

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0740**

State of Minnesota,
Respondent,

vs.

Justis David Harvey,
Appellant.

**Filed March 17, 2025
Affirmed
Florey, Judge***

Pine County District Court
File No. 58-CR-22-717

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Reese Frederickson, Pine County Attorney, Pine City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ede, Presiding Judge; Harris, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

Appellant Justis David Harvey challenges his convictions of second-degree assault, drive-by shooting, and possession of a firearm as an ineligible person, arguing that the

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

district court erred by allowing a police officer to testify that he recognized Harvey in a surveillance video when the perpetrator's identity was the sole issue at trial. We affirm.

FACTS

The following facts were introduced at a jury trial. On May 8, 2022, N.S. was driving in Pine City, with his brother Z.S. as a passenger, when a black Saturn Ion pulled out of a gas station and “brake-checked” them twice. Both cars got onto the same highway and, as the brothers passed the Saturn, N.S. got a “good look” at the driver, who was holding a revolver and “staring right at” N.S. Then, as Z.S. looked up from his phone, the driver, who was the only person in the Saturn, fired a single shot that hit the rear passenger-side door of the brothers’ vehicle. N.S. slowed down to get the Saturn’s license plate number, and the brothers reported the incident. Law enforcement could not immediately find the Saturn and the revolver or identify the driver, but a license-plate search revealed that the Saturn was registered to Harvey.

An investigator eventually obtained surveillance footage from the gas station that the Saturn pulled out of, which showed the driver and a car matching the description that N.S. and Z.S. provided. About a month after the shooting, law enforcement administered a photo lineup to Z.S. and N.S. The lineup included photographs six people, including Harvey. Z.S. “definitely said no” to the photo of Harvey and indicated that he “kind of recognized” the individuals in two of the photographs, neither of which was Harvey. Z.S. was “pretty confident” that one of the two individuals he picked out was the shooter, whom Z.S. recalled as having “a scraggly beard” with “a blondish tone” and a short haircut. N.S. indicated that two of the photographs, including the one of Harvey, looked familiar and

that he was 80 to 85 percent sure that Harvey was the shooter. N.S. ultimately chose the photo of Harvey, which was consistent with N.S.'s memory of the shooter having a "scruffier," "lightish . . . color" beard and "squintier" eyes. At trial, the defense's theory was that Harvey was not the shooter.

A few months later, law enforcement conducted a search at Harvey's house. They failed to locate the Saturn or any firearms but found an empty handgun holster. Harvey was charged with drive-by shooting and second-degree assault with a dangerous weapon.

In November 2023, the district court held a three-day jury trial. The sole disputed issue was the identity of the shooter. Before the trial began, the district court addressed Harvey's motion in limine concerning the state's plan to have two police officers testify that they recognized Harvey in the gas-station surveillance video. The state acknowledged the risk of prejudice because the identifications were based on prior contacts but explained that it "already warned the officers that we're not going to talk about [the prior contacts]." Defense counsel asked the district court to exclude the officers' testimony, which would be "highly prejudicial" because the jury would "be improperly influenced by such an identification [by] . . . an officer" and would likely make improper inferences "even if there's nothing testified . . . [regarding] the basis of [the officers'] knowledge." When the district court asked if "there [was] something we can do to allow the state to get that in without calling those witnesses," defense counsel pointed to other evidence, including the Saturn's license plate information and the surveillance videos.

The district court characterized the “basis” of Harvey’s motion as “[rules] 403 and then 404 [of the Minnesota Rules of Evidence],” which defense counsel did not dispute. The district court agreed with defense counsel that “if the jury hears multiple witnesses saying, [Harvey’s] been up in Duluth being identified by police . . . that starts to sound more like an arrest rather than one person saying she knows him personally.” The district court suggested “limit[ing] [the testimony] to one [witness] so that it sounds less like an arrest and more like an ambiguous contact” but ultimately reserved its ruling for trial.

When the district court revisited whether to allow the officers’ identification testimony, the state agreed to have only one officer testify, and defense counsel renewed its objection on the same prejudice and lack-of-probative-value grounds:

I don’t believe there’s any probative value to what the witness would testify to. I think furthermore, . . . the prejudicial effect would be . . . profound given certainly, there’s . . . supposed to be some testimony about a holster . . . so I’m concerned . . . again that the probative value would be outweighed by the unfair prejudice that would result.

The district court overruled the objection and allowed one of the officers to testify. The officer testified to the following:

Q: Now um it’s kind of yes or no, are you familiar with an individual named Justis Harvey?

A: I am.

Q: And you know him by sight?

A: I do.

Q: Is he in this courtroom?

A: He is.

Q: And where’s he seated and what is he wearing.

A: He’s sitting at the defense table, wearing a gray suit.

