W.2d 606, 610 (Minn. 1982) (noting that accomplice testimony does not need to "be corroborated on every point or element of the crime"). Because "corroborative

evidence does not need to be sufficient to establish a prima facie case of the defendant's guilt or sustain a conviction," we conclude that the State presented other evidence sufficient to corroborate Robinson's testimony. *Clark*, 755 N.W.2d at 253–54.

The second factor also supports the conclusion that the jury did not rely solely on Robinson's testimony because the jury "was alerted to facts that could raise questions about the motivations for an accomplice's testimony." *Davenport*, 947 N.W.2d at 264 (noting that "[w]hen a jury does not understand that accomplice testimony was motivated by a desire to get a better deal or some other malicious motive, the harm from the failure to give the accomplice corroboration instruction may be exacerbated"). Here, the jury understood Robinson "testified in exchange for leniency." *Horst*, 880 N.W.2d at 38. Indeed, the jury knew that Robinson was charged with first-degree murder, among other charges, but would only receive a 5-year prison sentence. *Cf. id.* at 38–39 (determining that the jury was "fully informed" to evaluate the testifying accomplice's credibility because the jury knew the testifying accomplice "had made an agreement with the State").

Third, we analyze whether the prosecution emphasized the accomplice's testimony in closing argument. *Davenport*, 947 N.W.2d at 263. Here, "the State did not unduly emphasize the testimony of the accomplice[] over other evidence" or "encourage the jury to rely solely on" Robinson's testimony. *Horst*, 880 N.W.2d at 39. Although the prosecutor relied on Robinson's testimony, he discussed specific facts that corroborated Robinson's testimony as well. *See Shoop*, 441 N.W.2d at 481 ("[T]he closing argument of the prosecutor not only conceded to the jury that [the testifying accomplice] had an obvious interest in trying to minimize his guilt and point a finger of primary guilt at defendant, but

focused the jury's attention on the evidence corroborating [the accomplice]'s testimony.").

In closing argument, the prosecutor discussed corroboration of Robinson's testimony, saying:

> You're going to read your instructions, and you heard about an accomplice testimony instruction. And that's important, but it's common sense. And what that instruction's telling you is that somebody up here is an accomplice to the crime. You're not going to just take their word for it, they need to be corroborated in some ways. If we had no video, no evidence other than Dayton Robinson, that wouldn't be enough. And that's, like I said, common sense.
>
> You're going to want to corroborate him because of course he has an interest—he has an interest in reducing his sentence.

The prosecutor then discussed evidence that could corroborate Robinson's testimony and said, "All of this corroborates and really independently proves this case, but it corroborates the testimony of Dayton Robinson. . . . It's corroborated the entire way." In rebuttal, the prosecutor further said, "The accomplice—if you find that Dayton Robinson was knowingly involved in the murder—you know what, he's corroborated either way, so go ahead and find it. That's fine. But he needs to be corroborated, okay, and he has been corroborated at every single stage."

Fourth, the district court gave a general witness-credibility instruction to the jury. *See Horst*, 880 N.W.2d at 39 (noting that this is an important factor to consider).[4]

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[4] In addition to the four factors, we note that the jury asked during deliberations, "Regarding accomplice testimony, is [Robinson]'s testimony only considered what was said on the witness stand during trial, or is his testimony any information that's been admitted into trial? Are both his initial police interview and proffer interview also considered accomplice testimony?" Based on these questions, the jury seemed to have already concluded Robinson to be an accomplice and was examining corroborating evidence for his testimony.

In conclusion, after balancing these factors, we conclude that Gilleylen's substantial rights were not affected. The closing arguments emphasized that the jury needed to corroborate Robinson's testimony. The district court instructed the jury on the general credibility of witnesses. And the jury also knew that Robinson received a deal in exchange for testifying. Whether, and to what extent, other evidence corroborated Robinson's testimony also weighs in favor of the State because the State presented other evidence to support the truthfulness of Robinson's testimony.

After conducting an independent review of the record and considering all relevant factors, "there is not a reasonable likelihood that the jury's verdict would have been any different" had the district court identified Robinson as an accomplice. *Horst*, 880 N.W.2d at 39. Accordingly, Gilleylen has not shown that his substantial rights were affected by the failure of the district court to identify Robinson as an accomplice in the jury instructions and, therefore, he has not satisfied the plain error exception to the forfeiture doctrine.

IV.

