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STATE OF MINNESOTA | FILED | DISTRICT COURT

COUNTY OF HENNEPIN | 08 APR 9 PM 2:[illegible] | FOURTH JUDICIAL DISTRICT

BY _____ DEPUTY
HENN CO. DISTRICT
COURT ADMINISTRATOR

State of Minnesota,

Plaintiff,

v.

Myon Demarlo Burrell,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
27 CR 02-098794

The above-entitled matter came before Judge Charles A. Porter, Jr. on March 10, 11, 13, 14, 17, 18, 25, 26, 27, and April 7, 2008 for a court trial. Michael Furnstahl, Esq. appeared for the State. Tracy Eichorn-Hicks, Esq. appeared for the Defendant. Prior to the commencement of the trial on March 10, the previously-made jury and *Blakely* waivers were confirmed by the Defendant on the record. At the close of evidence, the waiver of lesser-included charges was confirmed by the Defendant on the record.

Based upon the evidence adduced, the argument of counsel, and all of the files, records, and proceedings herein, the Court makes the following:

FINDINGS OF FACT:

The Charges

1. The Defendant is charged with the following eight counts for the murder of Tyesha Edwards and the attempted murder of Timothy Oliver, both acts occurring on November 22, 2002:

   Count 1: Murder in the first degree under Minn.Stat. §609.185(a)(1);
   Count 2: Murder in the first degree committed for the benefit of a gang under Minn.Stat. §609.229, subd. 2;

   Count 3: Murder in the first degree under Minn.Stat. §609.185(a)(3);
   Count 4: Murder in the first degree committed for the benefit of a gang under Minn.Stat. §609.229, subd. 2;

   Count 5: Attempted murder in the first degree under Minn.Stat. §609.185(a)(1);

Count 6: Attempted murder in the first degree committed for the benefit of a gang under Minn.Stat. §609.229, subd. 2;

Count 7: Attempted murder in the first degree under Minn.Stat. §609.185(a)(3); and

Count 8: Attempted murder in the first degree committed for the benefit of a gang under Minn.Stat. §609.229, subd. 2.

The Shooting

2. On November 22, 2002, at approximately 3:00 p.m., Timothy Oliver was standing on the porch of his Aunt Vera Gross' home at 3433 Chicago Avenue South, when a maroon Chevrolet Malibu with drove slowly southbound on Chicago in front of 3133.
3. At some time thereafter, gunshots were fired generally at Timothy Oliver from across Chicago Avenue as he remained in his aunt's front yard. Approximately eight shots were fired from one gun. The shooter was standing just south of the porch of a house at 3436 Chicago, which is across the street from 3433 Chicago. The shots were fired from behind the porch railing of 3436 Chicago.
4. No return shots were fired.
5. At the time of the shooting, eleven-year-old Tyesha Edwards and her younger sister, Lakia, were sitting at their dining room table on the lower level of 3431 Chicago Avenue South, which is a duplex next door to 3433 Chicago. A single bullet came through the wall, striking and killing Tyesha almost instantly. The bullet was removed during her autopsy. A second bullet also came through a wall of Tyesha Edwards' home and was found on an upper-level bedroom floor.
6. Eight casings were found on the front and side lawns between 3431 and 3433 Chicago Avenue South. Two bullets struck the porch railing at 3436 Chicago, with one making a deeper and one making a more superficial blemish. This damage is consistent with these bullets being fired recently and from close range.
7. One other bullet went through Timothy Oliver's pant leg but did not hit his body.
8. The angle of the bullet hole in the dining room wall at 3433 Chicago is consistent with the shots being fired from the area across the street near 3436 Chicago.
9. Following a very thorough police investigation that included interviews with intended target Timothy Oliver and Family Mob leader Ike Hodge, Hans Williams and Ike Tyson were arrested on Monday, November 25, 2002, and the Defendant was arrested the following day.

Eyewitnesses

10. Timothy Oliver is a self-described member of the Gangster Disciples. This shooting was an attempt to kill Timothy Oliver. He gave testimony under oath before the grand jury and at the first trail of this matter, but was killed before the current trial began. His prior testimony from the grand jury and the first trial was admitted under *Crawford*.

11. On the afternoon of November 22, 2002, Oliver was visiting Vera Gross at 3433 Chicago Avenue South, when he observed a maroon car with three passengers drive slowly by. Oliver observed that the car's passengers were the driver, an African American male whom Oliver knew as "Ike;" an African American male riding in the front passenger seat whom Oliver knew as "Skits;" and an Asian male with braided hair, riding in the back seat, whom Oliver could not identify by name. Oliver later identified the Defendant, Ike Tyson, and Hans Williams as the occupants when shown photo lineups by the investigating Minneapolis Police Officers. Shortly after the car drove by, Oliver heard gunshots and saw a black male, whom he knew as "Skits," shooting at him from next to a house across the street. Oliver, testified that he knew "Skits" was a member of the Bloods gang. When he testified live at the first trial, Oliver identified "Skits," the shooter, as the Defendant. Oliver's testimony of his observations was not impeached by any prior inconsistent statements or history of being untruthful. His testimony was credible and is believed.

12. Anthony "Cornbread" Collins, a self-identified member of the Gangster Disciples gang and a friend of Oliver, had been working on his car in front of 3433 Chicago on the afternoon of the shooting, and was inside the upper level of 3433 when the shooting occurred. Collins saw Oliver in front of the house and saw a red car drive by with two black males in the front and one Asian person in the back. A few minutes after the car drove by, Collins heard shots fired but could not identify the shooter. There was no returned fire. Collins told Oliver to run, and Oliver ran to the side of the house. Shortly thereafter, Collins met a little girl who said her sister had been shot. Collins' testimony of his observations was not impeached by any prior inconsistent statements or history of being untruthful. His testimony was credible and is believed.

13. Thomas Bennett was visiting Vera Gross with Tim Oliver, Antonio "Little Cuz" Williams, and "Cornbread" on the afternoon of November 22, 2002. At the time of the shooting, Bennett was sitting in the front seat of Cornbread's car parked in front of 3433 Chicago. There were also two children in the car. Vera Gross' brother, Tracy, was working on the car. While in the car, Bennett saw a car driving southbound on Chicago slow down as it drove by; Bennett saw one person in the car. Bennett was still in Collins' vehicle when he heard shots fired; Bennett saw Oliver standing on the front steps when the shots were fired and afterward saw a new bullet hole in Oliver's pant leg. Bennett did not identify anyone involved in the shooting. Bennett's testimony of his observations was not impeached by any prior inconsistent statements or history of being untruthful. His testimony generally as to the shooting was credible and is believed.

The Co-Defendants

14. The Police investigation ultimately identified three people as the participants in the shooting: Isaiah "Ike" Tyson, Hans Williams, and Myon Burrell. Tyson and

Williams have pleaded guilty to their roles in the shooting and are currently serving their respective sentences. Hans' and Ike's statements regarding the events of November 22, 2002 have been varied over the time since the date of the shooting. Because of the inconsistencies within their own statements, between their various statements, and between their statements and the statements of other witnesses and the conflict between their statements and other uncontested or proven facts, to the extent of these inconsistencies, their testimony is not credible and is not believed.

15. Ike identified himself as a former member of the Tyson Mafia, who sometimes identified himself as a Blood, and who claims to have abandoned the gang life while in prison. Ike acknowledged that almost everyone in prison is in a gang, that he associates with Rolling 30's Bloods in prison, and that he has engaged in gang-related activity while in prison. Hans identified himself as a non-gang member who associates with known gang members. Both denied knowing for sure that the Defendant is a Blood. Both admitted, reluctantly, that a person could be hurt or killed for snitching, but both denied being snitches. Ike is a Blood. Hans is so closely associated with the Bloods as to be legally recognized as a Blood.

16. Approximately one month before the November 22, 2002 shooting, Hans and Ike were riding together in a car, when another car pulled up on the side, and Tim Oliver started shooting at them. No one was injured. Hans and Ike were aware that the Bloods and the Family Mob were engaged in an ongoing war at that time.

17. On November 22, 2002, Ike was living at 39th Street and 14th Avenue South and Hans was living at 38th Street and 2nd Avenue South in Minneapolis. Ike and Hans were good friends; both knew the Defendant from the neighborhood but neither had spent much time with him. On the morning of November 22, 2002, Ike went to Hans' house. Hans and Ike were driving in a maroon Malibu that day, but Ike said the car was already at Hans' house and Hans said they had to get a ride to pick it up at his girlfriend's workplace. This discrepancy is immaterial to the proof of these offenses but affects their credibility.

18. Once they got into the car, Ike drove. At some time that day, the two saw Tim Oliver at 34th and Chicago, where they exchanged "mean mugs," or unfriendly looks, with Timothy Oliver.

19. Ike testified that after he saw Oliver at 34th and Chicago, he drove to his home at 39th and 14th –not to an alley or to his brother Sam's house at 30th and Clinton—to get his new 40 caliber Smith & Wesson gun, which had a capacity for 12 shells, but was loaded with 8 shells that day, and that Hans waited in the car while Ike went inside to get the gun. Hans testified that Ike drove to an alley at 38th Street between Portland and Oakland—not at Ike's house and not at 3040 Clinton—where the two remained in the car and a black male walked up to the car and

handed the gun to Ike. Again, this discrepancy is immaterial to the proof of these offenses but affects their credibility.

20. Ike's brother, Samuel James, formerly known as Samuel Tyson, is a self-identified former member of the Tyson Mob and current member of the Bloods. James testified that on November 22, 2002, he was living at 3040 Clinton, and Ike often came to his house without calling ahead. He testified that Ike arrived in Hans' green Honda—not a maroon or red Malibu—with Hans and Tyree Jackson. Ike asked where the gun was; James told Ike where it was and saw him get it. James had no doubt why he gave Ike the gun. He testified that Ike, Hans, and Tyree Jackson then left the house together and all three later returned to the house. James acknowledged that he has lied to the police and has lied under oath in court on several occasions. This testimony is inconsistent with the testimony of Ike and Hans on this issue. This discrepancy is immaterial to the proof of these offenses but affects James' credibility.

