STATE OF MINNESOTA
IN COURT OF APPEALS
A25-0085

State of Minnesota,
Respondent,

vs.

Travis Joel Bauer,
Appellant.

Filed December 15, 2025
Affirmed
Bratvold, Judge

Sibley County District Court
File No. 72-CR-23-80

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

Donald E. Lannoye, Sibley County Attorney, Gaylord, Minnesota (for respondent)

Zachary C. Graham, Halberg Criminal Defense, Bloomington, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Bjorkman, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this direct appeal from a final judgment of conviction for second-degree intentional murder, appellant presents four arguments, which we have reorganized somewhat for ease of discussion. First, appellant contends that the circumstantial evidence is insufficient to sustain the jury's guilty verdict, requiring reversal of his conviction.

Second, appellant argues that four trial errors warrant a new trial: (A) the district court abused its discretion during jury selection; (B) the district court abused its discretion by denying appellant's motion for a *Schwartz* hearing on alleged juror misconduct;[1] (C) the district court abused its discretion by admitting evidence in error; and (D) the prosecuting attorney committed prejudicial misconduct during closing arguments. Third, and alternatively, appellant argues that cumulative trial errors denied appellant his right to a fair trial.[2] Fourth, appellant maintains that the district court abused its discretion during sentencing by imposing a "top of the box" sentence.

Because the evidence is sufficient to sustain the conviction, the challenged trial issues either lack merit or do not require correction in a new trial, cumulative error does not warrant a new trial, and the district court did not abuse its discretion when it imposed a sentence that followed the Minnesota Sentencing Guidelines, we affirm.

FACTS

Respondent State of Minnesota, following the decision of a grand jury, indicted appellant Travis Joel Bauer for first-degree premeditated murder under Minn. Stat. § 609.185(a)(1) (2022). A jury trial was held from October 7 to 18, 2024. The jury found

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[1] "A *Schwartz* hearing provides a party an opportunity to impeach a verdict due to juror misconduct or bias." *Pulczinski v. State*, 972 N.W.2d 347, 361 (Minn. 2022); *see also Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301 (Minn. 1960).

[2] On appeal, Bauer argues a sixth trial error in his brief, urging that the district court abused its discretion when communicating with the jury by implying that the jury had to keep deliberating on a Friday evening and could not break for the weekend. During oral argument to this court, Bauer's attorney conceded that the district court communicated appropriately with the jury about its deliberation options. Thus, we do not consider the issue further.

Bauer not guilty of first-degree premeditated murder and guilty of second-degree intentional murder under Minn. Stat. § 609.19, subd. 1(1) (2022). The following summarizes the evidence received at trial.

At 2:35 p.m. on September 20, 2022, Bauer called 911 to report that he had just found his longtime farming partner D.W. "passed out in a chair [with] blood all over the place" in a machine shed on D.W.'s farm. During the 911 call, Bauer stated that about 10 to 15 minutes before he found D.W.—at approximately 2:20 p.m.—Bauer was driving south from the farm toward Winthrop when he met D.W., who was driving north toward D.W.'s farm. Bauer told the 911 dispatcher that he did not know whether D.W. was breathing and that he had not touched D.W. Bauer later told an investigator that he did not try to help D.W. The district court received a recording of the 911 call into evidence.

The first law-enforcement officer to arrive testified that he saw D.W. "seated in a chair . . . roughly five to ten feet within [a] machine shed." The officer immediately determined that D.W. was dead. Trial testimony was consistent that D.W. was likely seated when he was shot and was not moved. D.W.'s body faced east; the open doors of the machine shed faced south.

The medical examiner who performed the autopsy on D.W.'s body testified that the cause of D.W.'s death was a single gunshot to the back of his head "consistent with a .22" caliber bullet. The medical examiner determined that the manner of death was homicide. Law-enforcement investigators did not connect a weapon or cartridge casing to D.W.'s

shooting or uncover a witness to the shooting. No ballistics analysis was done on the bullet that killed D.W.[3]

The law-enforcement investigation considered whether a fight or robbery occurred in the machine shed. The first BCA special agent (first BCA agent) testified, "There was no evidence of a struggle or a physical fight that I could see. [D.W.'s] sunglasses were still on." The first BCA agent added that "[i]t appeared as though [D.W.] may have been shucking corn" because there was shucked corn around the chair where his body was found and corn silk in his hand. The BCA forensic scientist testified to finding D.W.'s cell phone and $115 or $116 in cash in his pockets. The first BCA agent agreed that there was "no evidence" that "this was a potential robbery" and that "[n]o items were missing from the barn or any of the out areas."

During trial, law-enforcement investigators responded to questions about whether the bullet that killed D.W. came from outside the machine shed. The first BCA agent stated, "I wouldn't say it's impossible, but I thought it was very unlikely"; he noted that, "[i]f you look at where" D.W. was in the machine shed, "there's not a big window there and there's a barn in the way."[4] The first BCA agent also rejected the possibility that the shooter stood

[3] A firearms examiner from the Minnesota Bureau of Criminal Apprehension (BCA) testified that, "due to the damaged condition" of the bullet recovered from D.W.'s body, he was unable to "do a database search for this bullet so even if a firearm was recovered" he "wouldn't be able to do any comparisons with it."

[4] Other law-enforcement testimony established that the machine shed was surrounded by vehicles and equipment. The BCA forensic scientist testified that the machine shed where D.W. was found was "particularly long" and that there were three rows of vehicles and equipment inside, "including a grain semi and combine" on the north side.

outside the machine-shed doors just south of the body because, "if a person was out here to the south, if [D.W.'s] body is in this position or approximately this position when the shot is fired . . . [t]he bullet would have to come and turn, make a right-hand turn."

A Sibley County sheriff's deputy testified that law enforcement searched the property for "weapons, footprints, any indication that someone would have been in" the other buildings on D.W.'s farm and to determine whether any damage to buildings could have resulted from a bullet. The search did not yield "anything of evidentiary value." The BCA forensic scientist testified that officers also searched around and beneath vehicles in the machine shed, "looking for potential bullet holes in windows or doors or flat tires" or "a thrown piece of evidence or blood somewhere," and that law-enforcement officers did not find any bullet damage or other evidence in the machine shed.

Law-enforcement investigators interviewed Bauer three times. Bauer's statements were recorded, but the recordings were not offered into evidence.[5] Law-enforcement investigators who conducted the interviews testified to Bauer's statements during the interviews.

September 20 Interview: On the day of D.W.'s death, Bauer told law-enforcement investigators that he and D.W. were working together on D.W.'s farm in the morning. Around noon, they separated for a lunch break, each going to his own home. D.W.'s home was in Winthrop, just south of D.W.'s farm. Bauer's home, which was on a farm, was southwest of D.W.'s farm and just outside Winthrop.

[5] The district court received the interview recordings as court exhibits, but the recordings were not played for the jury.

Bauer told investigators that he returned to D.W.'s farm around 1:30 p.m., then left D.W.'s farm after 2:00 p.m. to go to an auto-parts store in Winthrop. As Bauer drove south, he met D.W. on the road about 10 to 15 minutes before he placed the 911 call. The first BCA agent testified that Bauer described meeting D.W. on County Road 57 at a point "right where the gravel meets the blacktop on the north side of Winthrop." Bauer also stated that he spent about 10 or 15 minutes in the auto-parts store, that he made no other stops, and that he returned to D.W.'s farm, where he discovered D.W. and called 911.

Later in the same interview, investigators asked Bauer for his clothing and cell phone, which he provided.

September 28 Interview: About one week after D.W.'s death, Bauer again spoke to law-enforcement investigators. At first, Bauer repeated statements that tracked his September 20 interview about his activity and travel route between 2:00 and 2:35 p.m. After investigators discussed cell-phone location data inconsistent with the route Bauer had described in his first interview, Bauer revised his account. The first BCA agent testified that, when confronted with the cell-phone data, Bauer "described being panicked and that . . . he knew he would be the No. 1 suspect." The first special agent agreed that Bauer said something "about keeping his story straight."

