This opinion is nonprecedential except as provided by Minn.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
A24-1491

State of Minnesota,
Respondent,

vs.

Donta Jaboat Brown,
Appellant.

Filed September 8, 2025
Affirmed; motion denied
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-CR-23-10460

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

Mary F. Moriarty, Hennepin County Attorney, Britta Nicholson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Eva F. Wailes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Frisch, Chief Judge; and Johnson, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this direct appeal from a final judgment of conviction for second-degree intentional murder for the benefit of a gang, appellant Donta Jaboat Brown argues that (1) the district court abused its discretion by admitting a prior recorded statement of a witness under the residual exception to the hearsay rule; (2) the district court abused its discretion by admitting cumulative and prejudicial gang-related evidence; (3) the prosecutor committed misconduct by eliciting hearsay, appealing to racial stereotypes, injecting a personal opinion into the case to endorse the credibility of a witness, and improperly making arguments in the opening statement; and (4) the cumulative effect of these errors deprived Brown of a fair trial. Because we discern no error, we affirm.

FACTS

The following factual summary is drawn from Brown's jury trial and relevant court records.

The Shooting

Around 4:30 a.m. on April 9, 2023, Minneapolis police responded to a reported shooting in north Minneapolis. Upon arriving at the scene, officers observed a handful of people standing in front of a house. As the officers approached, they observed that the people were surrounding a man who was lying on his back in the house's front yard. The man, who officers later identified as Q.Y., was bleeding from his head and neck area and was nonresponsive. An officer began CPR on Q.Y. Soon thereafter, Q.Y. was transported to the hospital where he was pronounced dead. An autopsy showed that Q.Y. was shot twice—once in the head and once in the neck, both times near his left ear—from an "intermediate range," meaning somewhere between inches to a few feet away.

Police Investigation

During the subsequent police investigation, a forensic scientist identified Q.Y.'s DNA on two discharged cartridge casings that police had found at the scene. Brown's DNA was not found on the casings. Police searched the house, and Brown's DNA was not found inside. Police determined that a nine-millimeter semi-automatic handgun was used to shoot Q.Y., but the weapon was never found.

About four days after the shooting, police received a statement from E.A., who told police that he had witnessed the shooting. According to police, E.A. stated that he was with Q.Y. on the night of the shooting and that they had been at a house in north Minneapolis for an "after-set party." E.A. stated that he had been on the front-porch area of the house when he observed the following: Brown left the house, Brown noticed that Q.Y. was in the front yard, Q.Y. was kneeling down to tie his shoes, and Brown took out a handgun and shot Q.Y. twice. E.A. knew it was Brown because E.A. had known Brown for over a decade.

About a month later, on May 17, 2023, police received a statement from K.N., who told police that he had been with Brown the night of the shooting. According to police, K.N. stated that he and Brown had arrived at the party together and that, as they were leaving, Brown shot Q.Y. while Q.Y. was bending down to tie his shoes. K.N. stated that he had been close enough to the shooting that he believed that Q.Y.'s blood was on his shoes. K.N. gave the police his shoes, and DNA testing confirmed that Q.Y.'s blood was on K.N.'s left shoe.

In addition to the eyewitness reports, officers were familiar with Brown and Q.Y. and knew that Brown was a member of the Stick Up Boys street gang, which is a sub-clique of another gang, the Lows, and that Q.Y. had previous associations with rival gangs, specifically, the gangs Taliban/Young N Thuggin (YNT),[1] which are sub-cliques of another gang, the Highs. The Highs and the Lows are the predominant gangs in north Minneapolis and "are in a war with each other"—members of each group refer to members of the other as "ops," meaning "opposition." Further, police knew that reputation is a core part of gang culture, and, if a gang member were to shoot an opposing or rival gang member, that act would build both the shooter's reputation and the reputation of their gang.

Brown's Arrest and Charges

On May 17, 2023, the same day that K.N. made his report, police arrested Brown. Two days later, the state charged Brown with one count of second-degree intentional murder for the benefit of a gang, in violation of Minnesota Statutes sections 609.19, subdivision 1(1), and 609.229 (2022), and with one count of second-degree intentional murder, in violation of Minnesota Statutes section 609.19, subdivision 1(1).