21. Once he had the gun, Ike drove with Hans back toward 34th and Chicago to shoot at Oliver. Ike stopped the car and a third person got in. Ike testified that the third person flagged the car down at 37th and Chicago and Hans told Ike to let him in. Hans testified that the third person did not flag the car down or waive, but got in the car at 38th Street and 3rd Avenue when Ike stopped the car and told him to get in. Ike described the third person as dark-skinned, and shorter than himself, and possibly 17 years old. Hans described the third person as light-skinned, slender, 15 or 16 years old, and a little taller than himself (5'7"). Both Hans and Ike denied knowing the third person; each said the other appeared to know the third person. Both denied the Defendant was the third person. These denials are not credible, and it is clear that the third person was the Defendant.

22. By leaving the parked vehicle, walking between houses, and "hiding" behind a porch, the Defendant sufficiently separated himself from the car so as to not have immediately exited the car when he committed his subsequent acts. There was no eyewitness testimony regarding how soon after how soon the Defendant fired the shots after exiting the car.

23. Ike parked the car at 34th and Columbus, which is parallel to 34th and Chicago. Both Ike and the third person got out of the car and walked between the houses. Shortly thereafter, the two got back into the car quickly and Hans drove away. Ike testified that he alone walked between the houses and stood beside a house across the street from where he saw Tim Oliver standing, and Ike shot eight times, aiming at Oliver for the purpose of scaring, but not killing, Oliver. None of this portion of the story is true. Hans testified that he remained in the car, the radio was on, and he heard shots but did not know and did not want to know what happened. When he heard the shots fired, Hans moved from the front passenger seat to the driver seat. This portion of the story is credible, corroborated, and believed.

24. When the shooting ended, Hans drove away with Ike and the third person in the car. Ike, Hans, and the third person went together to Hans' house, where they stayed for a couple of hours and Ike later had his hair braided by a girl he was dating. Hans testified that he dropped the third person off where they picked him up, and then Hans and Ike went to Hans' house. While there, they saw a breaking news story on television that a little girl was shot by a stray bullet on Chicago Avenue; and at that time, Hans and Ike got back into the car and drove to the scene of the shooting, where they saw flashing lights, an ambulance, and yellow tape. They did not get out of the car. They then picked up a female then returned to Hans' house, where the female braided Ike's hair.

25. The gun has not been found. Ike left the gun in the car behind Hans' house and never saw it afterward. In the days between the November 22 shooting and their arrests on November 25, 2002, Hans urged or begged Ike to remove the gun from the silver car at Hans' house.

26. Hans and Ike were arrested together three days later, on Monday, November 25, 2002, along with Hans' girlfriend, Angela. Ike initially did not acknowledge his role to the police, but eventually admitted he was involved in the shooting. Hans similarly was not initially forthcoming with the police. Hans and Ike have both pleaded guilty.

27. Ike gave testimony about his conversations with his attorney, Assistant Hennepin County Public Defender Richard Trachy, that waived the attorney-client privilege. Prior to pleading guilty, Ike told his attorney that he refused to accept a plea offer that included testifying against the Defendant because Ike feared he would be labeled a "snitch" and that would be a death sentence. Ike initially told his attorney that the shooter was an unnamed person who was not the Defendant, but eventually agreed to testify under oath at his own plea hearing that, in truth, the Defendant was the third person and was the shooter.

28. Hans and Ike both wrote letters for the Defendant while all three were in prison indicating that the Defendant was not the third person involved in the shooting that killed Tyesha Edwards. While in prison but prior to writing the letters, incarcerated Bloods were calling Ike a "snitch," and Hans was beat-up. These letters were false.

29. Both Hans and Ike have identified the Defendant as the shooter out of court. In a phone call shortly after his arrest, Ike told Shiron Edwards to tell Little Skits that he better not be found, and when Shiron responded that Little Skits was arrested the previous day, Ike said, "For real? . . . Damn." Ike told the probation officer preparing his presentence investigation that he had tried to restrain the Defendant from shooting because there were innocent bystanders in the area. While in prison, Ike also told Lovell Ross, a/k/a Delvecchio Smith, that Skits was the shooter and that Skits was aiming for "Little Timmy." While in prison, Ike told Eldioju Reynolds that Skits was the third person and was the shooter because

Skits wanted to "earn his stripes." In a phone call to his father, Hans said the mother of the younger one, the one who killed the girl, was killed in a car accident. The Defendant's mother was killed in a car accident.

The Defendant's Incriminating Statements

30. The Defendant has made several incriminating statements while in jail.

31. On a recorded phone call to his close friend Esque Dickerson, the Defendant admitted to being in the car with Hans and Ike when the little girl was shot; the Defendant described the car the three were in as a red car, like a Ford, with the name beginning with the letter "M." Dickerson was a reluctant witness for the State, but the evidence of the Defendant's admissions in this phone call came in through a recorded phone call between Dickerson and her then-boyfriend, George Canady, that took place a few hours after the call in which the Defendant made the admissions. The evidence of the Defendant's admissions to Esque Dickerson was credible and is believed.

32. On a recorded phone call to his mother, the Defendant said, "I mean, I'm not innocent, mom, ..." This phone call was credible evidence of this admission and is believed.

33. In quad 10A of the Hennepin County jail, the Defendant had several conversations with his cell neighbor, James Turner, who did not previously know the Defendant. Turner observed that when the Defendant first arrived in quad 10A, in November 2002, he was mad, upset, angry, and yelling. Turner and the Defendant prayed together and had conversations about the Defendant's case. The Defendant told Turner that that he, Tyson, and a third person (who had been beat-up in jail), were driving in a maroon car looking for the Family Mob, and that the car belonged to the girlfriend of the one who was beat-up. The Defendant and Tyson got out of the car, chased the intended target through the houses, and that the Defendant started shooting, while the third person remained in the car. The Defendant said Tyson directed him to shoot because he was a "rider," earning his stripes, and that he was shooting at a rival in the Family Mob, but that the bullet went the other way and hit the little girl. Turner did not read the newspaper and did not watch the news during his time with the Defendant in quad 10. Prior to meeting the Defendant in quad 10A, Turner did not know the Defendant, Hans, Ike, or Tyesha. Turner has been diagnosed with paranoid schizophrenia, and tends to hear voices when he is off his medication and is around a lot of people. Turner was not hearing voices during his time with the Defendant in quad 10A. Turner's testimony of the Defendant's admissions was not impeached by any prior inconsistent statements or history of being untruthful. His testimony was credible and is believed.

34. In the St. Cloud prison, the Defendant told Dameon Leake, a rival gang member, that when Tyesha Edwards was killed the Defendant was trying to "smoke"

"Little Timmy." "Little Timmy" was Timothy Oliver of the Family Mob. Leake's testimony of this statement was not impeached by any prior inconsistent statements or history of being untruthful. His testimony was credible and is believed.

35. Kiron Williams, a self-described member of the Family Mob, got into a fight with the Defendant at the Hennepin County Jail in July 2005. The fight began when Kiron told the Defendant he was killing little kids and the Defendant responded by saying the bullet was meant for Kiron's [obscenity] homeboy, Oliver. A physical fight ensued. Kiron Williams is currently serving a sentence in federal prison and has asked to be moved to a safe place, but with no possibility of a downward departure, for his testimony here. His testimony of this incident was not impeached by any prior inconsistent statements or history of being untruthful. His testimony was credible and is believed.

36. In May 2007, while in the Hennepin County Jail, the Defendant told Terry Arrington that the bullet that killed Tyesha Edwards was meant for Tim Oliver. Arrington did not hear the Defendant say he was the shooter. Arrington is a self-described member of the Black Stone gang, which is a friend of the Family Mob and an enemy of the Bloods. Arrington's testimony was not impeached by any prior inconsistent statements or history of being untruthful. His testimony was credible and is believed.

Other "Bad Acts" Committed by the Defendant

37. Evidence of other "bad acts" done by the Defendant was admissible at trial to prove motive. The State offered testimony of several "bad acts" to prove the Defendant's motive for committing the crimes alleged in the present case.

38. Dameon Leake, a self-identified member of the Rolling 60's Crips, who is older than the Defendant, testified about two prior incidents involving the Defendant, whom Leake identified as a member of the Rolling 30's Bloods with the nickname "Little Skits." Leake was a friend of Timothy Oliver and an enemy of the Defendant. In November 2002, Leake knew that people were trying to harm the Defendant, but Leake himself was not participating in the attempts because he viewed himself as having an unfair advantage due to his age, physical stature, and rank in his own gang. On a date prior to November 22, 2002, Leake was hanging out at Portland and Franklin with, among others, "Little Cuz" and "E." Shortly after "Little Cuz" left, the Defendant, Hans Williams, and a third person walked toward him from Oakland, spreading out as they crossed the street. Each of the three had a gun. The Defendant began shooting at Leake and his group and yelled "Rolling 30's Bloods gang." No one was hit, and the incident was not reported to police because the people involved in this type of incident routinely do not report these incidents.

39. The second incident involving Dameon Leake was a brief conversation he had with the Defendant in the St. Cloud prison. Leake and the Defendant crossed paths in the hallway; the Defendant said he was aiming at "Little Cuz," not at Leake, in the prior shooting. Leake believed the Defendant was lying, and was really shooting at him, because "Little Cuz" had left before the Defendant shot. Leake noticed that the Defendant was heavier and no longer little, and decided he would beat the Defendant up the next time he saw him because of the earlier shooting. Leake mentioned Tyesha Edwards to the Defendant. The Defendant replied that he was trying to "smoke" Little Timmy of the Family Mob.

40. Dameon Leake is currently awaiting sentencing on drug charges and testifying truthfully at this trial is part of his plea negotiation. Leake did not report the November 2002 shooting or the St. Cloud conversation to the police until recently, because it is common practice in his community to not report these types of incidents to the police. Leake acknowledged that he could be killed for testifying at this trial because snitching is a violation of gang rules. Leake's testimony of the 2002 shooting and the St. Cloud conversation was not impeached by any prior inconsistent statements or history of being untruthful. His testimony was credible.