Bauer explained that, when he left D.W.'s farm to go to the auto-parts store, he met D.W. on the driveway as D.W. drove into the farm. Bauer corrected his earlier account and stated that he did not drive south on County Road 57. Rather, Bauer stated that he drove east from D.W.'s farm to check on sweet corn near Bauer's home, which is not along County Road 57. After checking on his sweet corn, Bauer went to the auto-parts store, then

he returned to D.W.'s farm and found D.W. Bauer also acknowledged that cell-phone location data placing both Bauer and D.W. at D.W.'s farm at 2:16 p.m. could be accurate.

Bauer denied using a gun recently.

March 10 Interview: Law-enforcement investigators conducted a third interview of Bauer on March 10, 2023. The first BCA agent testified that, when confronted with evidence of gunshot residue on the clothing he had worn on September 20, 2022, Bauer revised his earlier statement that he had not shot a gun recently. Bauer "talked about how he had been near his daughter and shooting . . . he maybe initially talked about shooting a bird in the shed at some time recently before but then he also talked about his daughter shooting a shotgun at the farm, too." At the end of the interview, Bauer was arrested. During trial, the state offered testimony that Bauer's clothing had tested positive for particles consistent with gunshot residue.

The state also offered evidence about Bauer's financial affairs. The second BCA special agent (second BCA agent) testified that in the September 28 interview, Bauer acknowledged that he received phone calls at 1:30 and 1:39 p.m. on September 20, during which his uncle "told him you're past due and the State's going to take your property." Bauer explained that "it was a three-generation property and that amped things up."

The second BCA agent's review of Bauer's bank records from 2019 to 2022 showed that, "[i]n 2022, the debt was different than any of the previous years. There was more going on . . . ." Bauer's bank statements showed "approximately eight" instances of continuous overdraft fees, wage garnishments by creditors, and 21 checks returned for

insufficient funds.[6] The second BCA agent also testified that Bauer had a past-due notice for over $11,000 with a farming cooperative, a total balance due of over $23,000 on one credit-card account and $53,000 on a second credit-card account, and a writ of execution for a $56,683.15 judgment. Bauer was $6,220.00 behind on contract-for-deed payments on his "acreage property." The second BCA agent concluded that Bauer was in "financial distress" on the day of D.W.'s death.

The second BCA agent also testified about the terms of a family trust created by D.W. and his wife. The trust named Bauer as a beneficiary and provided that, after both D.W. and his wife died, Bauer would own D.W.'s farm equipment and a parcel of D.W.'s farmland and would have the option to lease additional farmland at a discounted rate. The second BCA agent presented statements from Bauer to show he was aware of D.W.'s trust.[7] The trust agreement was received into evidence.

The state also offered evidence of Bauer's and D.W.'s whereabouts on the afternoon of D.W.'s death. Bauer and D.W. were both carrying their cell phones. Pursuant to a search warrant, investigators obtained call-detail records and timing advance data for both phones.[8] Through the testimony of a special agent with the Federal Bureau of Investigation

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[6] The second BCA agent acknowledged that "some of [the checks] were overlapping with each other" based on multiple attempts by the bank to deposit the same check.

[7] During his testimony, the second BCA agent read for the jury a portion of the transcript of Bauer's September 20 interview, including Bauer's statement that D.W. "was putting something in the trust but other for after that, I don't know."

[8] According to trial testimony, timing advance data is based on signals transmitted between a cell device and a cell tower; the signals occur whenever a cell phone is turned on and connected to a service network. The cell phone need not be in use for it to generate timing

(FBI agent), the district court admitted the raw data during trial, as well as a cell-data report prepared by the FBI agent; the evidence established a timeline of both Bauer's and D.W.'s approximate locations around the time of D.W.'s death.

Timing advance data showed that, on September 20, 2022, D.W.'s cell phone was near his Winthrop home at 2:04 p.m. At 2:05 p.m., D.W.'s cell phone was north of Winthrop. A law-enforcement officer testified that, while on traffic-control duty, he saw D.W. driving in Winthrop and heading toward D.W.'s farm at 2:07 p.m. This was corroborated by the officer's squad-camera video, which was received into evidence. Law-enforcement investigators testified that the drive time between the point where D.W. was seen in Winthrop and D.W.'s farm is about four or five minutes and that D.W. may have arrived at his farm around 2:11 p.m.

But D.W.'s exact arrival time at his farm is unknown. There is a gap in his cell-phone data produced by D.W.'s service provider from 2:05 to 2:16 p.m. Timing advance data first shows D.W.'s phone in the area of his farm at 2:17 p.m.

Timing advance data placed Bauer's cell phone in the area of D.W.'s farm from 1:21 to 2:16 p.m. on September 20, 2022. There is a gap in his cell-phone data produced by Bauer's service provider from 2:17 to 2:21 p.m. From 2:22 to 2:25 p.m., the timing advance data shows that Bauer's cell phone traveled east of D.W.'s farm. Between 2:25 and 2:28 p.m., the timing advance data shows that Bauer's cell phone traveled west from

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advance data. The timing advance data includes the distance between the cell device and the cell tower and places the cell device's location within a 120-degree sector relative to the tower. Because the cell device may be anywhere within this 120-degree sector, timing advance data does not provide a precise location.

the area of Bauer's home towards Winthrop. At 2:33 p.m., Bauer's cell phone moved north of Winthrop and was in the area of D.W.'s farm at 2:35 p.m., when Bauer made the 911 call.

The state offered surveillance-camera footage from the auto-parts store in Winthrop, which showed that Bauer arrived at 2:29 p.m. and departed at 2:31 p.m., driving towards D.W.'s farm. This footage was consistent with the locations and timeline in the cell-data report that was received into evidence.

Bauer called six witnesses who testified to his reputation for peacefulness, including the manager of the auto-parts store, who testified that Bauer was "acting normal" when he was in the store on the afternoon of September 20, 2022. Bauer's niece, who was with him on D.W.'s farm after Bauer called 911, testified that Bauer was "crying hysterically and distraught" and agreed that his emotions appeared genuine. Bauer waived his right to testify. After the jury found Bauer guilty of second-degree intentional murder, the district court entered judgment of conviction and sentenced Bauer to 367 months in prison.

Bauer appeals.

DECISION

I. The circumstantial evidence is sufficient to sustain the jury's verdict that Bauer caused D.W.'s death with intent to kill.

Minnesota Statutes section 609.19, subdivision 1(1), defines second-degree intentional murder as "caus[ing] the death of a human being with intent to effect the death

of that person or another, but without premeditation." On appeal, Bauer contends that the state's evidence is insufficient to prove that Bauer intended or caused D.W.'s death.

The state proved its case against Bauer by circumstantial evidence. Appellate courts review the sufficiency of circumstantial evidence in two steps. "The first step is to identify the circumstances proved. In identifying the circumstances proved, we defer to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013) (quotations and citation omitted). Appellate courts "consider only those circumstances that are consistent with the verdict." *Id.* at 599.

"The second step is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotations omitted). Appellate courts "review the circumstantial evidence not as isolated facts, but as a whole," and "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved." *Id.* (quotations omitted). In doing so, appellate courts "give no deference to the fact finder's choice between reasonable inferences." *Id.* (quotation omitted). We consider both steps of the applicable analysis.

A. The Circumstances Proved

The circumstances proved are detailed and summarized thoroughly above. The relevant circumstances for September 20, 2022, include (1) a timeline placed D.W. and Bauer at D.W.'s farm in the morning, Bauer and D.W. separated around noon, and they were together again at D.W.'s farm from around 2:11 until 2:16 p.m.; (2) law enforcement analyzed D.W.'s body and the crime scene, which showed that D.W. was killed by a single

bullet to the back of his head while seated in a chair in the machine shed and that, just before his death, D.W. was shucking sweet corn; (3) law enforcement found no evidence of a struggle, robbery, or of a bullet penetrating the machine shed from the outside; (4) Bauer gave conflicting statements about his timing and the route he drove away from D.W.'s farm to the auto-parts store as well as about when he last shot a gun; (5) forensic analysis found gunshot residue on the clothes Bauer wore the day D.W. was killed; and (6) Bauer experienced financial hardship for months before to D.W.'s death and was a named beneficiary of D.W.'s trust.