K.R.'s Statement

In mid-July 2023, an inmate at the Hennepin County jail, K.R., provided two of the homicide detectives assigned to Q.Y.'s case with a statement, which was recorded. In the recording, K.R. stated that he had talked to Brown in the jail five days earlier, when both K.R. and Brown were walking together to "medical." K.R. stated that he knew Brown because "everybody in the Lows knows him." K.R. stated that Brown told K.R. about "the op" Q.Y. and that Brown confessed to K.R. that he had shot Q.Y. outside when Q.Y. was "snoozing" at the party. K.R. stated that Brown said that "any time he ever get a chance

[1] According to police, the Taliban used to be a separate sub-clique of the Highs but eventually became part of YNT.

like that, he gonna take it every time." During K.R.'s statement, an officer asked for clarification about the word "snoozing," and K.R. agreed that "snoozing" meant that Q.Y. was not paying attention.

Jury Trial and Sentencing

The district court held a jury trial in May 2024. The state initially called 19 witnesses. Among the state's witnesses were the two eyewitnesses, E.A. and K.N., who recounted what they had reported to police—that they witnessed Brown shoot Q.Y. The state also called K.R., but he initially refused to answer questions and then recanted his recorded statement, claiming that he was forced by police to make the statement about Brown confessing to shooting Q.Y. Nevertheless, one of the homicide detectives assigned to Q.Y.'s case, Sergeant Andrew Schroeder, testified that K.R. had provided him with a statement that Brown confessed to killing Q.Y., and the district court subsequently admitted the recording of K.R.'s statement into evidence. Sergeant Schroeder also provided other testimony about the investigation as well as expert testimony about the gangs in north Minneapolis. Finally, another detective who testified as a witness for the state provided evidence showing that a phone that Brown had been known to use "was in the immediate area consistent with [the house where the shooting occurred] at the time of the homicide." The defense then called three witnesses who testified that Brown was not at the party when Q.Y. was shot. After that, the state called two additional witnesses to rebut Brown's alibi.

The jury returned a verdict of guilty on both counts. The district court entered a conviction for second-degree intentional murder for the benefit of a gang and sentenced Brown to the presumptive sentence of 438 months in prison.

Brown appeals.

DECISION

Brown makes four arguments on appeal, challenging (1) the admission of K.R.'s prior recorded statement, (2) the admission of gang-related expert testimony and photos, (3) several aspects of the prosecutor's conduct, and (4) whether Brown received a fair trial given the cumulative effect of the errors. We address each of Brown's arguments in turn.

I. The district court did not abuse its discretion by admitting K.R.'s prior recorded statement under the residual exception to the hearsay rule.

Brown argues that the district court abused its discretion by admitting, over his objection, the prior recorded statement of K.R. under the residual exception to the hearsay rule because K.R.'s "statement lacked circumstantial guarantees of trustworthiness, was not more probative than other evidence, and did not serve the interests of justice."

Evidentiary rulings are reviewed for a clear abuse of discretion. *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). To obtain reversal based on an objected-to evidentiary error that does not implicate a constitutional right, an appellant "must prove that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016) (quotation omitted).

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). It is generally "not admissible except as provided by [the Minnesota Rules of Evidence] or by other rules prescribed by the [Minnesota] Supreme Court or by the Legislature." Minn. R. Evid. 802. Hearsay that is not covered by a specific exception may still be admitted under the residual hearsay exception provided by Minnesota Rule of Evidence 807. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019). Rule 807 provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

To determine whether to admit a hearsay statement under rule 807, the district court conducts a two-step analysis. *Id.* at 292. "First, the district court must look at the totality of the circumstances to determine whether the hearsay statement has circumstantial guarantees of trustworthiness." *Id.* (quotations omitted). Second, it must determine whether requirements (A) through (C) listed in rule 807 are met. *Id.* at 293. If the district court evaluates some, but not all, aspects of rule 807, appellate courts may independently review the record to determine whether the statement at issue is admissible under the rule.[2] *See id.* at 294-97.

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[2] Brown argues for the first time in his reply brief that the district court's failure to explicitly address the three enumerated requirements of rule 807 is reversible error. Brown bases his argument on *State v. Wersinger*, a nonprecedential opinion in which we decided not to conduct an independent review of the facts to determine whether the requirements under rule 807 were met because "[t]he district court provided no legal analysis on rule 807, and the record [was] also devoid of any findings or analysis concerning the recorded statement itself." No. A19-0738, 2020 WL 2703718, at *4 (Minn. App. May 26, 2020). The state has moved to strike this argument, claiming that this is a new procedural argument that was not raised in Brown's principal brief.