[THE STATE]: And your honor, could the record reflect that the witness has identified the defendant.

The officer also testified regarding screenshots that an investigator took of the gas-station surveillance video:

Q: I'm showing you [the screenshots]. Do you recognize these photos at all?

A: I do.

Q: And how do you recognize them?

A: They appear to be the photographs that were shown to me by [another officer].

Q: Okay. And did [that officer] ask if you recognize anybody in those photographs?

A: He did.

Q: And did you recognize anybody in those photographs?

A: I did.

Q: And who was that?

A: I believed it to be Justis Harvey.

Q: The defendant in this case?

A: Yes.

In addition to the officer's testimony, N.S., who got a "good look" at the driver during the shooting and picked Harvey out of the photo lineup, identified Harvey in the courtroom as the driver and shooter. N.S. also identified Harvey as the person entering and driving the Saturn in the surveillance video. The state produced a photograph showing the shooter wearing a necklace like one that Harvey wore in photographs posted to his social media profile. At the time of trial, the Saturn had not been reported stolen and was still registered to Harvey.

The jury deliberated for less than two hours before returning a guilty verdict on all counts: (1) second-degree assault, Minn. Stat. § 609.222, subd. 1 (2020); (2) drive-by shooting toward an occupied motor vehicle, Minn. Stat. § 609.66, subd. 1e(a)(2) (Supp. 2021); and (3) possession of a firearm as an ineligible person, Minn. Stat. § 624.713, subd. 1(2) (2020). The district court entered judgments of conviction on all three counts but only

sentenced Harvey on two of those counts. Harvey was sentenced to 68 months' incarceration for the drive-by shooting charge and 60 months' incarceration for the charge of possession of a firearm by an ineligible person.

Harvey appeals.

DECISION

Harvey seeks a new trial, arguing that the district court committed reversible error by allowing a police officer to “conclusively” testify that he recognized Harvey in the gas station surveillance video. Although Harvey only asserted Minn. R. Evid. 403 as the basis for his objection to the testimony in the district court proceedings, he claims, for the first time on appeal, that the officer’s testimony should have been excluded because it was unhelpful to the jury under Minn. R. Evid. 701. He also maintains that he properly preserved that objection because the testimony’s unhelpfulness is what makes it prejudicial.

We address these arguments in turn.

I.

First, in arguing that the abuse-of-discretion standard of review applies to his challenge of the district court’s evidentiary ruling, Harvey claims that the bases for his objections to the officer’s identification testimony at trial, Minn. R. Evid. 403 (unfair prejudice), and on appeal, Minn. R. Evid. 701 (unhelpfulness), are the same. According to Harvey, the officer’s testimony “was highly prejudicial . . . because it was unhelpful.”

“[T]o properly preserve a claim that evidence should be excluded under the Minnesota Rules of Evidence, a defendant must ‘timely object[]’ and ‘state[] the *specific ground* of objection.’” *State v. Mosley*, 853 N.W.2d 789, 797 n.2 (Minn. 2014) (alteration in original) (quoting Minn. R. Evid. 103(a)(1)). The “specific ground for [the] objection” must include the specific rule of evidence or, at least the concept of the rule, that serves as its basis. *See id.* If a party raises new grounds for objection on appeal, a reviewing court should not consider those arguments. *See State v. Jackson*, 770 N.W.2d 470, 483 n.8 (Minn. 2009) (disregarding appellant’s argument that evidence was not relevant because it was not raised at the district court) (citing *State v. Bailey*, 732 N.W.2d 612, 623 (Minn. 2007)).

Here, both times that Harvey objected to the officer’s identification testimony, he referred only to the “highly prejudicial” nature of the officer’s testimony. Harvey’s concern “that the probative value [of the testimony] would be outweighed by the unfair prejudice that would result” was stated entirely in terms of Minn. R. Evid. 403. And Harvey never claimed, or even implied, either in his pre-trial motion or during trial, that the testimony would be unhelpful to the jury, even when the district court characterized the “basis” of Harvey’s objection as “[rule] 403,” which Harvey did not dispute. Because Harvey never raised rule 701 or unhelpfulness in objecting to the officer’s identification testimony before this appeal, he forfeited that argument. *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015).

Harvey argues that he properly preserved his objection on unhelpfulness grounds, Minn. R. Evid. 701, by objecting that the officer’s testimony was prejudicial under Minn. R. Evid. 403. However, whether evidence is unhelpful or prejudicial are distinct questions.

State v. DeShay, 669 N.W.2d 878, 888 (Minn. 2003) (“Even if acceptable under rule 702, expert testimony should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.”); *see also State v. Post*, 512 N.W.2d 99, 101-02 (Minn. 1994) (explaining that a rule 701 analysis focuses on “whether the witness personally knows what he or she is talking about and whether the testimony will be helpful to the jury,” unlike the rule 403 balancing factors). Therefore, to preserve an objection on the grounds that the officer’s testimony was unhelpful to the jury, Harvey must have separately raised that argument before the district court.