B. The circumstances proved are consistent with Bauer's guilt.

On appeal, Bauer does not challenge this step of the relevant analysis. The circumstances proved support the reasonable inference that Bauer is the person who shot D.W. Importantly, Bauer and D.W. were alone at D.W.'s farm sometime between about 2:11 to 2:16 p.m., and Bauer fired a gun on September 20, 2022. Based on the position of his body, D.W. was not alarmed by the shooter, and there was no evidence of a struggle, indicating that D.W. knew the person who shot him. Bauer did not touch or move D.W.'s body after he was shot, suggesting that he knew D.W. was dead before he called 911.

That D.W. was killed by a single shot to the back of his head while he was shucking corn supports the inference that Bauer caused D.W.'s death with intent to kill D.W. *See State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997) ("[I]ntent to cause death may be inferred from the manner of shooting." (quotation omitted)); *see also State v. Boitnott*, 443 N.W.2d 527, 531-32 (Minn. 1989) (concluding that "a contact gunshot from a .22 revolver to the back of a person's head" supported a finding of intent because it would be

"considered nearly as likely to cause death" as a similar shooting with a more powerful weapon). Bauer's financial distress and potential financial gain from D.W.'s death also support the inference that Bauer intended to cause D.W.'s death. *See State v. Tran*, 712 N.W.2d 540, 546 (Minn. 2006) ("Evidence of motive is relevant to show premeditation or intent.").

Finally, Bauer's changing statements about his travel route after he left D.W.'s farm to go to the auto-parts store—omitting that he took an indirect route and drove by his own farm—along with his inconsistent statements about his recent use of a gun support the inference that he was lying to investigators to hide that he was the shooter. *See State v. Andersen*, 784 N.W.2d 320, 330-32, 336 (Minn. 2010) (affirming a murder conviction based on circumstantial evidence and considering Andersen's false statements to law enforcement as supporting the verdict). Thus, viewing the evidence as a whole, it is reasonable to infer that Bauer intentionally caused D.W.'s death.

C. The circumstances proved are not consistent with any rational hypothesis other than guilt.

Bauer asserts that "several rational hypotheses other than [Bauer's] guilt were supported by the evidence." Bauer first argues that the cell-phone data is consistent with the alternative hypothesis that he passed D.W. on the farm driveway as Bauer was driving towards the auto-parts store in Winthrop. Second, Bauer contends that the manner of D.W.'s death is consistent with the alternative inference that an unknown hunter's stray bullet killed D.W. while he was sitting in the machine shed. We consider both of Bauer's hypotheses in turn.

Bauer's first hypothesis fails, in part, because we must assume that the jury rejected Bauer's statement about meeting D.W. in the driveway—it is inconsistent with its verdict. *See Silvernail*, 831 N.W.2d at 599. The first hypothesis also does not view the circumstances proved as a whole. *See id*. It disregards the gunshot residue on Bauer's clothes, Bauer's lies to law enforcement about his travel route to the auto-parts store and when he last fired a gun. Simply put, the first hypothesis rests on speculation that someone else was in the machine shed with D.W. No record evidence establishes that anyone other than D.W. or Bauer was at D.W.'s farm at the time that D.W. died. Appellate courts "will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003) (quotation omitted). Rather, "a defendant must point to evidence in the record that is consistent with a rational theory other than guilt." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

Bauer's second hypothesis—that a hunter's stray bullet killed D.W.—fails as inconsistent with the circumstances proved. D.W. was shot while seated with the back of his head towards the western wall of the machine shed. No evidence suggests that a bullet penetrated the shed wall. *Id*. (stating that an alternative hypothesis other than an appellant's guilt must rest on record evidence). Also, law-enforcement testimony ruled out nearby hunters as possible shooters; therefore, death by an unknown hunter's stray bullet relies on speculation and is not a reasonable alternative hypothesis. *See Asfeld*, 662 N.W.2d at 544 (stating that an alternative hypothesis cannot rely on speculation).

Because the circumstances proved at trial, viewed in the light most favorable to the verdict, support a rational inference of Bauer's guilt and are inconsistent with any rational

hypotheses other than Bauer's guilt, the evidence is sufficient to sustain the jury's verdict that Bauer is guilty of second-degree intentional murder.

II. The district court's denial of Bauer's motion to strike prospective juror 1 for cause did not deprive him of a fair trial.

Bauer argues that he is entitled to a new trial because he did not receive a "fair trial by an impartial jury." During voir dire, Bauer moved to strike prospective juror 1 for cause.[9] Prospective juror 1 stated that, if a lay witness and a law-enforcement witness "tell [her] two different things, [she] would agree with the law-enforcement person." The district court denied Bauer's motion, and Bauer used a peremptory challenge to exclude prospective juror 1.

Bauer maintains that the district court's denial of his motion established a "prohibitive threshold to sustain for-cause challenges" that led his trial attorney to "reluctantly conserve[]" peremptory challenges for "the most egregious instances of actual bias." As a result, according to Bauer, he passed on prospective juror 3 and had an unfair trial. "We review the district court's denial of a challenge for cause for an abuse of discretion." *State v. Munt*, 831 N.W.2d 569, 576 (Minn. 2013).

State v. Prtine guides our analysis. 784 N.W.2d 303 (Minn. 2010). In *Prtine*, the supreme court determined that the district court abused its discretion in refusing to strike a juror who stated, "I would be more inclined to believe [a police officer] . . . . I think that's

[9] In issues II and III, the parties' briefs refer to jurors by the number assigned to each as prospective jurors and to the number corresponding to the order in which they were seated. As a result, in the briefing, two different individuals are referred to "juror 3." For clarity, this opinion calls jurors either "prospective" or "sworn."

human nature to believe a police officer. You want to believe that police officer." *Id.* at 309-11. The supreme court determined, however, that reversal was not warranted because Prtine used a peremptory challenge to exclude the biased juror. *Id.* at 311-12. The supreme court rejected Prtine's argument that the district court's failure to strike the biased juror "had the same effect as if the district court only gave [Prtine] 14 peremptory challenges instead of the 15 he was permitted by law." *Id.* at 312. The supreme court concluded that "the district court's decision may have affected how Prtine exercised his peremptory strikes, but it did not deny him his full complement of strikes. Therefore, Prtine is not entitled to a new trial." *Id.*

Similar to the peremptory challenge analyzed in *Prtine*, Bauer used a peremptory challenge to exclude prospective juror 1. We conclude, as did the supreme court in *Prtine*, that "the peremptory challenge served the purpose for which it was created, to remove a juror." *Id.* Thus, no new trial is warranted based on Bauer's use of a peremptory challenge for prospective juror 1.

Also, we are not persuaded by Bauer's argument that he was prejudiced by the district court's ruling on prospective juror 1 because he was forced to "conserve" his peremptory challenges and did not exclude prospective juror 3, who was seated. Bauer used only 11 of his 15 peremptory challenges, so no prejudice is apparent. Still, Bauer contends he was prejudiced because prospective juror 3 was empaneled despite allegedly expressing bias in favor of law enforcement.

We are not persuaded because Bauer passed on prospective juror 3 for cause. In *State v. Geleneau*, this court determined that, when Geleneau passed a juror for cause, this

reflected "an intentional relinquishment . . . of the right to challenge a prospective juror for cause" and "relieve[s] the district court of any obligation to dismiss any juror for cause *sua sponte*." 873 N.W.2d 373, 381 (Minn. App. 2015), *rev. denied* (Minn. Mar. 29, 2016). This court concluded that, "[b]ecause Geleneau waived that right, this court will not consider on appeal whether the district court erred." *Id.* Similarly, we will not consider the consequences of empaneling prospective juror 3 because Bauer passed on this juror for cause.

In sum, even if we assume that the district court abused its discretion in denying Bauer's motion to strike prospective juror 1 for cause, we conclude that the district court did not commit reversible error.

III. The district court did not abuse its discretion in denying Bauer's motion for a *Schwartz* hearing.

Bauer contends that the district court abused its discretion when it denied his motion for a hearing to inquire into juror misconduct, generally called a *Schwartz* hearing. Four days after the verdict was received, sworn juror 3 contacted Bauer's attorney. According to the attorney's affidavit, sworn juror 3 expressed concern that the jury had been influenced by sworn juror 8, who "repeatedly brought up that he lived close by to Mr. Bauer and that Mr. Bauer does not farm any land near the area where Mr. Bauer claimed to check his sweet corn field." Sworn juror 3 also said that sworn juror 8 "insisted that he was not going to let a guilty man go free," that "jurors were feeling pressured to change their minds," and that sworn juror 8 was "the most vocal" about avoiding weekend deliberations. Bauer moved for a *Schwartz* hearing and submitted affidavits in support of

the motion. After a hearing, the district court denied Bauer's motion for the *Schwartz* hearing.