Wersinger is not persuasive here. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) (stating that nonprecedential opinions may be considered for their persuasive value). As

We address both steps in our analysis of the district court's admission of K.R.'s statement. But before doing so, we provide the following additional details about the circumstances that inform our analysis.

K.R. initially refused to testify at trial. After a discussion between the parties, the district court ordered K.R. to the stand for the prosecutor to ask whether K.R. knew Brown and whether K.R. spoke to an officer in July 2023. K.R. refused to answer the prosecutor's questions, but he responded to defense counsel on cross-examination, agreeing that he never had a meeting with Brown, that police had given him the information that he then gave the detectives in his recorded statement, and that he felt coerced into saying that he met with Brown.

Sergeant Schroeder testified after K.R. and stated that he took a recorded statement from K.R. in July 2023, that K.R. was the one who reached out and voluntarily provided the statement, that K.R. was not fed information or pressured to make a statement, that K.R. had provided truthful information in the past, and that K.R. did not request or receive any benefit in exchange for making the statement. But Sergeant Schroeder did note that, when K.R. made his statement, he was facing criminal charges and he provided information

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described below, the record here is not completely devoid of analysis related to rule 807; rather, Brown's case is comparable to *Hallmark*, in which the district court admitted a prior recorded statement based on factors related to circumstantial guarantees of trustworthiness and "without discussing the three prongs of Rule 807 itself." 927 N.W.2d at 294. Accordingly, like in *Hallmark*, because the district court made some findings related to the first step of the rule 807 analysis, we conclude that we may conduct an independent review of the record to determine whether there was an abuse of discretion in admitting the recorded statement, even though the district court did not explicitly address the enumerated requirements under rule 807. *See id.* And, as a result, we deny the state's motion to strike as moot.

"to try and help himself out." After the sergeant's testimony, the district court admitted the audio recording of K.R.'s statement as substantive evidence under rule 807. The recording was then played for the jury.

A. Circumstantial Guarantees of Trustworthiness

When determining whether a statement has circumstantial guarantees of trustworthiness, courts generally consider four factors, known as the *Ortlepp* factors. *Id.* at 292-93. These factors are (1) whether there is a Confrontation Clause issue, (2) whether "the statement is recorded, removing any real dispute about what the declarant said," (3) whether "the statement is against the declarant's penal interest," and (4) whether the statement is consistent with other evidence "pointing strongly toward" guilt. *Id.* at 293; *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985). Since deciding *Ortlepp*, the supreme court has noted additional relevant factors, including whether the statement was made voluntarily; whether it was made under oath and subject to cross-examination; the declarant's motivation for making the statement, relationship to the parties in the litigation, and personal knowledge of the statement; whether the declarant recanted; whether there is corroborating evidence; and the declarant's reputation for honesty. *State v. Vangrevenhof*, 941 N.W.2d 730, 736 (Minn. 2020) (explaining that the *Ortlepp* factors are nonexclusive and are merely meant to represent the totality of the circumstances).

In considering whether to admit K.R.'s statement, the district court noted the following circumstances: defense counsel had cross-examined K.R., who answered defense counsel's questions, and, as a result, there was no issue under the Confrontation Clause; K.R. had previously provided truthful information to Sergeant Schroeder; K.R. had recanted his statement, stating at trial that police forced him to make it; and K.R. had a self-interest in providing useful information because he was in jail and facing charges. Weighing these circumstances, the district court "[found] that the circumstances [were] sufficiently reliable to allow admission."

Brown argues that the district court incorrectly weighed the relevant circumstances and that it should have found that K.R.'s statement lacked sufficient guarantees of trustworthiness because K.R.'s statement was not sworn, the statement was made under duress, K.R. had a reason to lie, and K.R. testified at trial that the conversation between him and Brown never happened. The argument is unavailing.

With the exception of K.R.'s statement not being sworn, the district court explicitly took into account the circumstances cited by Brown. It weighed those circumstances against other factors indicating reliability and determined that the statement was sufficiently reliable. The fact that the statement was not sworn does not invalidate the district court's determination of reliability. Additionally, K.R.'s statement was recorded, preventing any argument about what K.R. told the officer, and K.R.'s statement that Brown confessed that Brown shot Q.Y. when Q.Y. was "snoozing" outside of a party is consistent with eyewitness accounts that Q.Y. was shot while he was bending down to tie his shoes outside of a party. *See Ortlepp*, 363 N.W.2d at 44.