41. Terry Arrington, a self-described member of the Black Stone gang, was in a park on Franklin Avenue in May 2002 with Tim, D, Little Cuz, and others, when a carload of Bloods drove by. The Defendant hung out the window, holding a red rag around his hand, and fired shots at Arrington's group and yelled "What up; Blood." Arrington is currently in federal custody awaiting sentencing and could get a lesser sentence for testifying truthfully here. Arrington's testimony of the shooting incident was not impeached by any prior inconsistent statements or history of being untruthful. His testimony was credible.

42. Deleon Walker testified about one prior incident in which the Defendant shot at him. According to Walker, in November 2002, there was a war between the Family Mob and the Bloods that involved shootouts. Walker identified the Defendant as a Blood with the nickname "Skits." On November 25, 2002, the Monday following the shooting at Tim Oliver, the Defendant was walking down Lake Street with Artavies "Tay" Brown. Tay was walking with a limp because he had been shot in the foot at some time prior to this incident. Deleon Walker, who was friendly with the Family Mob, the 20's gangs, and the Gangster Disciples, was standing in front of the coffee shop next to 701 Lake Street with Timothy Oliver's girlfriend, Shay. Walker was a friend of Timothy Oliver and an enemy of the Defendant. Walker saw Tay and Skits, whom he knew to be Bloods, coming from Columbus Avenue and walking toward him. Tay said, "How's that Blood life treating you," and Walker immediately ran into the coffee shop. When Walker exited the coffee shop, Skits fired two to four shots and hit a Somali man in the leg but did not hit Walker.

43. Deleon Walker is currently in state prison awaiting sentencing and could get a lesser sentence for testifying truthfully here. Walker has safety concerns at Stillwater. Walker's testimony of the November 25, 2002 shooting was not impeached by any prior inconsistent statements or history of being untruthful. His testimony was credible.

44. In the winter of 2000, the Defendant was with his then-girlfriend and her baby, and Artavies Brown, when Artavies told the Defendant to shoot at a nearby car. The Defendant shot.

Alibi Evidence

45. Jillian Sully testified that on November 22, 2002, she was standing outside at 37th and Chicago across the street from Tavia's hair salon, and was talking to the Defendant when she heard 2 or 3 gunshots. Sully had left work at her temporary job at Wells Fargo around noon, drove 15 minutes to Tavia's, and had just had her hair washed when she went outside for a smoke, saw the Defendant, and heard the gunshots, and within minutes, heard sirens. Sully then went back inside Tavia's to continue her hair appointment, and within hours, while she was still at Tavia's, people in the salon said someone was killed. Sully concluded that the 2 or 3 shots she heard while standing with the Defendant at 37th and Chicago were the shots that killed Tyesha Edwards. Sully testified that a few days later, when she saw the Defendant was arrested, she called the police at the direct number for the third precinct, not at the hotline number publicized in the media, and that she did not receive a return call until recently. Such a series of events would be inconsistent with the police protocol in place at that time.

46. Sully further testified that she knew the Defendant from the neighborhood but did not know him well and did not know his family; that she was familiar with the Bloods and had friends growing up that could be identified as Bloods; but she could not identify the Defendant as a Blood.

47. Sully told Sgt. Zimmerman that she heard only one gunshot. When she left the courtroom after testifying, Sully hugged members of the Defendant's family in the hallway. Sully has a criminal history that includes being arrested with individuals who have been identified as Bloods or other gang members.

48. Sully's testimony was impeached by her acknowledgement on cross-examination of inconsistencies in her own testimony, as well as undisputed rebuttal testimony that Sully did not work with Temp Force in November 2002 and she did not work for Wells Fargo through Temp Force. In addition, several witnesses who were either at the scene of the shooting or participated in the police investigation gave undisputed testimony that approximately 8, and not 1, 2, or 3, shots were fired in the shooting that killed Tyesha Edwards.

49. In light of Sully's contradictory testimony regarding the number of shots she heard, what number she used to contact the police, her familiarity with the Defendant's family, and her affiliation with Bloods members, as well as her impeached testimony regarding her own employment on November 22, Sully's conclusory testimony that the Defendant was with her at the time of the shooting that killed Tyesha Edwards on the afternoon of November 22, 2002 was not credible.

50. James Graham testified that on November 22, 2002, the Defendant was with him, at Graham's house playing video games from about 2:15 pm until about 5:00 pm, though Graham did not check the time carefully. Graham's testimony was not impeached by any prior inconsistent statements or history of being untruthful. However, Graham's testimony that the Defendant was with him at the time of the shooting is not credible because it is implausible. Graham's testimony conflicts with the totality of the evidence presented at trial which overwhelmingly proves the Defendant was the third person involved in the shooting that killed Tyesha Edwards.

Tyree Jackson

51. Throughout this trial, the defense has attempted to prove the Defendant was not the third person involved in the shooting that killed Tyesha Edwards because Tyree Jackson was the third person.

52. The name "Tyree" or "Tyee" was first mentioned to the police in 2003 by then-defense counsel after the jury was picked but before the first trial began. The police investigated but did not have a last name and their database included several "Tyrees" or "Tyees."

53. Tyree Jackson is currently in prison for murder but was not in jail or prison in April 2003.

54. At trial, Hans Williams was shown a photograph of Tyree Jackson and testified that the person in the photograph was the third person. However, prior to trial, Hans was shown the same photograph of Tyree Jackson and told the police the person in the photograph was not the third person.

55. The only testimony that could have supported the theory that Tyree Jackson was in fact the third person was given by Samuel James, who testified that Hans and Tyree were with Ike when Ike picked the gun up at James' house, and that Ike, Hans, and Tyree returned to James' house after the shooting. This evidence was so inconsistent with the rest of the evidence at trial as to be insufficient to create a reasonable doubt that the Defendant was not the third person.

Gang Evidence

56. The State presented gang expert testimony in the form of firsthand information, with its primary gang expert being Isaac Hodge, a self-described longtime leader of the Family Mob gang, who testified generally about the existence, membership, and activities of Minneapolis gangs including the Rolling 30s Bloods, the Family Mob, and the Gangster Disciples ("GD's"). Additional gang evidence came from firsthand testimony of other self-described gang members, including Anthony "Cornbread" Collins, a GD; Dameon Leake, a Rolling 60s Crip (friendly with the Family Mob); Kiron Williams, a Family Mob; Terry Arrington, a Black Stone (friendly with the Family Mob); and Samuel James, a Blood. In addition, other people who live in the community and are personally familiar with the Defendant's gang affiliation, but who did not testify about their own gang affiliation or lack thereof, gave firsthand testimony of their knowledge.

57. The Rolling 30s Bloods ("Bloods") have existed in Minneapolis since the early 1990s. The Bloods have more than three members; at least 15 individuals were identified at trial as being Bloods. The Bloods have, as a primary activity, the commission of crimes including shooting rival gang members—sometimes to kill and sometimes to scare—as well as aggravated robbery and selling drugs. The shootings are sometimes drive-by, sometimes walk-up, sometimes shooting-up a park or a rival's neighborhood.

58. Traditionally, the Bloods have used red as their signature color. Lately, gangs are moving away from signature colors because they are too easily identifiable to police.

59. The area around and including 34th and Chicago in Minneapolis is commonly understood by Bloods and rival gang members to be Bloods territory.

60. In November 2002, the Defendant was a member of the Rolling 30's Bloods with the nickname "Skits" or "Little Skits," after having been "jumped in" to the Bloods in January 2001. The Defendant is a former Vice Lord with the nickname "Little Lord."

61. Also identified as Bloods were: Artavies "Tay" Brown; Tommie "Little Tommie" Milon; Reggie Ferguson, a retired leader; Eugene Sandberg; Solomon "Lazy" Shannon; Grant Tyus; Larry "Mellow" Tyus; Alonzo Graham; James "Monk" or "Mook" Graham; Donald Jackson; Michael Burrell, the Defendant's brother; Konata Hill; Calvin Ferguson; Arthur Adams; Kye Powell; and Deaunteze Bobo. Some of these individuals have died as a result of violence, and others are or have been incarcerated. Hans Williams was identified as a Blood or a Blood wanna-be or a "do"-boy. Ike Tyson was identified as both Tyson Mob (also referred to as T-Mob or Tyson Mafia) and Blood, because the Tyson Mob is closely affiliated with the Bloods.

62. The Family Mob and the Gangster Disciples, also referred to as "GD's," are friendly with each other, and both are enemies of the Bloods. The Family Mob is a clique or a gang that derives from the Gangster Disciples gang, having split from the Gangster Disciples in 1992, and are also friendly with other gangs, including the 20s gangs and the Lake Street Boys. The Bloods are enemies of the Family Mob, the Gangster Disciples, the Crips, and the Black Stone gang.

63. A person joining a gang is initiated by being "jumped in," meaning beat-up.

64. Young gang members have to "earn their stripes" by riding and shooting at rivals. A person transferring from one gang to another would have to prove his loyalty to the new gang by shooting at rivals. A young member who is trying to make a name for himself is often a "rider." A rider always has a gun, and he rides in cars along with fellow members and shoots at rivals. The Defendant and Timothy Oliver were both riders for their respective gangs.

65. Loyalty to one's own gang and retaliation against enemies are essentials in gang life. Gang members will lie, steal, cheat, and kill for their allies. If one gang member is in prison for life, he will "take" another case by falsely confessing to a crime in order to get a fellow gang member cleared. Retaliation involves doing to an enemy what they did to your gang because a gang is a family. Turf is to be respected.

66. Gang members do not report shootings to the police. Instead, they retaliate.

67. If a gang member gives information to the police or in court about another gang member—whether an ally or a rival—he is considered to be a snitch. Gang members intimidate, hurt, or even kill, snitches.

68. The general protocol is that the younger gang members commit the violent acts, including doing the shootings, and they shoot at rivals who are or have been shooting at them. Protocol dictates that the older, senior gang members do not commit violent acts against the younger, smaller rivals because of the unfair advantage.

69. Timothy Oliver, a rider for the Gangster Disciples in the Gangster Disciples/Family Mob neighborhood, had a reputation of shooting the most Bloods, even shooting older Bloods. The Bloods were after Oliver and had an understanding to "blast [Oliver] on sight." In November 2002, killing Oliver would earn a young Blood "stripes."