Gilleylen's fourth argument is that the district court abused its discretion by providing an instruction that confused the jury and improperly highlighted evidence. In its jury instructions, the court included a limiting instruction for evidence presented regarding J.W. and C.J. The instruction stated:

> Members of the jury, you have heard testimony regarding the description of the shooter and of an identification of [J.W.] from a number of non-testifying witnesses. You have heard testimony of a fingerprint from [C.J.] found on the magazine of the gun, and testimony regarding a photograph of [C.J.] containing dreadlocks or braids. All of this evidence was admitted to test the thoroughness of the investigation. You may not consider it for any other purpose.

We review the decision of a district court regarding a jury instruction for an abuse of discretion. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). A district court has "considerable latitude in selecting language for jury instructions," *id.*, but it abuses its discretion "if the challenged instruction confuses, misleads, or materially misstates the law." *State v. Guzman*, 892 N.W.2d 801, 816 (Minn. 2017).

The Minnesota Rules of Evidence provide that when evidence is admissible for one purpose but not for another purpose, the district court, upon request, "shall restrict the evidence to its proper scope and instruct the jury accordingly." Minn. R. Evid. 105. Jury instructions, however, should not highlight particular kinds of evidence. *See State v. Starfield*, 481 N.W.2d 834, 839 (Minn. 1992) ("Ordinarily, instructions drawing attention to particular kinds of evidence should be avoided in criminal cases."). Before analyzing whether the jury instruction was erroneous, an overview of the relevant evidence is necessary to understand the instruction given by the district court.

Defense counsel provided notice of three alternative perpetrators before trial: Robinson, J.W., and the front seat passenger who is not relevant to this jury instruction. At trial, there was evidence introduced that J.W. was an initial suspect, had been arrested walking in the neighborhood after the shooting, and was identified as the shooter by one witness during a show-up, but police later ruled him out as a suspect after taking him to the police department. J.W. testified at trial that he was at his grandmother's house that day with family because his grandmother had recently died. Defense counsel only minimally cross-examined J.W., never questioning his alibi story. The father of J.W.

also testified at trial. He confirmed that his son was at the grandmother's house with family. Defense counsel did not cross-examine J.W.'s father.

Over the State's hearsay objection, the district court also allowed statements from non-testifying witnesses describing the shooter's clothing and hairstyle, and testimony from a lead investigator that J.W. was identified in a show-up. The court determined that the evidence was not being presented for the truth of the matter asserted, but rather for the purposes of testing the thoroughness of the investigation or impeaching the investigation. Nevertheless, the district court prohibited defense counsel from arguing that the evidence constituted substantive evidence of another shooter.

During trial, evidence related to C.J. was also introduced and used during cross-examination. Before the jury was sworn, the State asked the district court to completely exclude discussion of C.J., arguing that the evidence was irrelevant as C.J. was not noticed as an alternative perpetrator. Defense counsel argued C.J.'s partial fingerprint that was found on the magazine of the gun was relevant evidence, and at the same time admitted, "We do not have and we do not intend to offer any other evidence the State has against C.J." The court determined the evidence of C.J.'s fingerprint found on the magazine of the alleged murder weapon was relevant and rejected the State's request to exclude the evidence.

Throughout the trial, the parties discussed the evidence of C.J.'s partial fingerprint and a photograph of C.J. During such discussions, defense counsel acknowledged that there was no evidence placing C.J. at the scene of the crime and that he was not arguing that C.J. was the shooter. Yet defense counsel wanted to use the photograph of C.J. to

cross-examine investigators about C.J.'s hairstyle, which matched witnesses' descriptions of the shooter. The court ultimately prohibited defense counsel from admitting the photograph of C.J. and showing it to the jury, but the court allowed defense counsel to use the photograph of C.J. for purposes of examining investigators to impeach or test "the thoroughness of the investigation." Defense counsel leaned heavily on the theory that confirmation bias affected the police investigation.

Before closing arguments and upon review of the jury instructions, the court read the instructions to the attorneys and explained that defense counsel could not characterize or argue that the evidence identified in the limiting instruction constituted evidence of an alternative perpetrator during closing arguments. At this point, defense counsel appeared to take a different position—objecting to the limiting instruction and characterizing the objection as "an ongoing objection to anything that has to do with me arguing or introducing evidence regarding [C.J.] as a possible suspect." Defense counsel did not object to the references to J.W.[5] The court followed up and asked defense counsel to further clarify his objections. Defense counsel objected to the limiting instruction and to the court limiting how he could use testimony in the case.