Accordingly, while some factors weigh against admitting K.R.'s statement, we conclude that the district court did not abuse its discretion by determining that the first step of rule 807 was satisfied. *See id.*; *Vangrevenhof*, 941 N.W.2d at 736.

B. Enumerated Requirements Under Rule 807

Next, Brown argues that two of the enumerated requirements under rule 807 were not met.[3] Although the district court did not address these requirements before admitting the statement, the record supports that these requirements were met.

Brown argues that the second enumerated requirement under rule 807—that "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts"—was not met because K.R.'s statement "was not more probative than other evidence, namely, [K.R.'s] in-person courtroom testimony." To satisfy the second requirement under rule 807, courts should "consider whether other admissible evidence on the same point could be obtained through reasonable efforts." *Hallmark*, 927 N.W.2d at 294.

During the trial, K.R. was asked leading questions by both the prosecutor and defense counsel; he provided contradictory answers about what he said when he talked to police; and he never described what he told Sergeant Schroeder about Brown in July 2023, despite being given multiple opportunities to do so. For example, some of K.R.'s responses regarding his statement to Sergeant Schroeder were as follows:

> Q: You told [Sergeant Schroeder] that you had a statement or you talked about [Brown] on the way to the infirmary or the medical center in the jail, correct?
> A: No.
>
> Q: You didn't tell him that?

[3] Brown concedes that the first enumerated requirement under rule 807 was satisfied because K.R.'s statement was offered to establish that Brown confessed to killing Q.Y., which is a material fact. *See* Minn. E. Evid. 807.

> A: No.
>
> . . . .
> Q: Did the conversation [with Sergeant Schroeder in July] happen?
> A: I don't remember.
>
> . . . .
> Q: So you told Sergeant Schroeder that you [and Brown] had gone down to the medical unit . . . ; is that correct?
> A: Yes.
>
> . . . .
> Q: So when you told Sergeant Schroeder that [Brown] told you that he shot [Q.Y.], that never happened?
> A: I was forced. He told me what—what supposedly happened.

Due to the contradictory nature of K.R.'s testimony, the most probative way to address what K.R. told Sergeant Schroeder about Brown, including what K.R. stated that Brown confessed to, was through the recorded statement. For these reasons, the recorded statement was more probative on the point for which it was offered—namely, what Brown allegedly confessed to—than any other evidence that could have been procured and, as a result, it satisfied the second requirement under rule 807. Whether K.R. truthfully made that statement or was forced to do so was a separate question for the jury. *Compare* Minn. R. Evid. 104(a) (stating that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court"), *with State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005) ("Witness credibility determinations are strictly the domain of the jury.").

Brown also argues that the third enumerated requirement under rule 807—that admission would serve "the general purposes of [the Minnesota Rules of Evidence] and the interests of justice"—was not met because the state presented other evidence of the crime, and, therefore, admission of the recorded statement was unnecessary, cumulative evidence. Minn. R. Evid. 807. The purpose of the third requirement of rule 807 is "to promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *See Hallmark*, 927 N.W.2d at 294 (quotation omitted).

Even though the state had produced other evidence of the crime, including the testimony of two eyewitnesses, evidence of a confession by Brown and of Brown's motivation for the crime remained relevant evidence that could have helped the jury ascertain the truth about who committed the murder and whether it was committed for the benefit of a gang. Therefore, we conclude that admission of the recorded statement served the purposes of the evidentiary rules and the interests of justice and satisfied the third enumerated requirement.

In sum, the district court did not abuse its discretion by admitting K.R.'s recorded statement.

II. The district court did not abuse its discretion by admitting certain gang-related expert testimony and photos.

Brown argues that the district court abused its discretion by admitting, over his objection, gang-related evidence—namely, expert testimony from Sergeant Schroeder about north Minneapolis gangs and photos suggesting that K.R. and Brown were associated with gangs—because the evidence was unhelpful to the jury, duplicative, and more prejudicial than probative. We address each piece of evidence in turn.

A. Expert Testimony

An expert may testify "in the form of an opinion" if the expert's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. Generally, expert testimony about gangs is admissible when a defendant is charged with committing an offense for the benefit of a gang and the expert testimony will add "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) (quotation omitted). "The ultimate question of admissibility under Rule 702 is whether the expert's testimony will help the jury evaluate the evidence or resolve factual issues." *Id.* at 841 (quotation omitted). Even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." Minn. R. Evid. 403. Appellate courts "review evidentiary rulings, including those related to the admissibility of expert testimony, for an abuse of discretion." *Thao*, 875 N.W.2d at 840.