70. In November 2002, there was an escalating war involving the Rolling 30s Bloods against the Gangster Disciples and the Family Mob. The war involved 3 or 4 shootings per day. The Defendant was living in Bemidji, Minnesota; Artavies "Tay" Brown, a Blood who was older than the Defendant, called the Defendant's Bemidji home several times in the week before November 22, 2002. Tay

informed the Defendant that the war was going on, and told the Defendant to go to Minneapolis. The Defendant's mother drove him to Minneapolis.

CONCLUSIONS OF LAW:

1. The testimony given by the State's witnesses was materially consistent, materially unimpeached, and credible. The testimony given by the defense witnesses was materially inconsistent, routinely impeached on material facts, and not credible.

2. The State's evidence, which includes firsthand testimony, photographs, phone calls, letters, reports, and other documents, proves beyond a reasonable doubt that the Defendant was not only the third person involved, but was the sole person shooting on November 22, 2002 and that he killed Tyesha Edwards.

3. To prove first degree murder and attempted murder, the State must prove the Defendant "cause[d] the death of a human being with premeditation and with intent to effect the death of the person or another." Minn.Stat. §609.185(a)(1). Here, the State's evidence proves beyond a reasonable doubt that on November 22, 2002, the Defendant premeditated the shooting, and that he shot at Timothy Oliver with the intent to kill Oliver, and that Tyesha Edwards died as a result of being struck by one of the bullets intended for Oliver.

4. To prove first degree murder and attempted murder for the benefit of a gang, the State must prove the Defendant committed first degree murder and attempted murder "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 is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, that has, as one of its primary activities, the commission of one or more of the offenses listed in section 609.11, subdivision 9; has a common name or common identifying sign or symbol; and includes members who individually or collectively engage in or have engaged in a pattern of criminal activity." Minn.Stat. §609.229, subd. 1.

5. Here, the State's evidence proves beyond a reasonable doubt that the Rolling 30's Bloods and the Family Mob and the Gangster Disciples are gangs; the Defendant was a member of the Rolling 30's Bloods on November 22, 2002 and that he was an enemy of the Family Mob and the Gangster Disciples; and the Defendant's commission of the November 22, 2002 shooting that killed Tyesha Edwards was done in association with the Rolling 30's Bloods, was motivated by his involvement with the Rolling 30's Bloods, and benefitted the Rolling 30's Bloods.

6. To prove first degree murder and attempted murder in a drive-by shooting, the State must prove the Defendant "cause[d] the death of a human being with intent to effect the death of the person or another, while committing or attempting to

commit . . . a drive-by shooting." Minn.Stat. §609.185(a)(3). A drive-by shooting is defined as when a person "recklessly discharges a firearm at or toward . . . a person, or an occupied building or motor vehicle," "while in or having just exited from a motor vehicle." Minn.Stat. §609.66, subd. 1e(a), (b). The term "having just exited a motor vehicle" is defined as "having exited 'only a moment ago,'" which means "requiring the immediate action of shooting following the exiting from an automobile." *State v. Lewis*, 638 N.W.2d 788, 791 (Minn.App. 2002).

7. Here, the State's evidence does not prove beyond a reasonable doubt that the Defendant did the shooting while having just exited a motor vehicle. The testimony is unclear about exactly how much time the Defendant spent outside of the vehicle, moving through yards, hiding behind the porch of 3436 Chicago, looking for, aiming, and shooting at Oliver. Without these details, it cannot be said beyond a reasonable doubt that the shooting occurred immediately after the Defendant exited the vehicle.

8. Thus, the State has proven beyond a reasonable doubt that the Defendant committed the following: intentional, premeditated murder of Tyesha Edwards by transferred intent; intentional, premeditated attempted murder of Timothy Oliver; intentional, premeditated murder of Tyesha Edwards for the benefit of a gang by transferred intent; and attempted intentional, premeditated murder of Timothy Oliver for the benefit of a gang.

9. The State has failed to prove beyond a reasonable doubt that the Defendant committed a drive-by shooting. The State has therefore failed to prove the Defendant committed first degree murder by drive-by shooting; first degree murder for the benefit of a gang by drive-by shooting; first degree attempted murder by drive-by shooting; and first degree attempted murder for the benefit of a gang by drive-by shooting.

ORDER:

1. On Count 1, Murder in the First Degree, the Court finds the Defendant **GUILTY**.

2. On Count 2, Murder in the First Degree for the Benefit of a Gang, the Court finds the Defendant **GUILTY**.

3. On Count 3, Murder in the First Degree While Committing a Drive-By Shooting, the Court finds the Defendant **NOT GUILTY**.

4. On Count 4, Murder in the First Degree While Committing a Drive-By Shooting for the Benefit of a Gang, the Court finds the Defendant **NOT GUILTY**.

5. On Count 5, Attempted Murder in the First Degree, the Court finds the Defendant **GUILTY**.

6. On Count 6, Attempted Murder in the First Degree for the Benefit of a Gang, the Court finds the Defendant **GUILTY**.

7. On Count 7, Attempted Murder in the First Degree While Committing a Drive-By Shooting, the Court finds the Defendant **NOT GUILTY**.

8. On Count 8, Attempted Murder in the First Degree While Committing a Drive-By Shooting for the Benefit of a Gang, the Court finds the Defendant **NOT GUILTY**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: April 9, 2008

Charles A. Porter, Jr.
Judge of District Court

STATE OF MINNESOTA

IN SUPREME COURT

A03-1293

Hennepin County

Anderson, Paul H., J.
Concurring/Dissenting, Hanson and Anderson, Russell A., JJ.
Took no part, Anderson, G. Barry, J.

State of Minnesota,

Respondent,

Filed: May 19, 2005
Office of Appellate Courts

vs.

Myon Demarlo Burrell,

Appellant.

S Y L L A B U S

District court erred by concluding that the state proved by a fair preponderance of the evidence that a 16-year-old defendant who asked for his mother 3 times before receiving a *Miranda* warning and 10 times afterward made a knowing, intelligent, and voluntary *Miranda* waiver.

Allowing the jury to view a videotape of an interrogation that followed an ineffective *Miranda* waiver was prejudicial error.

State bears the burden of proving that hearsay evidence does not violate a defendant's Sixth Amendment confrontation rights as defined in *Crawford v. Washington*, 541 U.S. 36 (2004), and upon receiving such evidence, the district court must weigh all relevant factors to determine whether incriminating comments from a deceased person made to police at a police station are admissible hearsay.

District court abused its discretion by permitting an expert witness to vouch for another witness's truthfulness.

District court must carefully scrutinize expert testimony from a Gang Strike Force police officer to ensure

that it complies with directives in *State v. DeShay*, 669 N.W.2d 878 (Minn. 2003), and *State v. Lopez-Rios*, 669 N.W.2d 603 (Minn. 2003).

District court did not abuse its discretion in excluding evidence from jail inmates and a jail visitor who purportedly heard a codefendant exonerate the defendant because the defendant failed to provide sufficient indicia of the statements' reliability.

District court erred by not performing an independent *in camera* review of circumstances surrounding plea negotiations with codefendants that may have deprived the defendant of his due process rights.

Reversed and remanded.

Heard, considered, and decided by the court en banc.

O P I N I O N

ANDERSON, Paul H., Justice.

This appeal results from the death in 2002 of Tyesha Edwards, 11, who died from a stray bullet fired during an apparent gang feud. Two persons pleaded guilty in connection with the crime. A third, appellant Myon Demarlo Burrell, was found guilty of Tyesha's murder and the attempted murder of Timothy Oliver, the apparent target of the shooting.

Burrell, a minor when the shooting took place, claims that the district court committed prejudicial error when it (1) found his *Miranda* waiver valid even though the police lied to him and denied him access to speak to his mother despite repeated requests before and after receiving his *Miranda* warning, (2) denied his request to cross-examine the police officers who interrogated him about specific false statements they made to him during the interrogation, (3) prevented him from exercising his constitutional right to confront a witness against him by admitting a pretrial statement his mother made to police before she died, (4) permitted a psychiatrist to vouch for a prosecution witness's truthfulness, (5) admitted expert testimony about criminal gangs, (6) refused to admit testimony from jail inmates who purportedly heard a nontestifying codefendant confess to firing the fatal shot and state that Burrell had not been present at the shooting, (7) denied his request to compel the discovery of two codefendants' plea negotiations, and (8) imposed a sentence that constitutes an unsupported departure from the Minnesota Sentencing Guidelines' presumptive sentence. We conclude that several errors occurred during Burrell's trial, and therefore reverse and grant a new trial.

The crime and investigation

At around 3:00 p.m. on November 22, 2002, Tyesha Edwards was with her younger sister, Lakia, doing

homework and watching television inside her South Minneapolis home when she was struck in the chest by a bullet. Lakia tried to call 911, but the phone did not work, so she sought help from the next-door neighbors. Neighbor Tinicia Longs ran to the girls' home and found Tyesha on the dining room floor. Longs ran to get her phone and then, with her husband, returned to the girls' home, where she dialed 911. Longs and her husband attempted to comfort Tyesha until she lost consciousness. Tyesha was taken to Hennepin County Medical Center in Minneapolis, where she was pronounced dead.

The first officers on the scene found a bullet hole in the wall of the home, behind a dining room chair. Subsequent investigation revealed that the bullet was fired from outside the home and had traveled from southwest to northeast. Southwest of the home, officers found seven spent shell casings and a bullet lodged in the porch rail of another home. Two days later, Tyesha's parents found a bullet hole in Tyesha's bedroom wall and a bullet nearby.

After interviewing witnesses, police learned that a teenager named Timothy Oliver was linked to the crime. On November 25, 2002, Oliver called the lead investigator in the case, saying that he delayed coming forward because he was afraid that someone was trying to kill him. Later that afternoon, police detained Oliver in connection with a separate shooting. Investigators in Tyesha's case interviewed Oliver and showed him two photographic lineups, each containing photographs of six males of similar race and age. From the lineups, Oliver identified Hans Williams and Ike Tyson as being involved in Tyesha's shooting, but Oliver said that a 15- to 17-year-old male named "Skits" was the shooter.

Police officers subsequently learned that "Skits" was Myon Burrell, a 16-year-old who grew up in Minneapolis and had moved with his mother to Bemidji, Minnesota. Early on November 26, 2002, Oliver selected Burrell's photograph from a third photographic lineup.