When a defendant learns facts suggesting the possibility of juror misconduct after a verdict has been rendered, the defendant "may move the court for a hearing to impeach the verdict." Minn. R. Crim. P. 26.03, subd. 20(6). If the defendant presents facts that appear to require corrective action, the district court may hold a hearing to examine jurors about possible misconduct. *Zimmerman*, 259 N.W.2d at 263. "The standard of review for denial of a *Schwartz* hearing is abuse of discretion." *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998).

The defendant establishes a prima facie case for a *Schwartz* hearing through "oral assertion by counsel or hearsay affidavit," *Zimmerman*, 259 N.W.2d at 263, and "must submit sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct," *State v. Pederson*, 614 N.W.2d 724, 730 (Minn. 2000) (quotation omitted). A district court may deny a hearing when the defendant's offer of proof includes inadmissible evidence. *See State v. Martin*, 614 N.W.2d 214, 226-27 (Minn. 2000) (affirming the denial of a defendant's motion for a *Schwartz* hearing where the proffered evidence required inadmissible testimony about jurors' thought process during deliberations).

Minnesota Rule of Evidence 606(b) generally prohibits evidence of "the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith." But rule 606(b) carves out several categories of evidence from its general

prohibition and allows evidence of (1) "extraneous prejudicial information . . . improperly brought to the jury's attention" and (2) "any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict."

On appeal, Bauer contends that sworn juror 3's statements to his attorney established a prima facie case that sworn juror 8 committed misconduct in two ways: first, by showing "other jurors where he lived in relation to Mr. Bauer on the map multiple times and insist[ing] Mr. Bauer did not own farmland" as his defense suggested and that Bauer had no reason to drive the route he said he did"; and second, by refusing to vote anonymously and allegedly intimidating other jurors [who] were afraid of merely being recognized" in the community, by coercing jurors to have no weekend deliberations, and by insisting "he was not going to let a guilty man go free." We consider Bauer's arguments in turn.

A. Sworn juror 8's statements during deliberations about Bauer's travel route were not admissible under rule 606(b).

Caselaw supports the conclusion that Bauer's proffer of sworn juror 8's statements about Bauer's travel route did not describe admissible evidence of "extraneous prejudicial information" under rule 606(b). In *Olberg v. Minneapolis Gas Co.*, the supreme court explained that "[c]asual observations taken while a juror is going about his ordinary business can be expected in many situations. It would be totally unrealistic to expect a juror, while out of the jury room, to purge his consciousness of any and all reflections upon the trial at hand." 191 N.W.2d 418, 423 (Minn. 1971). In *Olberg*, which involved a pedestrian-automobile accident, the district court granted a new trial after a *Schwartz*

hearing based in part on evidence that a juror "had ridden in a car three times and had reflected on the width of the headlight beams and . . . he mentioned his observation to the other jurors." *Id.* at 420, 423. The supreme court reversed the grant of a new trial, concluding that the juror's comments on headlight beams was not evidence of misconduct. *Id.* at 423. The supreme court distinguished the juror's observation based on personal experience from "a deliberate inspection of an area to ascertain damages or prove a witness' testimony." *Id.* at 423, 425.

Bauer's travel route was a central issue at trial. No evidence suggests that sworn juror 8 investigated Bauer's travel route or visited any locations to gather information about the route. Sworn juror 8's statements about the location of Bauer's farm and travel route based on his familiarity with the area amount to "[c]asual observations taken while a juror is going about his ordinary business," as discussed in *Olberg*. *Id.* at 423. It is notable that, during voir dire, sworn juror 8 disclosed that he had delivered hay to Bauer's farm in the past. We conclude that the district court did not abuse its discretion in denying Bauer's motion for a *Schwartz* hearing on this basis.

B. Sworn juror 8's alleged intimidating and/or coercive statements were not admissible under rule 606(b).

Rule 606(b) is a limited exception to the rule excluding juror testimony about deliberations. For example, in *State v. Kelley*, the supreme court determined that evidence was admissible under rule 606(b) when one juror asked another to "step out into the hall to settle [a] dispute" and "threatened to injure the second juror." 517 N.W.2d 905, 908, 910-11 (Minn. 1994). By contrast, this court determined that evidence was not admissible

under rule 606(b) when a jury foreperson told another juror that he "wanted to finish the case and get home" so he could host a party. *State v. Jackson*, 615 N.W.2d 391, 393-94, 396 (Minn. App. 2000), *rev. denied* (Minn. Oct. 17, 2000).

Bauer does not explain how sworn juror 8's alleged statement that he opposed weekend deliberations or would vote guilty was coercive. According to the attorney affidavits, other jurors also stated a preference not to deliberate on Saturday. And a juror's strongly held position or stubborn insistence is not misconduct. *See State v. Hoskins*, 193 N.W.2d 802, 813 (Minn. 1972) ("[U]nless the predominance is obtained by 'overt actions' which are coercive in nature and effect and are within the consciousness of all jurors, postverdict impeachment by a juror is not allowed."). Finally, Bauer's argument that sworn juror 8 allegedly opposed anonymous voting fails to consider that the district court advised that "juror names will be public after the trial is done."

Applicable caselaw supports the conclusion that Bauer's offer of proof did not show jury misconduct. Sworn juror 8's alleged intimidating or coercive statements did not include or suggest "threats of violence or violent acts brought to bear on jurors," and therefore, Bauer offered no admissible evidence of misconduct. Minn. R. Evid. 606(b). We conclude that the district court did not abuse its discretion in denying Bauer's motion for a *Schwartz* hearing.

IV. The district court did not abuse its discretion by admitting evidence of Bauer's financial distress, the trust agreement, hearsay witness testimony, or cell-phone records. The erroneous admission of *Spreigl* evidence did not significantly affect the verdict.

Bauer argues that the district court prejudicially erred in evidentiary rulings that overruled his objections. "Evidentiary rulings rest within the sound discretion of the district court, and [appellate courts] will not reverse an evidentiary ruling absent a clear abuse of discretion." *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). When the alleged evidentiary error "does not implicate a constitutional right," the 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).

A. Evidence of Bauer's Financial Distress and Financial Motive

Before trial, Bauer moved to exclude evidence of "all financial information related to the decedent, [Bauer], and the farm site gathered during [the state's] investigation," including D.W.'s trust agreement. In a pretrial order, the district court ruled that "[g]enerally . . . the financial information is admissible" but reserved its ruling "on the admissibility as to the other specific financial documents the State intends to introduce at trial." During trial, the district court received evidence of Bauer's financial affairs, including D.W.'s trust agreement, Bauer's financial documents as described above, and testimony from the attorney who prepared the trust agreement and the second BCA agent who examined Bauer's finances.

On appeal, Bauer contends that the district court abused its discretion because the financial evidence was irrelevant or, if relevant, it should have been excluded because its

admission was unfairly prejudicial and tended to confuse or mislead the jury. We consider each argument in turn.