Brown was charged with second-degree murder for the benefit of a gang in violation of Minnesota Statutes section 609.19, subdivision 1(1), with reference to Minnesota Statutes section 609.229. To be sentenced for a crime under section 609.229, subdivision 3(a), the defendant must have "commit[ted] 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." Minn. Stat. § 609.229, subd. 2. A "criminal gang," for the purposes of this section, is defined as follows:

> [A]ny ongoing organization, association, or group of three or more persons . . . 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.

Id., subd. 1.

Brown argues that Sergeant Schroeder's gang-related testimony was inadmissible because it was too general, duplicative, and prejudicial. We disagree.

First, the fact that testimony is general in nature does not necessarily make it inadmissible so long as it is helpful to the jury. In *State v. Jackson*, the supreme court determined that expert testimony about general aspects of gang culture, such as the role of respect, was admissible "[b]ecause jurors are unlikely to be familiar with gang culture" and such testimony can be "helpful to establish the 'for the benefit of a gang' element and to explain the state's theory of motive." 714 N.W.2d 681, 692 (Minn. 2006). Similarly, here, Sergeant Schroeder's testimony about the history, structure, and activities of the north Minneapolis gangs would have assisted the jury in resolving whether the groups fell within the statutory definition of "criminal gang." *See* Minn. Stat. § 609.229, subd. 1. And his testimony about territorial boundaries and culture, including the importance of reputation, would have helped jurors to evaluate whether the offense was motivated by involvement with a criminal gang. *See id.*, subd. 2.

Second, although other witnesses discussed gang culture during their testimony, Sergeant Schroeder's testimony was not cumulative. Sergeant Schroeder's testimony provided a comprehensive overview about the history, structure, activities, and culture of the gangs in north Minneapolis, much of which was not fully covered by other witnesses' testimony. And, for the same reasons discussed above, such a comprehensive overview would have been helpful to the jury. *See Jackson*, 714 N.W.2d at 692.

Finally, Sergeant Schroeder's testimony was more probative than prejudicial. The supreme court has acknowledged that "[m]ost evidence introduced to prove the 'for the benefit of a gang' element is likely to be improperly prejudicial to some degree by suggesting guilt based on gang membership alone." *Id.* But all such evidence cannot be prohibited without "rendering convictions under [section 609.229] nearly impossible to obtain." *Id.* In *Jackson*, the supreme court determined that, "while [the sheriff's] testimony about gang culture and the Bloods gang may have posed some risk of prejudice, it did not require exclusion under Minn. R. Evid. 403 because it had significant probative value." *Id.* Similarly, here, Sergeant Schroeder's expert testimony about the history and culture of the gangs was highly probative regarding whether the groups at issue should be considered "criminal gangs" under section 609.229 and whether Brown's alleged acts were for the benefit of a criminal gang. Therefore, to the extent that the testimony may have been prejudicial, that prejudice was outweighed by its probative value. Accordingly, the district court did not abuse its discretion by permitting Sergeant Schroeder's expert testimony about gangs in north Minneapolis.

B. Photos

Brown also argues that the photos of K.R. and Brown that were admitted during Sergeant Schroeder's testimony to show that both men were affiliated with gangs were "redundant, cumulative, misleading, confusing, and with an unknown timeframe." Brown asserts that the district court abused its discretion by admitting the photos because they were more prejudicial than probative. *See* Minn. R. Evid. 403. Again, we review the district court's evidentiary rulings for an abuse of discretion. *Ali*, 855 N.W.2d at 249.

The district court admitted five photos of K.R. One photo shows K.R. alone while the other four show him with other men. In all the photos, at least one person is making a sign with their hands. Sergeant Schroeder testified about who was in the photos, that most of the individuals pictured were associated with the Lows, and about what the various hand signs meant. Because K.R. recanted his testimony, having five images showing that K.R. had some affiliation with the Lows, which is the same gang that Brown was associated with, would have been helpful for the jury in determining how to assess K.R.'s credibility, particularly in light of K.R.'s testimony that he did not know Brown and only said that he did because he was "forced" to by police. And, while Sergeant Schroeder testified that K.R. was a member of the Lows, the photos would have helped bolster the credibility of Schroeder's testimony and, given the relatively small number of photos, were not cumulative.