Shortly before noon on November 26, the Minneapolis police arrested Burrell in South Minneapolis. Burrell was brought to a police department interrogation room, where a video camera recorded his meeting with police investigators. The interview videotape begins with Burrell alone in an interrogation room, seated with his hands handcuffed behind his back. After about eight minutes, a police officer opened the door, but did not say anything or immediately enter the room. Almost a minute later, Burrell said to the officer: "Sir, can I call my mom now please?" The officer responded that Burrell will "have to wait." Burrell answered in the affirmative when the officer asked whether he had been in trouble before. Burrell then said: "So I don't get to talk to my

mom before I get to talk to (inaudible)?" The officer responded that Burrell would "have to talk to the investigator," and then left Burrell alone, still handcuffed.

Twelve minutes later, the lead police investigator on Tyesha's homicide entered the room with another investigator. They removed Burrell's handcuffs, introduced themselves, informed him that they were "looking at that little girl that got shot," and asked Burrell his age. Burrell responded that he was 16. The lead investigator then told Burrell that "last night we uh, we talked with Hans and Ike and those guys," and that "they're putting you in the middle of some stuff," and that "they're hooking you into this stuff." Burrell responded by stating that he did not "even mess with Ike or Hans." The investigator then indicated that Williams and Tyson were "helping themselves," and that Burrell needed to "take care of yourself so you can be there for your baby in a year, five years, ten years." Shortly thereafter, the following exchange took place:

Lead investigator: But um, uh first of all uh what we need to do uh first okay, I want, I want to hear your side of it okay?

Burrell: Yeah.

Lead investigator: And, and let me know if those guys are full of baloney or let me know if they hooked you into something you didn't want to be in, okay?

Burrell: All right. (Inaudible)

Lead investigator: Okay, okay, look—

Burrell: What me being a juvenile interrogation, don't I get to um, can I call my mother cause (inaudible) supposed to be going (inaudible) at 12 o'clock.

Lead investigator: Yeah have you ever been, have you ever been arrested in Minnesota before? Or hauled in in Minnesota, ever?

Burrell indicated that he had a misdemeanor arrest on his record. Then this exchange occurred:

Lead investigator: Okay. In Minnesota what we're gonna do is uh, right here and right now, is we're gonna talk to you 'cause your mom wasn't with ya these last couple days. Ya know what I mean?

Burrell: Yes, my mom (inaudible).

The investigator responded that "we'll go talk to her too," but that first Burrell was to be given an opportunity to "let us know your side." Seven more exchanges between the investigators and Burrell followed, and then the lead investigator mentioned the *Miranda* warning. The investigator then administered the *Miranda* warning, inquiring after each part to ensure that Burrell understood each of his rights. Burrell generally indicated comprehension, responding that he "[didn't] have to say anything if I don't want to," that "if I say anything you can bring it up in court," and that, if he could not afford an attorney, the attorney who would be provided to him is called a "public defender." After the warning was complete, Burrell was asked whether he understood "each

of those rights." Burrell uttered something unintelligible and nodded his head up and down. The investigator then asked Burrell whether he wanted to "tell us your side."

Burrell responded that he "didn't know anything about what happened to that little girl or anything," and that he and his mother had arrived in the Twin Cities shortly after dark on Saturday, November 23—the day after Tyesha was shot. Burrell said he had slept at his brother's home on Saturday night, and early Sunday morning had taken a bus to the Mall of America in Bloomington, where he bought new clothes at about 6:45 a.m. and then saw a movie. About 30 minutes later, Burrell was informed that Mall of America stores are not open at 6:45 on a Sunday morning, that he was getting "caught up in your lies," and that he was under arrest for first-degree murder.

Burrell asked to speak with his mother 10 times after receiving his *Miranda* warning, and each time the request was denied. This exchange occurred a little over an hour into the interrogation:

> Lead investigator: And it was just you and your mom?
> Burrell: Can I talk to my mom now?
> Lead investigator: It was just you and your mom in the car?
> Burrell: It was just me and my mom. But can I talk to my mom now?
> Lead investigator: Um, not yet. Not yet. Uh, when we're finished here we'll let you talk to her.

During the interrogation, Burrell's mother, Marketta Burrell, had arrived at the police station to inquire about the circumstances of his arrest. She was taken to a separate interrogation room where she told an investigator that she and her son lived in Bemidji and that a Bloods gang member who was a "bad influence" had been calling, urging Burrell to come to Minneapolis. She also told the investigator that her son's street name was "Skits," that she and Burrell had arrived in Minneapolis around 7:00 p.m. the previous Thursday—the day before Tyesha was shot—and that she did not know where her son was between Thursday evening and the following Monday. The record indicates that the conversation was recorded electronically, but that Marketta Burrell was not under arrest.

The investigator who had interviewed Marketta Burrell then resumed Myon Burrell's interrogation, informing Burrell that his mother, whom the investigator described as a "Christian lady [who] * * * wouldn't lie to me," said they had arrived in Minneapolis on Thursday, not Saturday. Burrell denied arriving on Thursday, but said "It was Friday or Saturday. Saturday or Friday, I don't know, I, I think it was Friday or Saturday." Soon thereafter, Burrell said: "It would have been on Friday or Saturday. Okay? * * * Was it on Thursday?

Actually it was on Thursday."

After an additional 30 minutes of interrogation, Burrell said: "I really want to talk to my mom, you understand that?" The investigator replied: "Yeah, we'll, we'll arrange that." The interrogation resumed, and three minutes later this exchange took place:

> Burrell: Can I go and get my phone call to my mom (inaudible)?
> Investigator : We'll let you meet, we'll let you talk to your mom here.
> Burrell: She's here?
> Investigator: Yes.
> Burrell: All right.
> Investigator: We'll let you, we'll let you talk to your mom here, but I want to make sure that one thing.
> Burrell: Hmm?
> Investigator: That everything you said—
> Burrell: Is truth.

Two minutes later, Burrell asked: "Can I talk to my mom and go?" The investigator did not directly respond to the request. Almost five minutes later, Burrell again asked, "Can I talk to my mom?" The investigator responded "yeah you can," and then told Burrell that "your mom's pissed at you" for "not following the right way." Less than a minute later, Burrell said: "I want to see my mom." The investigator replied with a question about whether Burrell smoked drugs. Thirty seconds later, this exchange took place:

> Burrell: (Inaudible). What's up, can I go talk to my mom now?
> Investigator: Yeah we're gonna get your mom. We're gonna get your mom. (Inaudible) And she's a nice lady.
> Burrell: I know it.
> Investigator: Yeah. And it's too bad you had to do her like this.
> (Two minutes of interrogation passed.)
> Burrell: So can I go talk to my mom then?
> Investigator: We're going to bring her to you.
> Burrell: Bring her to me. This is crazy. So when do I get to go to court?

Throughout the post-*Miranda* interrogation, the investigators continued to mention Williams and Tyson. Burrell was asked, "Why would Hans and uh, Ike say you were with them?" Burrell was also told that "we talked to Ike several hours last night. * * * He says uh, you were in the car with him and uh with Hans." Later, an investigator asked: "Is it wrong if Ike's blamed it on you?" Burrell responded: "That's wrong." Throughout the interrogation, Burrell repeatedly denied riding in a car with Williams and Tyson on the day of the shooting.

The 2-hour, 57-minute videotape of the interrogation ended with the investigator promising to take Burrell to his mother. It is unclear from the record whether the investigator actually did take Burrell to see his mother.

In all, Burrell asked for his mother 13 times—3 times before the *Miranda* warning and 10 times afterward. He never asked for an attorney.

The next day, a criminal complaint was issued that collectively listed Burrell, Tyson, and Williams as codefendants. According to the complaint, Williams told police officers that (1) he had remained in the car after he, Tyson, and "another individual" drove to where they believed Oliver was located; (2) he had heard several gunshots; and (3) he had observed "Tyson and the third codefendant * * * walking very fast" back toward the car as Tyson held a handgun. Tyson admitted to being in a car with the other codefendants and that a "verbal exchange" with Oliver had taken place, but that "[d]efendant Tyson claims nothing happened beyond that." But the complaint also indicates that Tyson "stated he shot the gun several times." The complaint does not specify that either Tyson or Williams identified Burrell by name as being the third codefendant.

On December 19, 2002, a Hennepin County grand jury indicted Burrell, Williams, and Tyson for first-degree murder for Tyesha' death and for the attempted first-degree murder of Oliver. Minn. Stat. §§ 609.185(a)(1), 609.05, 609.17 (2004). All three also were indicted for committing crimes for the benefit of a gang and committing crimes during a drive-by shooting. Minn. Stat. §§ 609.229, 609.185(a)(3) (2004). Tyson pleaded guilty to second-degree murder committed for the benefit of a gang and attempted first-degree murder for the benefit of a gang. During his plea hearing, Tyson testified that Oliver was the intended target, that Burrell was the shooter, and that any statements he previously made to the contrary were untrue. Tyson said he understood that the state could "withdraw this plea" if Tyson "were to attempt to provide false testimony" in the future.

Pretrial motions

During a pretrial hearing, Burrell claimed that his *Miranda* warning was insufficient and his *Miranda* waiver was ineffective, in part because he was denied access to his mother. After viewing the videotaped interrogation and hearing testimony from two of the interrogating investigators on the videotape, the district court ruled that Burrell generally demonstrated comprehension of the *Miranda* warning, that he had made a knowing and intelligent waiver of his *Miranda* rights, and that he gave his statements freely and voluntarily. The court stated that "there is no constitutional right for an underage Defendant to speak with his mother. The fact that the officer did not allow him to contact a parent does not affect the admissibility of the statement."

Marketta Burrell was unavailable to testify because she had died in a traffic accident on the day before Burrell was indicted. The district court denied Burrell's pretrial motion to suppress Marketta Burrell's police

station statements on the ground that the totality of the circumstances indicated the statements were trustworthy. The court also denied Burrell's request for disclosure of Tyson's and Williams' plea negotiations and the testimony of their attorneys on the grounds that the negotiations would be inadmissible evidence and disclosure of the negotiations would violate the attorney-client privilege.