Relevance

"Evidence which is not relevant is not admissible." Minn. R. Evid. 402. Bauer argues that only some types of evidence are relevant to proving motive and that "financial evidence has been admitted only on a limited basis in murder trials in Minnesota." Bauer fails to discuss *Tran*, even though it considered whether evidence of indirect financial gain may be offered to prove motive.[10]

In *Tran*, the state offered evidence that the defendant would indirectly benefit from the murder victim's life insurance policy. 712 N.W.2d at 546-47. The policy was payable to the victim's wife, with whom Tran had a romantic relationship. *Id*. at 543-44. In the appeal challenging the admission of this evidence, the supreme court analyzed relevance in two steps. First, the supreme court stated that evidence of the life insurance policy was admissible if the state offered "some evidence," whether direct or circumstantial, that Tran "knew of an insurance policy." *Id.* at 541. Second, the supreme court upheld the relevance of the insurance policy because, "had there been no insurance in the case, there would arguably have been less motive" for the murder. *Id.*

Here, the state satisfied the first step by presenting evidence that Bauer "probably" knew he would benefit from D.W.'s trust agreement. *Id*. at 549 ("[C]ircumstantial evidence

[10] Bauer instead relies on *State v. Griller*. 583 N.W.2d 736 (Minn. 1998). *Griller* is not instructive here because the challenged financial evidence was not offered to prove Griller's motive, but to give the jury "context necessary to explain how the investigation against Griller began." *Id.* at 743.

that the defendant probably knew of the existence of the insurance policy is sufficient." (emphasis added)). On the second step, we acknowledge that Bauer's prospective financial benefit from D.W.'s death was direct though delayed, while Tran's financial benefit from the insurance policy was indirect—through Tran's relationship with the victim's spouse—though immediate. The relevance of D.W.'s trust agreement is nonetheless supported by analogy to *Tran* because, had there been no provision in D.W.'s trust agreement that benefitted Bauer, "there would arguably have been less motive" for D.W.'s murder. *Id.*

Because caselaw recognizes that evidence of financial distress or financial benefit from a victim's death is generally relevant to prove motive and the state offered evidence that Bauer was in financial distress and probably knew he was a beneficiary of D.W.'s trust agreement, the district court did not abuse its discretion by determining that the challenged evidence was relevant.

Unfair Prejudice and Confusion of the Issues

A district court may exclude relevant evidence it if "its probative value is substantially outweighed by the danger of unfair prejudice" or "confusion of the issues." Minn. R. Evid. 403. Bauer contends that evidence of his financial distress should have been excluded under Minn. R. Evid. 403 because its probative value was substantially outweighed by the risk of unfair prejudice and the evidence was confusing.

Bauer does not articulate why the financial evidence would be *unfairly* prejudicial. *See State v. Garland*, 942 N.W.2d 732, 748 (Minn. 2020) ("The term prejudice in Rule 403 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 the jury by illegitimate means." (quotations omitted)). Based on supreme court decision in *Tran* affirming the admission of similar evidence to show motive, and absent any explanation of unfair prejudice, Bauer's argument is not persuasive. *See Tran*, 712 N.W.2d at 549-50, 552.

Bauer argues that "the financial information was extremely confusing and misleading" and "likely confused and misled the jury at trial." We disagree. The state called a law-enforcement investigator and a probate attorney; both witnesses provided testimony on the financial evidence that was methodical and stated in plain terms. We conclude that the district court did not abuse its discretion by determining that the probative value of the financial evidence against Bauer was not substantially outweighed by the risk of unfair prejudice or confusion of the issues and was therefore admissible under rule 403.

B. Hearsay Evidence of D.W.'s Intent to Change His Business Arrangement with Bauer

In a pretrial order and over Bauer's opposition, the district court granted in part the state's motion to offer hearsay testimony. At trial, D.W.'s brother-in-law testified that, a few days before he died, D.W. stated he intended to change his business arrangement with Bauer. On appeal, Bauer contends that the district court erred in admitting this testimony.

Hearsay evidence is generally inadmissible. Minn. R. Evid. 802. But evidence of a declarant's "then existing state of mind" is not "excluded by the hearsay rule." Minn. R. Evid. 803(3). Caselaw applying this exception recognizes that statements of a declarant's intentions and plans are admissible. *State v. Miller*, 754 N.W.2d 686, 704 (Minn. 2008). To be admissible, the statement must be contemporaneous with the mental state it is

intended to prove, and the declarant's state of mind must be relevant to an issue in the case. *State v. DeRosier*, 695 N.W.2d 97, 104-05 (Minn. 2005).

The district court's admission of the brother-in-law's hearsay testimony against Bauer tracks the supreme court's approval of the admission of a victim's statements of intentions and plans in *Miller*. The brother-in-law testified and agreed that, on September 16, 2022, just a few days before D.W. died, D.W. told him that when D.W. "returned home from vacation he was going to make changes to his farming arrangements with Travis Bauer." The district court did not abuse its discretion by admitting this hearsay evidence as proof of D.W.'s intentions and plans under Minn. R. Evid. 803(3). *See Miller*, 754 N.W.2d at 704 (concluding that statements of a deceased victim's intent to move, to try to pay back a debt, and to look for a vehicle were admissible under rule 803(3) as evidence of intentions and plans).

Bauer also contends that the district court abused its discretion because the hearsay statement should have been excluded as unfairly prejudicial. *See* Minn. R. Evid. 403. Bauer's argument is not persuasive because he relies on caselaw in which motive was not at issue and the erroneously admitted statements related to the deceased declarant's emotions, not to the declarant's plans and intentions. *See State v. Ulvinen*, 313 N.W.2d 425, 427-28 (Minn. 1981) (concluding the district court erred in admitting the deceased victim's hearsay statements that "indicated that she hated" appellant because the victim's "state of mind was not an issue in the case").

Because the contested hearsay statement fits the exception under rule 803(3) allowing evidence of a declarant's then-existing intentions and plans, and because the

evidence was relevant to prove Bauer's motive and was not unfairly prejudicial, the district court did not abuse its discretion in admitting the brother-in-law's hearsay testimony.

C. Evidence of Bauer's Cell-Phone Data

Before trial, the prosecuting attorney suggested that the state would offer testimony from an FBI agent related to a report the FBI agent prepared about the location of Bauer's cell phone around the time of D.W.'s death. Over Bauer's objection, the district court granted the state's motion to admit the cell-phone data "as records of a regularly conducted business activity." The FBI agent's testimony and report and Bauer's cell-phone data were received into evidence at trial. On appeal, Bauer argues that the cell-phone data was improperly admitted under the business-records exception to the hearsay rule. Alternatively, Bauer argues that admission of the cell-phone data violated his Sixth Amendment right to confront witnesses.[11] We discuss Bauer's arguments in turn.

Business-Records Exception

Business records are another exception to the hearsay rule. Minn. R. Evid. 803(6). To be admissible, the records must be (1) "made at or near the time of the event"; (2) "kept in the course of a regularly conducted business activity"; (3) made as a "regular practice" of the business; and (4) authenticated by the testimony of a qualified custodian or witness. Minn. R. Evid. 803(6); *see Nat'l Tea Co. v. Tyler Refrigeration Co.*, 339 N.W.2d 59, 61

[11] Bauer also contends that "the FBI report contained inadmissible hearsay" because it "incorporated" the cell-phone data and that, therefore, "[p]ermitting [the report's] admission and allowing [the FBI agent] to testify regarding its contents" was improper. Because the basis of Bauer's challenge to the report and testimony is the inadmissibility of the underlying cell-phone data, our discussion of the cell-phone data also addresses Bauer's challenge to the report and testimony.

(Minn. 1983) (discussing the foundational requirements of the business-records exception); *State v. Vick*, ___ N.W.3d ___, ___, 2025 WL 2901445, at *4 (Minn. App. Oct. 13, 2025) (applying this aspect of *National Tea* in the criminal context).

Bauer appears to contend that the cell-phone service provider produced only an excerpt of a business record and therefore created a new document "in anticipation of litigation" that was not a business record. The record does not support Bauer's argument. The FBI agent testified that the cell-phone data was kept by the cell-phone service provider "not for law enforcement but for their network optimization."[12] Because the record supports the district court's decision that the cell-phone data met the requirements in Minn. R. Evid. 803(6), the district court did not abuse its discretion by admitting the challenged evidence as a business record.

Confrontation Clause

We understand Bauer to challenge whether the cell-phone data is the statement of a witness and, if yes, whether it is a testimonial statement. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, the United States Supreme Court held that the right to confrontation bars admitting a witness's pretrial testimonial statements unless (1) the witness appears at trial or (2) the witness is

[12] The FBI agent's testimony referred specifically to the timing advance data. The FBI agent also testified that cell-phone service providers keep call-detail records because "by law they have to maintain it" and "they have to maintain it for billing purposes."

unavailable *and* the defendant had a prior opportunity to cross-examine the witness. 541 U.S. 36, 68 (2004).