The district court also admitted 14 photos and one video without audio that either show Brown or were posted on Brown's social media. All show gang-related hand signs or tattoos. Although other witnesses had testified that Brown was associated with gangs, the photos and video would have helped support the credibility of those witnesses' testimony by providing evidence showing Brown associating with gangs. Further, the photos of K.R. and the photos and video of Brown helped to demonstrate that the gangs that both men associated with, including the Lows, had a "common identifying sign or symbol"—namely, a common hand signal—which is an element of the statutory definition of "criminal gang." Minn. Stat. § 609.229, subd. 1(2).

Therefore, we conclude that the district court did not abuse its discretion by admitting the photos because the evidence was not needlessly cumulative, and its probative value was not outweighed by the danger of unfair prejudice. *See* Minn. R. Evid. 403; *Jackson*, 714 N.W.2d at 692.

III. The prosecutor did not commit plain misconduct.

"A prosecutor engages in prosecutorial misconduct when he violates clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted). When, as here, the defendant fails to object during trial, prosecutorial misconduct is reviewed under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006); *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010) (referring to the standard outlined in *Ramey* as "the modified plain-error test"). Under this standard, the defendant bears the burden of establishing error that is plain. *Ramey*, 721 N.W.2d at 302. An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* If the defendant meets their burden, the burden shifts to the state "to show that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *Id.* (quotation omitted). "If the state fails to demonstrate that substantial rights were not affected, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (quotation omitted).

Brown argues that the prosecutor committed reversible plain prosecutorial misconduct by eliciting hearsay, appealing to racial stereotypes, injecting a personal opinion into the case to endorse the credibility of a witness, and making improper arguments in the opening statement. We address each argument in turn.

A. Eliciting Hearsay from a Witness

First, Brown contends that the prosecutor plainly erred by eliciting hearsay from Sergeant Schroeder about what K.R. said in his recorded statement before the statement was admitted.

Absent an exception, hearsay is generally not admissible in a criminal trial. Minn. R. Evid. 802. And "[i]t is generally misconduct for a prosecutor to knowingly offer inadmissible evidence for the purpose of bringing it to the jury's attention." *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014) (quotation omitted).

Before Sergeant Schroeder testified, the district court stated, "As to the hearsay rule, I am applying . . . *Ortlepp* and if I believe that the statement was taken under sufficiently reliable circumstances under 807, I will allow it in." The parties then agreed that Sergeant Schroeder would testify about the circumstances under which K.R.'s statement was taken for the purposes of determining whether the recorded statement would be admissible under rule 807 and agreed that the jury could be in the courtroom for that testimony. During the subsequent direct examination of Sergeant Schroeder, but before the district court admitted

K.R.'s recorded statement, the prosecutor elicited the following statements from Sergeant Schroeder:

> Q: What types of things were discussed in the conversation on July 17, 2023?
> A: I met with [K.R.]. He told me he had information which, from my memory, he told me what—murder of [Q.Y.]. And I knew that—or from my memory, he was in jail at the time, so I was a little bit curious how he could have information about it. He proceeded to tell me that him and [Brown]—he used the term—his nickname DeBo—met at the medical cart or medical office and that they were actually in adjoining cellblocks.
>
> . . . .
> Q: When they went to this medical location together, what did [K.R.] say happened?
> A: The CliffsNotes version is he said that [Brown]—well, that [Brown] confessed to him.
>
> Q: And when he confessed to him, is that in the homicide of [Q.Y.]?
> A: Correct.
>
> Q: Did [K.R.] give you detailed information that allowed you to understand he knew the exact homicide and exact facts that were presented in this homicide?
> A: Yes.
>
> Q: Do you recall what those facts were?
> A: He said that [Brown] admitted catching, I believe he used the word "op" outside, which [Q.Y.] was killed outside. And caught him—[K.R.] used the term "lacking," and I asked for clarification. I said, "what does that mean?" And he said, "you know, he caught him, like, snoozing, asleep, not paying attention." And that was exactly the facts of the homicide from our investigation.