The state sought to exclude testimony from Tyson's fellow inmates and a jail visitor who purportedly heard Tyson admit to being the shooter and say that Burrell was not involved. The court reserved ruling on the request, and made admission of this testimony contingent on Burrell establishing "sufficient indicia of reliability and a recognized exception to the prohibition of the admission of hearsay evidence." Ultimately, the court concluded that indicia of reliability were not proven, and did not allow the proffered jail witnesses to testify.

Trial

Testimony in Burrell's jury trial began on April 28, 2003. Among the eyewitnesses who testified, Oliver was the only one to state that Burrell, whom he identified as "Little Skits," was involved in the shooting.[1] Oliver testified that he and some individuals who belonged to various gangs were outside his aunt's house on Chicago Avenue South when he saw Bloods member Tyson drive up in a maroon Chevrolet Malibu, with "Little Skits" reclined in the front passenger seat. Oliver also testified that he and his gang rivals "mean mugg[ed]" each other—a gang reference, he said, for exchanging angry looks. The Malibu then sped away.

Oliver testified that soon he heard nine or ten gunshots from across Chicago Avenue. Oliver said he ran to the side of his aunt's house and saw "Little Skits" pointing a gun at him and pulling the trigger, but that no shots were fired because the gun had "no more shells in it." Oliver said he left the scene to avoid "the hassle of questioning."

The jurors viewed the videotape of Burrell's interrogation in its entirety. Burrell did not object to the videotape's admission. Burrell sought to cross-examine the investigators on specific mischaracterizations they had made during the interrogation before and after the *Miranda* warning was given. These mischaracterizations included the assertion that both Tyson and Williams had identified Burrell as being involved when in fact Williams had not identified Burrell by name and may not have known Burrell. The district court denied Burrell's request to have the investigators specify what statements were false, and only permitted Burrell to cross-examine the investigators generally about the use of false information during the interrogation.[2]

James Turner, who had been in a jail cell adjacent to Burrell's, testified that Burrell had admitted to being

the shooter and that a burgundy car had been used. Turner said Burrell characterized the shooting as a "planned out hit" against a rival gang member, but that a bullet intended for their target had entered Tyesha's home. On cross-examination, Turner admitted to being paranoid schizophrenic and that "sometimes I hear voices."

The state called forensic psychiatrist Karen Bruggemeyer, who had examined Turner, to offer an expert opinion on whether anything about Turner's mental state affected his ability to receive, recall, and relay information, and whether Turner may have been hearing voices. Bruggemeyer answered in the negative. On cross-examination, Bruggemeyer was asked whether Turner "would be capable of" confusing Burrell's jailhouse comments. Bruggemeyer responded: "It's possible." On redirect, the state asked: "Well, Dr. Bruggemeyer, in your professional opinion, to a reasonable medical certainty did you believe James Turner to have made up any of this information he provided to the police?" Burrell objected based on foundation, relevance, and speculation. The objection was overruled, and Bruggemeyer responded: "I believe he was being truthful."

Marketta Burrell could not testify because she had died before trial. Therefore, the investigator who interviewed her testified as to what she had said at the police station about Burrell's arrival in Minneapolis the day before the shooting and his gang connections. No tape of the interview with Marketta Burrell was played for the jury. A member of the Minnesota Gang Strike Force then gave expert testimony about the ten-point list of criteria that Minnesota police use to gauge gang membership. The officer concluded that Burrell "is a Vice Lord that turned Blood."

The state called Burrell's cousin, Esque Madonna Dickerson, who had spoken with Burrell by phone after the shooting and after Burrell's arrest and then told her boyfriend, Hennepin County Jail inmate George Canady, about the conversation. The Dickerson-Canady conversation had been recorded and Dickerson was confronted with the transcript of the phone conversation details during trial. Dickerson testified that Burrell had admitted to riding with Williams and Tyson when Tyesha was shot.

Burrell did not testify, nor did Williams or Tyson. James Graham, a former Bloods member, testified on Burrell's behalf and said that Burrell was among some kids who played dominoes and video games at his home from a little after 2:00 p.m. until after 5:00 p.m. on the afternoon of the shooting. Burrell also called private investigator Michael Grostyan to testify about an anonymous tip that Grostyan had received regarding another possible suspect in the Tyesha case, but the court excluded Grostyan's testimony as not sufficiently reliable.

After the state and Burrell had rested, but before the district court instructed the jury, Burrell's attorney

and the state placed on the record conversations between the court and counsel that had taken place during trial regarding Burrell's request to cross-examine the officers who Burrell claimed had made false statements during interrogation. The state referred to the court's apparent concern about "opening the door to the out-of-court statements of the co-defendants." The jurors were then instructed as follows: "The questions and statements of officers during Mr. Burrell's interrogation, which you viewed on videotape, are not evidence. You must not consider their statements in your deliberations and you may not use them in reaching your verdict."

The jury found Burrell guilty of all charges. The district court convicted Burrell on first-degree murder for the benefit of a gang and first-degree attempted murder for the benefit of a gang. Minn. Stat. §§ 609.17, 609.185(a)(1), 609.229 (2004). On June 10, 2003, the district court sentenced Burrell to life in prison for first-degree murder, 15 years for attempted murder, and 12-month and 6-month terms, respectively, for committing crimes for the benefit of a gang—all to run consecutively.

The issues raised on appeal are whether the district court erred in (1) finding Burrell's *Miranda* waiver valid even though he had repeatedly asked to speak with his mother before receiving his *Miranda* rights, (2) denying Burrell's request to be able to cross-examine the police officers who interrogated him on the specific false statements they made during the interrogation, (3) preventing Burrell from exercising his constitutional right to confront a witness against him by admitting a statement his mother made to police before she died, (4) permitting a psychiatrist to vouch for a prosecution witness's truthfulness, (5) admitting expert testimony about criminal gangs, (6) refusing to admit testimony from jail inmates who purportedly heard a codefendant confess to firing the fatal shot, (7) denying Burrell's request to compel the discovery of two codefendants' plea negotiations, and (8) imposing a sentence that constituted an unsupported departure from the Minnesota Sentencing Guidelines' presumptive sentence.

I.

We first consider Burrell's arguments regarding the adequacy of his *Miranda* warning and effectiveness of his waiver. Burrell contends that his *Miranda* warning was inadequate because he was not advised that his responses could be used in an adult-court prosecution. He also contends that his *Miranda* waiver was ineffective, in part because the police denied his repeated requests to speak with his mother and during his interrogation the police mischaracterized evidence they had against him.

We review findings of fact surrounding a purported *Miranda* waiver for clear error, and we review legal conclusions based on those facts de novo to determine whether the state has shown by a fair preponderance of the

evidence that the suspect's waiver was knowing, intelligent, and voluntary. *State v. Ray*, 659 N.W.2d 736, 742 (Minn. 2003); *State v. Hannon*, 636 N.W.2d 796, 806 (Minn. 2001), *reh'g denied* (Minn. Jan. 14, 2002). When an appellant contends that credible evidence supports a finding that his *Miranda* waiver was ineffective, "an appellate court will make a subjective factual inquiry to determine whether under the totality of the circumstances the waiver was valid. Despite this inquiry, the standard of review remains whether the district court's finding is clearly erroneous." *State v. Camacho*, 561 N.W.2d 160, 169 (Minn. 1997) (internal citation omitted).

1. Advice of adult court prosecution

In *Miranda v. Arizona*, the United States Supreme Court held that a criminal suspect facing interrogation must be informed that he has a right to remain silent, that anything he says can be used in court, that he has a right to consult with an attorney and to have the attorney present during interrogation, and that, if indigent, an attorney will be appointed to represent him. 384 U.S. 436, 467-73 (1966). A suspect may waive his rights, as long as he does so voluntarily, knowingly, and intelligently. *Id.* at 444.

When a juvenile is interrogated in connection with a crime that might be prosecuted outside of juvenile court, there is heightened concern that the juvenile understands that any inculpatory statements he makes after waiving his *Miranda* rights can be used against him in adult court. *State v. Loyd*, 297 Minn. 442, 445, 212 N.W.2d 671, 674 (1973). We have stated that the best course is to specifically warn the minor that his statement can be used in adult court, particularly when the juvenile might be misled by the "protective, nonadversary" environment that juvenile court fosters. *Id.* at 449-50, 212 N.W.2d at 676-77.

When investigators do not specifically warn a juvenile of possible adult prosecution, a *Miranda* waiver still may be effective because "[a]wareness of potential criminal responsibility may often be imputed to a juvenile when the police are conducting the interrogation." *Id.* at 450, 212 N.W.2d at 677. To determine whether adult court prosecution may be imputed to a juvenile, we examine several factors including the circumstances of the juvenile's arrest and the discussions that preceded administration of the *Miranda* rights. *See State v. Ouk*, 516 N.W.2d 180, 185 (Minn. 1994). In *Ouk*, we held that criminal responsibility could be imputed to a 15-year-old defendant whose home had been surrounded by more than two dozen armed police officers, who was told during two hours of negotiations that he was a suspect in a shooting and robbery, who was handcuffed upon arrest, and who was taken directly to a homicide unit conference room. *Id.* In *State v. Williams*, we held

that a juvenile could reasonably anticipate adult prosecution because "several police squad cars surrounded the car using highly adversarial felony arrest maneuvers," and the juvenile was told that police were investigating a double homicide. 535 N.W.2d 277, 287 (Minn. 1995).

In Burrell's case, the videotape of his interrogation made pursuant to *State v. Scales*, 518 N.W.2d 587 (Minn. 1994), indicates that Burrell was handcuffed upon entering a police department interrogation room. Before any *Miranda* warning was administered, an investigator told Burrell that "we're looking at that little girl that got shot" and asked Burrell some questions. Burrell was then given his *Miranda* rights. Burrell was then asked whether he wanted to tell his "side," and he responded: "I didn't know anything about what happened to that little girl or anything." Based on the physical restraints used during Burrell's arrest and the conversations indicating that Burrell knew that police officers had apprehended him in connection with Tyesha's killing, we conclude that knowledge of possible adult court prosecution could be imputed to Burrell.