Because the evidence was admissible under rule 403, and Harvey has not shown that the court plainly erred by admitting it under rule 701, the forfeiture doctrine precludes the requested relief. *Beaulieu*, 859 N.W.2d at 280.¹

¹ Although the “[f]ailure to object to the admission of evidence generally constitutes waiver of the right to appeal on that basis . . . an appellate court may consider a waived issue” if there exists plain error that affects substantial rights. *State v. Vick*, 632 N.W.2d 676, 684-85 (Minn. 2001). As we explain below, the district court did not admit the officer’s identification testimony in error, at least on the grounds raised. Even if it had, we would conclude that Harvey has not met his “heavy burden” of showing that “the error was prejudicial and affected the outcome of the case,” as required under the substantial-rights prong of the plain-error test. *Id.* at 685 (quoting *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998)). Without getting into a detailed analysis of each factor laid out by the supreme court in *State v. Bigbear*, the evidence of Harvey’s guilt was strong and “highly persuasive,” it was provided in a manner that reasonably limited any potential risk of prejudice to Harvey, and the defense “effectively countered the evidence” by producing evidence suggesting another person in the photo lineup was the shooter. 10 N.W.3d 48, 54-55 (Minn. 2024) (providing list of non-exhaustive factors for analyzing whether the erroneously admitted evidence affected the outcome of the case and noting that the analysis is “fact-specific” such that “not all the factors are relevant or persuasive in every case”).

II.

We now turn to Harvey’s argument that the officer’s identification testimony should have been excluded under Minn. R. Evid. 403 because its probative value was substantially outweighed by the danger of unfair prejudice. Specifically, he argued that the testimony improperly influenced the jury because it came from an officer and encouraged the jury to make improper inferences, “even if there’s nothing testified . . . [regarding] the basis of [the officers’] knowledge.”

Appellate courts review evidentiary rulings for “clear abuse of discretion.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted). The party challenging an evidentiary ruling has the burden of showing that the district court abused its discretion. *State v. Robertson*, 884 N.W.2d 864, 872 (Minn. 2016). And even if we conclude that a district court abused its discretion, we will reverse only if there is “a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *Bigbear*, 10 N.W.3d at 54 (quotation omitted).

The rule at issue here, Minn. R. Evid. 403, provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. “Generally, evidence is relevant and has probative value when it logically tends to prove or disprove a material fact in issue.” *Mosley*, 853 N.W.2d at 797. “Unfair prejudice” in this context “does not mean the damage to the opponent’s case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage

that results from the capacity of the evidence to persuade by illegitimate means.” *Id.* (quoting *State v. Cermak*, 365 N.W.2d 243, 247 n.2 (Minn. 1985)) (citing *State v. Schulz*, 691 N.W.2d 474, 479 (Minn. 2005)).

The officer’s testimony that they recognized Harvey in the gas station surveillance video was highly relevant. It tended to prove the identity of the shooter, which was the sole disputed issue at trial. *See State v. Valentine*, 787 N.W.2d 630, 641 (Minn. App. 2010) (holding that “eliciting an officer’s testimony that he knows the defendant from prior context is error” if “identity is not an issue in the case”). And it was minimally prejudicial, if at all. For one, the district court appropriately minimized the risk of prejudice by allowing only one officer to testify that they recognized Harvey in the gas station surveillance video, “so that it sound[ed] less like an arrest and more like an ambiguous contact.” The district court also limited the scope of the officer’s testimony to exclude any mention of prior arrests involving Harvey, such that it served only to establish that the officer recognized Harvey in the surveillance footage and not to “suggest[] that [Harvey] was a person of bad character who had frequent contacts with the police.” *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002); *see State v. Patzold*, 917 N.W.2d 798, 807-08 (Minn. App. 2018) (holding that an officer’s testimony that he knew the defendant from prior contacts, without explaining what those contacts were, did not affect the defendant’s substantial rights); *see also State v. Labarre*, 2015 WL 404545, at *4 (Minn. App. Feb. 2, 2015) (concluding that, where “a discussion about a number of times officers had interacted with an

individual . . . was presented in order to establish that they were able to recognize the defendant,” the testimony was not more prejudicial than probative).²

In sum, the “persuasive force” of the officer’s identification testimony came not “from [its] capacity . . . to persuade by illegitimate means” but “from the legitimate probative force of the evidence.” *Mosley*, 853 N.W.2d at 797 (quotation omitted).

Affirmed.

² Nonprecedential opinions are not binding authority except as law of the case, but they may be cited for their persuasive value. Minn. R. Civ. App. P. 136.01, subd. 1(c).