While the prosecutor's questions elicited testimony from Sergeant Schroeder about what K.R. said on the recording before the recording was admitted, the prosecutor's questions about K.R.'s statements addressed the requirements of rule 807, which the district court needed to evaluate to decide whether to admit the statement. The questions about the "types of things" discussed between Sergeant Schroeder and K.R. and whether K.R.'s statement included him stating that Brown had confessed to K.R. that Brown shot Q.Y. both address the point for which the state wanted to offer the statement—to show that Brown confessed to shooting Q.Y. *See* Minn. R. Evid. 807 (requiring that "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts"). And the questions asking about the facts that allowed Sergeant Schroeder to know that K.R. was talking about this "exact homicide" address whether K.R.'s statement in the recording was consistent with other eyewitnesses' testimony. *See Ortlepp*, 363 N.W.2d at 44 (considering, as part of the rule 807 analysis, whether the statement at issue was consistent with other evidence pointing toward guilt). Although the relevant factors for rule 807 purposes likely could have been addressed with less detailed testimony from the sergeant about the content of K.R.'s statement, we cannot say that the prosecutor's questioning constituted plain error.

B. Appealing to Racial Stereotypes

Second, Brown contends that the prosecutor committed plain misconduct by appealing to racial stereotypes and playing to the passions and prejudices of the jury during closing argument.[4]

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[4] Brown notes another instance of racial stereotyping that occurred during voir dire, but he does not appear to assert that it requires reversal. The statement at issue was made by the prosecutor during an exchange with a potential juror. It took place outside the presence of the other potential jurors, the potential juror in question did not serve on the jury, and the district court chastised the prosecutor for the statement. Accordingly, to the extent that Brown argues that this statement constituted reversible misconduct, we disagree.

"[T]he prosecutor and the defense have considerable latitude in closing argument, for neither is required to make a colorless argument." *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). Even "dramatic characterizations" may be permissible "when the evidence at trial supported those characterizations." *Matthews*, 779 N.W.2d at 551 (quotation omitted). However, parties may not inject race into their arguments when the issue is not relevant. *State v. Ray*, 659 N.W.2d 736, 747 (Minn. 2003). "[R]acial considerations, in particular, can affect a juror's impartiality and must be removed from courtroom proceedings to the fullest extent possible." *State v. Varner*, 643 N.W.2d 298, 304 (Minn. 2002). In evaluating alleged misconduct during a closing argument, appellate courts consider "the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Munt*, 831 N.W.2d 569, 587 (Minn. 2013) (quotation omitted).

Brown asserts that the prosecutor committed plain error when they started their closing argument by stating: "In the State of Minnesota, we enjoy hunting. But the only location—the City of Minneapolis—where hunting for sport is of human beings. You've heard, through the testimony throughout this trial—killing for sport in North Minneapolis is for a score." Brown argues that this statement implied that the jury should fear north Minneapolis, and because north Minneapolis has a large Black population, the prosecutor was inserting racial bias into their argument.

We note that the prosecutor did not mention race in their statement and Brown does not point to any evidence presented at trial about the racial composition of north Minneapolis. And, importantly, the prosecutor was apparently trying to call the jury's attention back to Sergeant Schroeder's testimony that gang members "go hunt each other down" when they experience disrespect from rival gangs and that gang members "keep score or often brag about" killing members from other gangs. Accordingly, we conclude that the prosecutor's closing argument, while dramatic, was not plain error because the statement had a basis in the record and was not an appeal to racial stereotypes. *See Matthews*, 779 N.W.2d at 551; *see also State v. Paul*, 716 N.W.2d 329, 340-41 (Minn. 2006) (holding that it was not plain error for prosecutor to argue that murder took place in "real world" when prosecutor did not mention race or culture and where remarks were brief and not demeaning); *Jackson*, 714 N.W.2d at 695 (holding that prosecutor's references to "gang world" were proper where designed to introduce jurors to unfamiliar behaviors of gang culture).

C. Injecting Personal Opinion and Endorsing a Witness's Credibility

Third, Brown contends that the prosecutor committed plain misconduct by injecting their personal opinion into the case and endorsing the credibility of K.N. during closing argument.

During closing argument, a prosecutor may argue whether a witness is credible but "must not personally endorse a witness's credibility." *State v. Martin*, 773 N.W.2d 89, 106 (Minn. 2009). Specifically, appellate courts have discouraged the use of the first-person "I," but they have acknowledged that the use of "I" does not always constitute prosecutorial misconduct. *See Blanche*, 696 N.W.2d at 375 (cautioning against use of first-person statements but concluding that prosecutor who prefaced 18 statements with "I suggest to you," "I think," or "I submit to you" did not commit plain error). In *Blanche*, the supreme court determined that there was not plain error where “the prosecutor’s use of [first-person] phrases was inadvertent and rooted in the prosecutor’s rhetorical idiosyncrasies and . . . the prosecutor’s comments were not such that a jury would view the prosecutor as taking on the role of a witness.” *Id.* (quotation omitted).