2. Totality of the circumstances surrounding waiver

Even though we conclude that Burrell's *Miranda* warning was adequate, in this situation we must make a subjective factual inquiry as to whether the district court erred by concluding that the state has proven that Burrell's waiver was valid. *Camacho*, 561 N.W.2d at 168-69. For a *Miranda* waiver to be valid, all suspects regardless of their age must fully understand their rights, including the right against self-incrimination that is guaranteed by both the Fifth Amendment to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.[3] *See id.* *Miranda's* due process protections generally apply to juveniles, even those prosecuted in juvenile court. *See In re Gault*, 387 U.S. 1, 13 (1967). When a juvenile's *Miranda* waiver is at issue, we examine the totality of the circumstances to determine whether the suspect understood his rights and the consequences that may arise if he waives them. *Ouk*, 516 N.W.2d at 184-85. The Supreme Court endorsed this approach in *Fare v. Michael C.*, saying:

> The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

442 U.S. 707, 725 (1979).

In *Fare*, the Supreme Court refused a juvenile suspect's attempt to equate his request for a probation officer with a request for an attorney. The Court reasoned that a probation officer is not poised to offer legal

assistance, and "is not necessary, in the way an attorney is, for the protection of the legal rights of the accused[.]" *Id.* at 722. The Court noted, arguably in dicta, that under the totality of the circumstances approach, a juvenile's requests for a parent's presence could lead to a different result: "Where the age and experience of a juvenile indicate that his request for his probation officer or *his parents* is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination." *Id.* at 725 (emphasis added).

Six years before *Fare*, in *State v. Hogan*, we had also rejected a per se rule requiring parental presence during a juvenile's interrogation, and instead adopted a totality of the circumstances test. 297 Minn. 430, 440, 212 N.W.2d 664, 671 (1973). The 15-year-old defendant, who was suspected of committing two downtown Saint Paul bombings, spoke voluntarily with police while in the hospital and after receiving his *Miranda* rights. *Id.* at 432-33, 441, 212 N.W.2d at 666-67, 671. He claimed he was a victim, but then declined to proceed without an attorney. *Id.* at 432, 212 N.W.2d at 666. However, after being told that he was under arrest, the juvenile made an inculpatory remark that was not in response to a police officer's question, which was admitted at trial. *Id.* at 441, 212 N.W.2d at 671. In that case, there was no indication that the juvenile had asked to speak with a parent before volunteering the inculpatory remark. *See id.* at 432-33, 212 N.W.2d at 666-67. We upheld the admission of the statement noting that the juvenile's "complete willingness, indeed determination, to establish his largely exculpatory story about being a victim of the bombing demonstrates that, considering the entire circumstances of his statements, he voluntarily told the story." *Id.* at 441, 212 N.W.2d at 671.

Hogan is relevant to our present analysis not only because we rejected a per se rule requiring parental presence, but also because of how this case fits into ongoing efforts in Minnesota and nationwide to determine when juveniles should have a parent present when waiving *Miranda* rights.[4] *Hogan* was decided at a time when all Minnesota counties except Hennepin and Ramsey had a Rule of Juvenile-Probate Procedure forbidding children from being interrogated without a parent being present. Minn. R. Juv.-Probate P. 2-2(1), Foreword at 615 (West deskbook 1982).[5] If this rule was violated in a delinquency action or traffic offense, any evidence from the interrogation was inadmissible. *Id.*, Rule 2-2(2). At that time, the Rules of Juvenile-Probate Procedure were adopted by county probate judges who had jurisdiction over juvenile proceedings; thus, these rules did not apply in Hennepin and Ramsey Counties where the district court had jurisdiction over juvenile proceedings. *Id.*,

Foreword at 615; 13 Robert Scott & John O. Sonsteng, *Minnesota Practice—Juvenile Law & Practice I*X (3d ed. 2002). In *Hogan*, we rejected the juvenile's argument that he was denied constitutional equal protection because the per se rule did not apply in Ramsey County. 297 Minn. at 439-40, 212 N.W.2d at 670.

The uniform Rules of Procedure for Juvenile Court, which took effect statewide after court consolidation in 1983, contained no required parental presence provision, but did require a child subject to interrogation to be advised of his constitutional rights. Minn. R. Juv. P. 6.01, subd. 1 (West deskbook Supp. 1983). Rule 6.01, subdivision 2, specified that the "totality of the circumstances" surrounding any waiver of the right to remain silent or the right to an attorney includes "the presence and competence of the child's parent(s) or guardian * * *." *Id.*, subd. 2. The present rules, renamed the Rules of Juvenile Delinquency Procedure in 2004, contain no specific provision addressing a juvenile's rights when the juvenile is interrogated. The Rules, however, require that a court holding a detention hearing must advise the juvenile of the right to remain silent. Minn. R. Juv. Delinq. P. 5.07, subd. 3(E) (West deskbook 2004). In addition, Minnesota Statutes require that a parent, guardian, or custodian of a child taken into custody be notified "as soon as possible" of the detention. Minn. Stat. § 260B.176, subd. 1 (2004).

Juveniles such as Burrell, who are 16 years old or older when accused of committing a felony while using a firearm, presumptively are certified for adult court prosecution. Minn. Stat. § 260B.125, subd. 3 (2004). But even then, courts must closely examine under the totality of the circumstances whether the juvenile is able to make a valid *Miranda* waiver without a parent's presence. In *State v. Jones*, we applied the test that we adopted in *Hogan* and held that a juvenile's request to speak with a parent after an interrogation had ceased did not trigger the right to counsel or the right to remain silent in two subsequent interrogations. 566 N.W.2d 317, 320-21, 324-25 (Minn. 1997). In *Williams*, we held that a 16-year-old's *Miranda* waiver was knowing, intelligent, and voluntary even though he was not advised that he could have a parent or guardian present during questioning. 535 N.W.2d at 282, 288. We noted that after the warning was administered, the juvenile had told the investigators that his mother had kicked him out of the house, that he did not know her phone number, that he had been staying with friends, and that he had not seen his father for a long time. *Id.* at 280. In addition, at no time during two hours of questioning did the juvenile request to speak with a parent or guardian. *Id.* at 282.

The circumstances of Burrell's purported *Miranda* waiver can be distinguished from *Jones* and *Williams* and again show why a district court must scrutinize the totality of the circumstances closely.[6] In this situation,

the district court made findings of fact as to how Burrell's request for a parent affected the "admissibility of the statement," but did not make specific findings as to how the request may have rendered his *Miranda* waiver ineffective. Accordingly, we make a subjective factual inquiry. *See Camacho*, 561 N.W.2d at 168 ("if there is other evidence indicating that the waiver was not knowing, voluntary, and intelligent, the district court must make a subjective factual inquiry to determine whether, under the totality of the circumstances, the waiver was knowing, voluntary, and intelligent"). Unlike in *Jones*, the first words that Burrell uttered during the videotaped interrogation were: "Sir, can I call my mom now please?" He asked for his mother two more times before receiving his *Miranda* warning, and asked for her ten more times after receiving the *Miranda* advisory. Unlike the defendant in *Williams*, Burrell was not estranged from his mother. The record indicates that while Burrell had grown up in Minneapolis, his mother moved with him to Bemidji so that he would be shielded from gang-related influences. Burrell appeared to have had a close relationship with his mother, evidenced by the compliments that he paid to her during his interrogation. The police officers should have realized that by making repeated requests for a trusted and respected parent, Burrell desired his mother's counsel before waiving his *Miranda* rights, as well as afterward.[7]

Burrell's request for a parent is just one circumstance surrounding his purported *Miranda* waiver. Other factors include the juvenile's age, maturity, intelligence, education, physical deprivations, prior criminal experience, length and legality of detention, lack of or adequacy of warnings, and the nature of the interrogation.[8] *Williams*, 535 N.W.2d at 287; *Ouk*, 516 N.W.2d at 184-85. The nature of the interrogation includes whether the police used deception or trickery in an attempt to secure a waiver and eventual confession. *State v. Thaggard*, 527 N.W.2d 804, 810 (Minn. 1995). In *Miranda*, the Supreme Court criticized police use of trickery, threats, and cajolement to persuade a suspect to waive his Fifth Amendment rights. *Miranda*, 384 U.S. at 476. In *Thaggard*, we observed that while there is no per se rule that bans use of deceit during interrogation, police officers "proceed on thin ice and at their own risk when they use deception" to secure a confession. 527 N.W.2d at 810.

Burrell argues that the police officers who interrogated him lied when they stated that codefendants Tyson and Williams both had implicated him in the shooting. The state stops short of conceding that a lie occurred, but acknowledges that the interrogators mischaracterized some evidence that they had against Burrell at that time, e.g., that Williams did not identify Burrell as the third person involved in the crime. Yet before Burrell was

given his *Miranda* warning, the lead investigator told Burrell that the investigators had "talked with Hans *and* Ike," that "*they're* putting you in the middle of some stuff," that "*they're* hooking you into this stuff," and that Burrell needed to let the investigators know "if *those guys* are full of baloney or * * * if *they* hooked you into something you didn't want to be in." (Emphasis added.) A transcript of Williams' guilty-plea hearing, which Burrell has made part of the record on appeal, shows that Williams had testified under oath to not knowing the identity of the third person involved in the shooting. Also, at Burrell's pretrial hearing, it was suggested that Williams had told his attorney that Burrell was not involved in the shooting—a suggestion that Williams was required to recant as part of his guilty plea a month after Burrell's trial.

These circumstances strongly suggest that some mischaracterizations occurred before Burrell received his *Miranda* warning. Accordingly, we distinguish this situation from that in *Jones* where, in addition to no request for a parent until after the interrogation, it was undisputed that the denied access to a parent was the "only factor" supporting the argument that the juvenile's *Miranda* waiver was not knowing, intelligent, and voluntary. *Jones*, 566 N.W.2d at 325.