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[5] Although Gilleylen argues in his brief to this court that the instruction is also problematic as it relates to J.W., that issue is not properly preserved because it was not raised at the district court. We conclude that even if Gilleylen could establish the error was plain and affected his substantial rights, the error would not require our court to reverse Gilleylen's conviction. Gilleylen did not advance the theory at trial that J.W. was a possible alternative perpetrator. He only minimally cross-examined J.W. and never asked if he was the shooter. When J.W.'s father testified, defense counsel did not cross-examine him. The focus of defense counsel when the jury instructions were discussed was on C.J. rather than J.W.

Here, on appeal, Gilleylen argues that the instruction went too far when it stated the jury could not use the evidence "for any other purpose," contending that "[a] reasonable juror interpreting the instruction could determine it could not use a lack of investigation to infer it was possible that someone other than Gilleylen was the shooter." But Gilleylen admits that the evidence of C.J.'s fingerprint and his hair was introduced to challenge the thoroughness of the investigation, not as alternative-perpetrator evidence.

The limiting instruction seems to be what defense counsel requested. It may have gone further than necessary by saying "and not for any other purpose," but defense counsel conceded earlier in the trial that he could not argue C.J. was an alternative perpetrator. When arguing about the admissibility of C.J.'s photograph, defense counsel stated, "I've always been arguing someone else committed this crime. I'm not arguing that we have evidence that [C.J. is] the shooter. No, I'm not arguing that." Defense counsel also conceded that he could not make an alternative-perpetrator argument based on the statements provided by the non-testifying witnesses, which included statements regarding J.W. Despite these concessions, defense counsel insisted on introducing evidence to support his theory that the police's investigation was affected by confirmation bias.

Gilleylen overstates the problem, if any, with the jury instruction. The instruction only allows the jury to use the evidence to test the thoroughness of the police investigation. It is true that the instruction prevented Gilleylen from arguing that C.J. was an alternative perpetrator. But Gilleylen did not give the required notice that he intended to claim C.J. was an alternative perpetrator and he had no evidence placing C.J. at the scene of the crime. *See, e.g.*, *State v. Larson*, 787 N.W.2d 592, 598 (Minn. 2010) (holding that the district court

did not abuse its discretion in denying the defendant's motion to present an alternative-perpetrator defense when the defendant did not proffer evidence showing the alleged alternative perpetrator was "at or near the murder scene" or "had the opportunity" to murder the victim). Regardless of whether no instruction or a different instruction might have been preferable, the district court did not abuse its discretion by providing the limiting instruction. *See Moore*, 699 N.W.2d at 736 (acknowledging that the "district court has considerable latitude in selecting language for jury instructions").

V.

Finally, Gilleylen argues that the cumulative effect of the errors here deprived him of a fair trial. In rare cases, an appellant is entitled to a new trial when the cumulative effect of trial errors results in denying the appellant a fair trial. *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017). "When considering a claim of cumulative error, we look to the egregiousness of the errors and the strength of the State's case." *Id.*

As part of our analysis, we have assumed without deciding that the district court committed only one error: failing to identify Robinson as an accomplice. But the failure to identify Robinson as an accomplice did not affect Gilleylen's substantial rights. Because Gilleylen failed to establish multiple errors, his cumulative effect argument fails.

VI.

Lastly, we consider an issue the parties did not raise. *State v. Balandin*, 944 N.W.2d 204, 221–22 (Minn. 2020) (*sua sponte* considering and resolving the same issue). The jury found Gilleylen guilty of both first-degree premeditated murder and second-degree intentional murder. The district court entered judgment of convictions for both crimes but

imposed a sentence only for the first-degree premediated murder conviction. The entry of a judgment of conviction for the second-degree intentional murder offense violated Minn. Stat. § 609.04, subd. 1 (2022), which provides that "[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both," because second-degree intentional murder is a lesser-included offense of first-degree premeditated murder. *See State v. Wipper*, 512 N.W.2d 92, 94 (Minn. 1994) (explaining that under section 609.04, a defendant may not be convicted of both first-degree murder and the lesser-included offense of second-degree intentional murder on the basis of the same criminal act); *Balandin*, 944 N.W.2d at 222 (same). Therefore, we remand to the district court to vacate the judgment of conviction for the second-degree intentional murder offense.

CONCLUSION

For the foregoing reasons, we affirm Gilleylen's conviction for first-degree premeditated murder but remand to the district court to vacate the judgment of conviction for the second-degree intentional murder offense.

Affirmed in part, reversed in part, and remanded.