Here, the prosecutor described how one of the eyewitnesses, K.N., had been hesitant to say that Brown shot Q.Y. when making his statement to police and offered reasons why that may have been the case, stating:

> [K.N.] said, I saw the guy in the blue and the white jacket lift up his arm and shoot the guy in front of me. And the guy in the blue and the white jacket was [Brown]. That’s what he said.
>
> . . . [Y]ou also heard [K.N.] describe to you that, after this shooting, he heard who [Brown] is and what he does. Yeah. *I’d probably want to minimize too.* If you’re worried about picking out that name of that gang member—say just enough to be helpful because of this horrible situation that you just saw in front of you, but try and protect yourself a little.
>
> Because what if he finds out? *So maybe I’ll just tell you what the guy was wearing, where he was standing.* Said he was right in front of me—and that that was the shooter and that—that’s what he was wearing. *Connect the dots so I don’t have to say the name.*

(Emphasis added.) Brown asserts that the italicized statements are the prosecutor’s personal opinion and that they endorsed K.N.’s credibility “by telling the jurors that [the prosecutor] would act in the same way and say the same things that the witness did.” We are not persuaded.

While an advocate’s use of “I” should be avoided during closing argument, here, the prosecutor was not expressing their approval of K.N.’s actions; rather, they were trying to describe what K.N. might have been thinking when he gave his statement to police and why that may have led him to act the way that he did. The state argues that this was "inadvertent, rhetorical phrasing" based on the evidence. We agree and, as a result, conclude that this was not plain error. *See id.*

D. Making Improper Arguments in Opening Statement

Fourth, Brown contends that the prosecutor committed misconduct by improperly arguing during opening statement.

This court has stated that "[a]n opening statement may not contain argument but rather must be confined to a description or outline of the facts a party expects to prove." *State v. Montgomery*, 707 N.W.2d 392, 399 (Minn. App. 2005). The prosecutor's opening statement should be

> a recital of factual claims expressed with an intention and expectation that testimony will be offered and received to support them. If the facts are stated in good faith with reasonable grounds to believe that the evidence to be offered in proof of such facts is admissible, no error is committed.

Tucker v. State, 245 N.W.2d 199, 202 (Minn. 1976) (emphasis omitted) (quotation omitted).

Here, during the opening statement, the prosecutor stated:

> You're not going to see a murder weapon *because people don't hold onto guns that they use to kill people*. . . .
>
> On top of that, what you'll see is [that] cell phone records show that just minutes after executing [Q.Y.] in the front yard of that party, *this defendant cut off his phone, we would argue, to prevent further detection of his movements from that point on*.

(Emphasis added.) Brown asserts that both italicized remarks are improper because they were "not limited to a description or outline of the facts the state expected to prove at trial" and were not intended to help the jury track the trial testimony. We are not persuaded.

The first statement that "people don't hold onto guns that they use to kill people," is information that the prosecutor could have reasonably expected one of the witnesses to testify about—for example, Sergeant Schroeder could have discussed what he has commonly seen during his years of experience in law enforcement. As to the second statement, the prosecutor prefaced the idea about the phone being shut off to prevent further detection by stating that it was something that the state "would argue." It is apparent that the prosecutor was previewing an argument that the state planned to make in closing argument based on cell-phone evidence that would be presented showing that a phone, with a number commonly used by Brown, was in the immediate area of the homicide when it occurred and that, shortly thereafter, the phone was either turned off or put in airplane mode, making it untraceable. In context, we conclude that neither statement was plain error. *See id.*

Because we conclude that the prosecutor did not commit plain error, we do not address the remaining elements of the modified plain-error standard. *See Ramey*, 721 N.W.2d at 302.

IV. The cumulative effect of the alleged errors does not warrant a new trial.

Brown argues that, even if each error by itself was harmless, the cumulative effect of the errors deprived Brown of a fair trial. "An appellant may be entitled to a new trial in rare cases where the errors, when taken cumulatively, have the effect of denying the appellant a fair trial." *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017) (quotation omitted). Because we determine that the district court did not err by admitting K.R.'s prior recorded statement or the gang-related expert testimony and photos and the prosecutor's conduct was not plainly erroneous, there were no errors that collectively resulted in an unfair trial.

Affirmed; motion denied.