After *Crawford*, the Supreme Court expanded its analysis of testimonial statements and held that laboratory analysts' sworn affidavits were testimonial because they related to "the results of the forensic analysis performed on the seized substances," including weight and the presence of cocaine, and were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308, 310-11 (2009) (quoting *Crawford*, 541 U.S. at 52). The Supreme Court concluded that the laboratory analysts' affidavits were inadmissible when the analysts were not present at trial "[a]bsent a showing that the analysts were "unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them." *Id.* at 309-11.

Citing *Melendez-Diaz*, Bauer argues that the cell-phone data was a testimonial statement and that its admission violated his Sixth Amendment rights because the "individual who prepared the records did not testify." We disagree, first, because the cell-phone data was not testimonial by analogy to the laboratory analysts' affidavits in *Melendez-Diaz*, in which the affidavits affirmed the accuracy of the test results. *Id.* at 309. The only witness against Bauer on the accuracy and scope of the cell-phone data was the FBI agent who testified.

Nor was the cell-phone data the statement of a witness. *Crawford* lists "formulations of [the] core class of testimonial statements," all of which are statements by a witness. 541 U.S. at 51-52 (listing affidavits, depositions, prior testimony, and confessions). While

Bauer's cell-phone service provider produced data pursuant to a warrant, the data was not a statement of a person; the cell-phone data was computer-generated, not prepared by a witness.[13] As explained in the FBI agent's report, the cell-phone data was created by the "network interaction to and from the target cell phones" and nearby cell towers.

In short, because the cell-phone data was not testimonial and was not the statement of a witness, its admission did not violate Bauer's rights under the Sixth Amendment.

D. *Spreigl* Evidence

Over Bauer's objection, the district court granted the state's motion to introduce evidence that Bauer forged a check signature, and during trial, a law-enforcement witness testified to this effect. The check was received into evidence.

Evidence of a criminal defendant's other crimes, wrongs, or acts is generally inadmissible to prove the defendant's character or "to show action in conformity therewith." Minn. R. Evid. 404(b)(1). Such evidence may be admissible for other purposes,

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[13] As one appellate judge explained,

> A critical distinction must be made between two types of computerized materials. "Computer-stored" materials are things like emails . . . . "Computer-generated" materials, on the other hand, are the product of the machine itself operating according to a program. Although it is true that a person created the program and likely activated it through input, the ultimate result is attributable to the computer itself . . . . Because computer-generated materials are not statements by persons, they cannot fit the definition of "hearsay" in Minnesota Rule of Evidence 801(c).

Gordon Shumaker, *Rulings on Evidence* 186 (2013).

including to prove the defendant's motive. *Id.* Courts refer to "other acts" evidence as "*Spreigl*" evidence and follow a five-step process to decide whether to admit the evidence:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 685-86 (Minn. 2006); *see also State v. Spreigl*, 139 N.W.2d 167, 168 (Minn. 1965) (holding that the state must, "within a reasonable time before trial," provide "in writing a statement of the offenses it intends to show [a defendant] has committed"). Each of the five *Spreigl* requirements must be satisfied before the evidence is admitted. *See State v. Stewart*, 643 N.W.2d 281, 297-98 (Minn. 2002) (listing the five factors with conjunctive "and"). "If the admission of evidence of other crimes or misconduct is a close call, it should be excluded." *Ness*, 707 N.W.2d at 685.

Because it disposes of this issue, we examine the disputed evidence under the second *Spreigl* requirement—whether the state clearly indicated what the forged check would be offered to prove. Bauer argues that check forgery does not relate to his motive to murder D.W. The state broadly contended that "[t]he check goes directly to appellant's financially related motive." The district court's memorandum explaining its decision to admit the *Spreigl* evidence was general: "the State clearly indicated that the *Spreigl* evidence would be used to 'show proof of motive, opportunity, intent, preparation, and plan.'"

But a *Spreigl* notice and a district court's reasoning must include "the *specific purpose(s)* for which the evidence will be offered." Minn. R. Evid. 404(b)(2) (emphasis added). And the district court "should not simply take the prosecution's stated purposes for the admission of other-acts evidence at face value." *Ness*, 707 N.W.2d at 686. The state's *Spreigl* argument and the district court's decision to admit the forged check did not sufficiently analyze the purposes for which the evidence was offered. *See State v. Montgomery*, 707 N.W.2d 392, 397-99 (Minn. App. 2005) (determining that the district court abused its discretion by admitting *Spreigl* evidence "without any analysis of the legitimacy" of the purposes for which the evidence was admitted).

On appeal, the state fails to articulate how a check Bauer forged more than one month *after* D.W.'s death is relevant to show Bauer's financial distress or motive to kill D.W. at the time of the D.W.'s death. Because the forged check's relevance to Bauer's financial distress is at best tenuous, we conclude that the district court abused its discretion in admitting *Spreigl* evidence of Bauer's check forgery.

This conclusion does not end our analysis. Bauer also bears the burden of demonstrating that he was prejudiced by the erroneous admission of evidence. *See Peltier*, 874 N.W.2d at 802. Because Bauer made a timely objection to the admission of the *Spreigl* evidence, the harmless-error standard applies. *Id.* Appellate courts apply the following nonexclusive factors to determine whether there is a reasonable possibility that the erroneously admitted evidence significantly affected the verdict: "(1) the manner in which the party presented the evidence, (2) whether the evidence was highly persuasive, (3) whether the party who offered the evidence used it in closing argument, and (4) whether

the defense effectively countered the evidence." *State v. Bigbear*, 10 N.W.3d 48, 54 (Minn. 2024) (quotation omitted). "In addition, strong evidence of guilt undermines the persuasive value of wrongly admitted evidence." *Id.* (quotation omitted).

We consider each of the relevant factors. The state did not present the *Spreigl* evidence in a pervasive manner. During the ten days of trial, which led to a transcript of over 1,000 pages, the state elicited brief testimony about the forged check, totaling about three pages of transcript. The forged-check evidence is not highly persuasive of financial distress because it occurred after D.W.'s death. And during closing argument, the prosecuting attorney briefly mentioned the forged check three times. Bauer's attorney countered the evidence by cross-examining the law-enforcement investigator about the forged-check evidence. Finally, as discussed above, the state presented other strong circumstantial evidence of Bauer's guilt. Based on the *Bigbear* factors, we conclude that there is no "reasonable possibility . . . that the erroneously admitted evidence significantly affected the verdict." *Id.* Thus, while the district court erred in admitting the forged-check evidence, the error was harmless.

V. The prosecuting attorney did not commit reversible misconduct during closing argument.

Bauer raises six instances of alleged prosecutorial misconduct during closing argument and contends that he was deprived of a fair trial. In its memorandum denying Bauer's posttrial motion based on these arguments, the district court concluded that "in some instances" the closing arguments were prosecutorial misconduct but the errors were not "so serious and prejudicial [such] that [Bauer's] right to a fair trial was denied." This

court will reverse a district court's determination regarding alleged prosecutorial misconduct "only when the misconduct, considered in the context of the trial as a whole, was so serious and prejudicial that the defendant's constitutional right to a fair trial was impaired." *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000).

Appellate courts review objected-to prosecutorial misconduct for harmless error. *State v. Hunt*, 615 N.W.2d 294, 301-02 (Minn. 2000). The standard for determining whether an error was harmless varies based on the severity of the misconduct:

> [I]n cases involving unusually serious prosecutorial misconduct this court has required certainty beyond a reasonable doubt that the misconduct was harmless before affirming. . . . On the other hand, in cases involving less serious prosecutorial misconduct this court has applied the test of whether the misconduct likely played a substantial part in influencing the jury to convict.

State v. Caron, 218 N.W.2d 197, 200 (Minn. 1974).[14] When assessing alleged misconduct during a closing argument, appellate courts "look to the closing argument as a whole, rather than to selected phrases and remarks." *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004).

A. The prosecuting attorney did not improperly belittle Bauer's defense.

Bauer contends that the prosecuting attorney "belittled" his defense by calling it a "distraction," "magic bullet," "stories," and "unicorn." A prosecuting attorney may argue that a defense lacks merit but cannot "belittle the defense." *State v. Griese*, 565 N.W.2d 419, 428 (Minn 1997) (quotation omitted). A prosecuting attorney may argue vigorously.

[14] The supreme court has questioned whether this two-tiered approach is still good law but declined to decide the issue. *See State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010); *see also State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012).

See State v. MacLennan, 702 N.W.2d 219, 236 (Minn. 2005) ("It is well-settled that the state has a right to vigorously argue its case."). We conclude that, when the challenged arguments are taken in context, the prosecuting attorney emphasized the state's view that Bauer's arguments were not supported by the evidence, which is "vigorous argument," not belittlement of Bauer's defense.

B. The prosecuting attorney did not improperly comment on Bauer's credibility.

Bauer argues that the prosecuting attorney improperly injected his personal opinion of Bauer's credibility by making statements like, "[Bauer]'s got a lot of stories to tell. Especially every time he's confronted with evidence. Then he comes up with a new story."

A prosecuting attorney may not state their personal opinion of a defendant's credibility. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). But "[a]n advocate may indeed point to circumstances which cast doubt on a witness's veracity." *Id.* In *Ture*, the supreme court determined that the prosecuting attorney committed misconduct by characterizing Ture's testimony as "incredible," stating Ture was "not exactly telling the truth on the stand," and referring to Ture's testimony as "a lot of nonsense" and as a "joke, joke." *Id.*

We conclude that the prosecuting attorney's arguments about Bauer were not opinions of Bauer's credibility, as were those made in *Ture*. Perhaps more importantly, the challenged arguments were based on Bauer's inconsistent statements as established by other evidence. Because the prosecuting attorney's comments were not generalized opinions about Bauer's credibility but discussed "circumstances which cast doubt on

[Bauer's] veracity," we conclude that the challenged arguments did not amount to misconduct. *Id.*

C. The prosecuting attorney improperly asked jurors to "put themselves in Bauer's shoes."

Bauer argues that the prosecuting attorney's closing argument effectively asked jurors to put themselves into Bauer's shoes. A prosecuting attorney is "not free to urge the jurors to put themselves in the defendant's shoes," and it is "improper for the prosecutor to urge the jurors to look at their own experiences as proof that the defendant's defense is not credible." *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994).

Bauer points out that the prosecuting attorney argued that, when the jury considered why Bauer did not disclose his actual travel route after he left D.W.'s farm, they should consider what they would do.

> If you were the defendant and you hid that gun, the Winthrop guy hid the gun who knows every place to hide or knows this area, owns land, multiple acres, if you hid that gun, would you want to tell law enforcement that you were going east where the gun was or would you want to tell them you were going south?

Bauer offers other examples from the prosecuting attorney's closing argument.[15] The district court determined that these arguments "crossed the line" into misconduct, but it did not order a new trial.

[15] Bauer also challenges arguments by the prosecuting attorney related to (1) Bauer's consciousness of guilt based on his conduct at the crime scene, such as, "If [D.W.] fell, wouldn't you go back to the area that occurred and you'd have blood on your hands," and (2) the effect of Bauer's financial distress, such as, "Imagine if you will as I go through these the weight . . . on your shoulders as one of the providers of your family."

We are persuaded that the prosecuting attorney's arguments amounted to asking the jury to step into Bauer's shoes. We therefore agree with the district court that the prosecuting attorney committed misconduct. The prejudicial effect of this misconduct is discussed below.

D. The prosecuting attorney did not improperly align himself with the jury.

Bauer urges that the prosecuting attorney improperly aligned himself with the jury by using the words "we" and "us" repeatedly during closing statement and rebuttal. Prosecuting attorneys may not attempt to align themselves with the jury to the defendant's exclusion. *State v. Mayhorn*, 720 N.W.2d 776, 789-90 (Minn. 2006). In *Mayhorn*, the prosecuting attorney improperly asserted cultural and racial distinctions between the jury and defendant. *Id.* at 790. The supreme court stated that "a prosecutor is not a member of the jury, so to use 'we' and 'us' is inappropriate and may be an effort to appeal to the jury's passions." *Id.* But in *Nunn v. State*, the supreme court clarified that the use of "we" to describe evidence presented at trial is not per se misconduct because it does not necessarily exclude the defendant. 753 N.W.2d 657, 663 (Minn. 2008).

We conclude that the contested arguments do not distinguish between the jury and Bauer as did the prosecuting attorney's comments in *Mayhorn*. In *Mayhorn*, the use of "we" emphasized racial and class distinctions and may have caused the jury to view the defendant as blameworthy on that basis. 720 N.W.2d at 789-90. Here, the prosecuting attorney's use of "we" and "us" do not relate to any differences between the jury and Bauer. Therefore, the prosecuting attorney's use of "we" and "us" was not misconduct.

E. The prosecuting attorney did not argue facts not in evidence.

Bauer maintains that the prosecuting attorney committed misconduct by arguing facts not in evidence. "The State may present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence in its closing argument. However, a lawyer may not speculate without a factual basis." *Peltier*, 874 N.W.2d at 804 (quotation omitted).

Bauer cites two examples. First, Bauer challenges the prosecuting attorney's argument that Bauer possessed, used, and hid a gun: "He'd hidden the gun, he goes back west, and now he's got to get his alibi in order." Bauer reasons these are facts not in evidence because law enforcement did not find the murder weapon and placed no firearm in evidence.

Second, Bauer challenges the prosecuting attorney's arguments that Bauer faked his emotional response to the crime by referring to Bauer's "body language," and "manner" as "acting mode," "waterworks," and "fake" behavior. Bauer maintains that no evidence established what physical gestures and verbal cues indicate untruthfulness. Describing Bauer's conduct at the crime scene as captured on a responding officer's squad camera and played for the jury, the prosecuting attorney argued, "When the squad car approaches, wouldn't you go towards the squad car and start saying what you observed? Or would you stay by your minivan and put your hand over your eyes and start to get in the acting mode."

Peltier instructs our analysis; it involved an appeal from a conviction for first-degree child-abuse murder. 874 N.W.2d at 795-96. The supreme court determined that it was misconduct for the prosecuting attorney to assert, without a basis in the record, "(1) that

Peltier learned the abusive behavior from an ex-boyfriend, and (2) that Peltier exhibited a trait common to child abusers when she engaged in victim-blaming." *Id.* at 804-05. The supreme court reasoned that the statements were improper "[b]ecause these inferences go to psychological hypotheses and are not adequately supported by either the facts in evidence or expert testimony." *Id.* at 805.

Here, the prosecuting attorney's arguments about the missing gun that shot D.W. are distinguishable from the speculative assertions in *Peltier*. The prosecuting attorney's arguments about Bauer having a gun were an inference supported by evidence showing that D.W. died of a gunshot wound at a time that he was on the farm with Bauer and that Bauer's clothing had gunshot residue. Law enforcement did not find the gun used to kill D.W., and Bauer lied about his travel route after he left D.W.'s farm.

In contrast, the prosecuting attorney's argument that Bauer's tears and gestures were not genuine is closer to a "psychological hypothesis" determined to be improper in *Peltier*. As in *Peltier*, the prosecuting attorney's arguments about Bauer's conduct at the crime scene arguably speculated about the reasons for Bauer's demeanor. *See id.* ("[T]he evidence is clear that Peltier publicly blamed [the victim] for his own injuries, but there is no indication that she did so *because* she felt a need to justify her actions or that this is a behavior common to child abusers." (emphasis added)). We distinguish, however, the contested statements about Bauer's conduct from the improper argument in *Peltier* because the argument against Bauer drew inferences about his demeanor from recorded evidence and the jurors had the opportunity to independently evaluate Bauer's demeanor by viewing the recording on which the prosecuting attorney based his argument.

Because the evidence supported the inferences argued by the prosecuting attorney and the jurors were allowed to independently evaluate the evidence and arguments, the state did not improperly argue facts not in evidence.

F. The prosecuting attorney did not improperly shift the burden of proof.

Bauer argues that the state improperly shifted the burden of proof. It is highly improper for a prosecuting attorney to misstate the burden of proof. *State v. Strommen*, 648 N.W.2d 681, 690 (Minn. 2002). "[T]he Due Process Clause requires the state to prove every element of a charged offense beyond a reasonable doubt." *State v. Peterson*, 673 N.W.2d 482, 486 (Minn. 2004).

Bauer contends that the prosecuting attorney made three improper arguments: (1) implying that, if Bauer was not telling the truth, he was guilty of murder (or that the jury must find him truthful to acquit); (2) suggesting that evidence of Bauer's guilty conscience created a presumption of guilt; and (3) indicating that Bauer had the burden to prove that D.W. was not killed intentionally by stating that "there's been no dispute at this trial that [D.W.] was murdered." We consider each of the arguments in turn.

First, Bauer cites no specific arguments by the prosecuting attorney that misstate the burden of proof by commenting on Bauer's truthfulness. His argument relies on caselaw addressing "were they lying" questions. This caselaw is not analogous because it concerns a prosecuting attorney's argument that acquittal would require the jury to believe that the *state's* witnesses were lying. *See, e.g.*, *State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005). Here, the prosecuting attorney highlighted inconsistencies in Bauer's statements to

investigators, which were in evidence. This does not shift the burden of proof and was not misconduct.

Second, Bauer acknowledges that a defendant's postoffense conduct is generally admissible, citing *State v. McTague*. 252 N.W. 446 (Minn. 1934). *McTague*'s holding, however, was narrow, determining that evidence of a suspect's "[f]light before apprehension or after arrest and when on bail is a circumstance to be considered—not as a presumption of guilt, but as something for the jury—as suggestive of a consciousness of guilt." *Id.* at 448.

Bauer challenges closing arguments about his postoffense conduct that described his conduct at D.W.'s farm as shown on an officer's squad camera video:

> [Bauer] [s]tops automatically. Stops. Do our emotions do that when we're distraught? Do our emotions stop on a dime? When anybody seems to be near him, he lets out a wail and then goes to covering his eyes. Defendant, Travis Bauer, is thinking of his next move.

This argument suggests Bauer's conduct demonstrated consciousness of guilt. But this argument does not imply a presumption of guilt or shift the burden of proof; it emphasizes an inference from the evidence consistent with the state's theory of the case. Analogizing from *McTague*'s guidance on evidence of a defendant's flight after the offense occurred, we conclude this argument was not misconduct.

Third, Bauer contests the prosecuting attorney's following argument: "To make it a bit easier, there's been no dispute at this trial that [D.W.] was murdered." This statement was improper, but considered in context, it did not imply that Bauer had the burden to

disprove murder.[16] Just before making the challenged argument, the prosecuting attorney listed the elements of first-degree murder and acknowledged the state's burden to prove all elements beyond a reasonable doubt. While it was improper to assert that D.W.'s "murder" rather than D.W.'s death was undisputed, this argument did not shift the burden of proof to Bauer.

G. The prosecutorial misconduct was harmless.

As discussed above, the prosecuting attorney committed misconduct during closing arguments by effectively asking jurors to place themselves in Bauer's shoes. Based on our review of the record, the prosecuting attorney's improper statements were harmless as they were not unusually serious misconduct and did not play a "substantial part in influencing the jury to convict." *Caron*, 218 N.W.2d at 200.

The evidence against Bauer was strong circumstantial evidence, particularly the timeline based on cell-phone location data, the gunshot residue on Bauer's clothes, Bauer's changing statements to law enforcement about his travel route, the evidence of Bauer's financial distress, and the financial benefit to Bauer following D.W.'s death. The prosecuting attorney's arguments determined to be misconduct were a small part of closing arguments, about two of 50 pages of argument. Bauer's attorney countered the arguments by highlighting the absence of a gun in evidence during his closing argument and responded directly to arguments about Bauer's finances, stating that "this was nothing

[16] We acknowledge that a prosecuting attorney "commits misconduct by *intentionally* misstating evidence." *Mayhorn*, 720 N.W.2d at 788. Based on the record, it does not appear that the prosecuting attorney's challenged statement here was intentional.

new . . . things were always tight for him before harvest time." Bauer also addressed arguments about his conduct at the crime scene: "Mr. Bauer is not trained to render aid. So why would we expect him to take steps to someone who's visibly dead?" Finally, the district court instructed jurors, "It is your duty to decide the questions of fact in this case," and, "If the attorneys . . . make any statement as to what the evidence is that differs from your own recollection of the evidence, you must disregard the statement and rely solely on your own memory."

Based on these factors, the absence of the prosecuting attorney's improper statements would not have significantly affected the verdict and Bauer was not deprived of a fair trial. *Cf. State v. Bauer*, 776 N.W.2d 462, 472 (Minn. App. 2009) (considering instructions to jurors and strength of the evidence in concluding that "less-serious prosecutorial misconduct" was harmless), *aff'd*, 792 N.W.2d 825 (Minn. 2011). Therefore, the district court did not abuse its discretion in denying Bauer's motion for a new trial based on prosecutorial misconduct.

VI. Cumulative trial errors did not deprive Bauer of a fair trial.

Bauer argues that, even if none of trial errors he raises independently require this court to reverse his conviction and order a new trial, their cumulative effect denied him a fair trial. As detailed above, we have concluded that the errors at trial included prosecutorial misconduct during closing argument and the erroneous admission of *Spreigl* evidence of check forgery.

Reviewing courts may reverse and order a new trial "when the cumulative effect of [trial] errors and indiscretions, none of which alone might have been enough to tip the

scales, operate to the defendant's prejudice by producing a biased jury." *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006). "When considering a claim of cumulative error, we look to the egregiousness of the errors and the strength of the State's case" and "are more inclined to order a new trial for cumulative error in a very close factual case." *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017). The alleged errors, when considered cumulatively, did not deprive Bauer of his right to a fair trial.

Bauer relies on *State v. Underwood* to argue that his conviction should be reversed based on cumulative error, urging us to conclude that this case was close, as was *Underwood*. 281 N.W.2d 337, 344 (Minn. 1979) (stating that where "there was a great deal of conflicting testimony and the factual determinations must have been difficult . . . any error, however small, may have prejudiced defendant"). But the evidence against Bauer was neither conflicting nor close. As discussed above, the few errors committed at trial were not prejudicial and the evidence for conviction was strong, so cumulative error does not require reversal or a new trial.

VII. The district court did not abuse its discretion in sentencing Bauer.

The district court sentenced Bauer to 367 months in prison. This is a "top of the box" sentence under the Minnesota Sentencing Guidelines for the severity of this offense and Bauer's lack of criminal history. Minn. Sent'g Guidelines 4.A (2022). The applicable box on the sentencing guidelines grid provides a presumptive range of 261 to 367 months, with a midrange sentence of 306 months. *Id*. Bauer asked for a "bottom of the box" sentence before the hearing and argues on appeal that the district court abused its discretion by imposing this sentence.

"We afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion." *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). A reviewing court "generally will not interfere with sentences that are within the presumptive sentence range." *State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982). The full range of sentence durations in any box of the sentencing grid "constitute an acceptable sentence based solely on the offense at issue and the offender's criminal history score—the lowest is not a downward departure, nor is the highest an upward departure." *State v. Jackson*, 749 N.W.2d 353, 359 n.2 (Minn. 2008).

Bauer points out that, under compelling circumstances, a reviewing court may modify a sentence that is within the guidelines range. *See Freyer*, 328 N.W.2d at 142. Bauer argues that his case presents compelling circumstances that require a modification of his sentence because the crime was less serious than a "typical" second-degree murder and imposing the maximum guidelines sentence would create an "unwarranted sentencing disparity" as compared with other second-degree intentional-murder convictions.

We are not persuaded. Bauer articulates no compelling circumstances. As authority for his position that his offense was less serious than the typical second-degree murder, Bauer cites caselaw reviewing sentences that depart from the guidelines. For example, Bauer relies on *State v. Mattson*, in which the supreme court reinstated the district court's downward durational departure when the defendant's conduct was "significantly less serious than that typically involved in the commission of the offense." 376 N.W.2d 413, 415 (Minn. 1985); *see also Holmes v. State*, 437 N.W.2d 58, 59-60 (Minn. 1989)

(concluding that an upward durational departure was unjustified); *State v. Musse*, 981 N.W.2d 216, 223-24 (Minn. App. 2022) (affirming denial of a downward durational departure), *rev. denied* (Minn. Dec. 28, 2022).

Caselaw on sentencing departures does not support Bauer's argument that an appellate court should depart from a guidelines sentence without compelling circumstances. We therefore decline to conclude that Bauer's offense was less serious than the usual second-degree murder. Thus, the district court did not abuse its discretion in imposing a sentence of 367 months.

Affirmed.