The state, which bears the burden of proving that Burrell's *Miranda* waiver was effective, maintains that it was reasonable to restrict Burrell's access to his mother and that any mischaracterizations made during interrogation were insufficient to invalidate Burrell's *Miranda* waiver. The state asserts that the waiver was knowing, intelligent, and voluntary because Burrell was "experienced in the criminal justice system and sophisticated enough to ask police whether, as a juvenile, he had a 'right' to contact his mother." However, the fact that Burrell asked for his mother three times before receiving a *Miranda* warning (and ten times afterward) suggests a lack of sophistication regarding his rights in general and the *Miranda* waiver in particular. Had Burrell received access to his mother, she might have advised him whether he should talk to an attorney before waiving his *Miranda* rights or to have an attorney present during questioning.[9]

As we have said, we subjectively analyze the totality of the circumstances to determine whether the district court committed clear error by ruling that the state has proven by a preponderance of the evidence that Burrell's *Miranda* waiver was knowing, intelligent, and voluntary. *See Ray*, 659 N.W.2d at 742; *Hannon*, 636 N.W.2d at 806; *Camacho*, 561 N.W.2d at 168-69. Although we reiterate that there is no per se rule requiring a parent's presence before a juvenile waives his *Miranda* rights, the circumstances of this case suggest that Burrell's repeated requests for a parent were enough to render his *Miranda* waiver ineffective. When the

requests are coupled with the pre-*Miranda* mischaracterization as to Williams implicating Burrell, we conclude that the police crossed the line when securing a waiver from this juvenile suspect, and that the state has not met its burden of proving that Burrell was unaffected by the denied access to his mother and the use of some mischaracterizations. Accordingly, we hold that the district court committed error by ruling that Burrell's *Miranda* waiver was knowing, intelligent, and voluntary.[10]

II.

Having concluded that Burrell's *Miranda* waiver was ineffective, we must determine whether the district court's error in permitting the jury to view the videotape of the interrogation was harmless. When statements are erroneously admitted after a *Miranda* waiver has been found ineffective, a new trial is warranted unless the error is harmless beyond a reasonable doubt. *Hannon*, 636 N.W.2d at 807. An error is harmless beyond a reasonable doubt only if the verdict was "surely unattributable" to the error. *Id*.

Here, we cannot ignore that during his interrogation, Burrell never confessed to shooting Tyesha, that he consistently maintained he was not involved, and that he repeatedly said that he did not associate with Tyson or Williams. We also acknowledge that Burrell did not object to the videotape's admission at trial and that the failure to object to a particular error generally bars appellate review unless substantial rights are at risk such that fair-trial rights are implicated. *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002); *see also* Minn. R. Crim. P. 31.02. But Burrell did adequately challenge his *Miranda* waiver before and after trial. Under these circumstances, it would be unjust to foreclose Burrell from challenging the admission of a videotaped interrogation that violates *Miranda* simply because he did not specifically object to its admission.

In addition, by allowing the jurors to view the videotape, we believe Burrell's substantial rights were at risk. Recently, in *Bernhardt v. State*, 684 N.W.2d 465, 475-76 (Minn. 2004), we held that admission of an interrogator's false statements—that the defendant's codefendants had implicated him in a murder—constituted plain error affecting substantial rights in part because the jury never was told that the statements were untrue. We distinguished the situation in *Bernhardt* from that in *State v. Tovar*, 605 N.W.2d 717 (Minn. 2000), where an interrogator's exaggeration of his knowledge of facts regarding the crime "turned out to be true." *Bernhardt*, 684 N.W.2d at 475.

Because Burrell's codefendants did not testify at any trial, we cannot say whether their statements, as told by Burrell's interrogators on the videotape and heard by the jury, turned out to be true.[11] But the criminal

complaint issued a day after Burrell's interrogation bolsters Burrell's contention that the videotaped interrogation resulted in putting uncorrected mischaracterizations before the jury. According to the complaint, Tyson maintained that although he, Burrell, and Williams were riding together on the day of the shooting and had had a "verbal exchange" with Oliver, they did not fire weapons. This does not support the post-*Miranda* suggestion that Tyson had "blamed" Burrell for the shooting. In addition, according to the complaint, Williams had observed Tyson return from the scene holding a gun. As we have said, there is evidence that Williams did not even know Burrell.

The district court denied Burrell's request to cross-examine the officers about specific false statements they made during interrogation. The court did so out of concern for "opening the door" to scrutiny of what the codefendants said or did not say.[12] Yet, instead of instructing the jurors before the videotape was played that the police officers' comments were not to be used to determine Burrell's guilt or innocence, the court waited until the end of the trial to do so and then did so as part of the general jury instructions. The better practice to take is the prophylactic measure taken in *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) *reh'g denied* (Minn. Aug. 3, 1998), when a transcript of an interrogation in which police accused the suspect of lying was read only after the court warned the jury that the officer's questions were not evidence to be considered in reaching a verdict.

The bottom line here is that as a direct result of viewing Burrell's videotaped interrogation taken in violation of *Miranda*, the jurors may well have gone to the jury room believing that both Tyson and Williams had identified Burrell by name as being involved, and that Tyson had "blamed" Burrell for the shooting. Besides the videotape, the state's case largely rested on testimony from Oliver, a potential rival gang member who said that "Little Skits" was the shooter; a jailhouse statement by Burrell as recalled by Burrell's cousin, but in which Burrell nevertheless denied being involved; testimony from a jail inmate who purportedly heard Burrell confess and whose credibility was improperly bolstered by a forensic psychologist[13] (*see* Part IV, *infra*); and eyewitness testimony that someone with physical characteristics similar to Burrell ran from the scene. This evidence is not so overwhelming that we can unequivocally say that "a reasonable jury would have arrived at the verdict without the prejudicial evidence." *Hannon*, 636 N.W.2d at 807. For these reasons, we conclude that the error of admitting the videotape is not harmless beyond a reasonable doubt because the verdict rendered was "surely unattributable" to the error. *See id.* Accordingly, we hold Burrell is entitled to a new trial at which his

videotaped interrogation is not to be shown to the trier of fact.

Because we conclude that the videotape of Burrell's interrogation is barred from use in any subsequent prosecution, we need not further address Burrell's argument that the district court committed error by refusing to allow cross-examination on specific false statements that police investigators made regarding what Tyson and Williams said about Burrell's involvement in the crime.

III.

Burrell also argues that his constitutional right to confront all witnesses against him was violated when the district court admitted hearsay testimony from his mother, Marketta Burrell.[14] The question of whether hearsay testimony violates a defendant's Confrontation Clause rights is one of law and fact; therefore, de novo review is proper. *State v. King*, 622 N.W.2d 800, 806 (Minn. 2001).

The Sixth Amendment to the United States Constitution ensures 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. After Burrell's conviction, but while his direct appeal was pending, the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), which has altered how courts have interpreted the Sixth Amendment.

In *Crawford*, the Court held that "testimonial" hearsay evidence is inadmissible unless the now unavailable declarant was previously available for cross-examination. *Id.* at 68. The declarant in *Crawford*—a suspect—was advised of her *Miranda* rights and then interrogated about roles that she and her husband may have played in an attempted murder. *Id.* at 38-40. Washington's marital privilege law barred the declarant from testifying in court at her husband's trial, but the court admitted her prior statement, which cast doubt on her husband's self-defense claim. *Id.* at 39-40. The Court held that admitting the declarant's prior testimonial statement when the defendant had no opportunity to cross-examine the declarant violated the Sixth Amendment's Confrontation Clause. *Id.* at 68.

The Supreme Court limited its holding in *Crawford* to "testimonial" hearsay evidence. *Id.* Although the Court "[left] for another day any effort to spell out a comprehensive definition of 'testimonial[,]'" it expressly held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations." *Id.* The Court advised that "interrogation" is to be used "in its colloquial, rather than any technical legal, sense," and includes under any definition a "statement[] knowingly given in response to structured police questioning * * *." *Id.* at 53 n.4.

In this situation, it appears that Marketta Burrell voluntarily came to the police station to inquire about the circumstances of her son's arrest. It also appears that she willingly went to a police interrogation room. Apparently her exchange with the police was recorded electronically, but neither a recording nor a transcript of the exchange was made part of the record. Unlike the declarant in *Crawford*, she was not in custody, not a suspect, and was not advised of her *Miranda* rights. Further, the record before us is relatively undeveloped with respect to the facts and circumstances of her meeting with the police. This is not surprising given that *Crawford* was decided after Burrell's trial. In any case, the existing record is insufficient for us to make an informed decision whether Marketta Burrell's statements are testimonial within the meaning of *Crawford.* Thus, we are unable at this time to determine whether her comments are admissible hearsay under *Crawford*, i.e., were not made in response to "structured police questioning." Accordingly, on remand the district court should receive foundational evidence regarding Marketta Burrell's statement and then weigh all relevant factors as it determines whether the state has proven that the statement may be admitted consistent with the Sixth Amendment and *Crawford. See King*, 622 N.W.2d at 807 (placing on the state the burden of proving that hearsay statement does not violate defendant's Sixth Amendment rights).

IV.

Burrell's next argument is that the court erred by admitting expert vouching testimony from forensic psychiatrist Karen Bruggemeyer. Bruggemeyer testified at trial that Burrell's fellow inmate James Turner, who suffered from mental illness, was being "truthful" when he testified that he heard Burrell confess to committing the shooting. We review evidentiary rulings for abuse of discretion. *State v. Bailey*, 677 N.W.2d 380, 395 (Minn. 2004).

The Minnesota Rules of Evidence permit any witness with "scientific, technical, or other specialized knowledge" to be qualified as an expert and give testimony that assists the trier of fact in understanding evidence or determining a fact in issue. Minn. R. Evid. 702. However, we have repeatedly stated that in criminal trials expert testimony must be monitored carefully to ensure that the jury is the sole determiner of a witness's credibility. *See, e.g., State v. DeShay*, 669 N.W.2d 878, 885 (Minn. 2003); *State v. Nystrom*, 596 N.W.2d 256, 259-60 (Minn. 1999); *State v. Grecinger*, 569 N.W.2d 189, 193 (Minn. 1997). Generally, expert opinions about whether a witness is testifying falsely or from fantasy are excluded. *State v. Myers*, 359 N.W.2d 604, 611 (Minn. 1984); *State v. Saldana*, 324 N.W.2d 227, 231 (Minn. 1982).

When Burrell cross-examined Bruggemeyer, our reading of the record is that he was not attacking

Turner's character for truthfulness. By asking whether Turner was "capable of" confusing what he heard in jail, Burrell was questioning Turner's *competency* to testify—an inquiry relevant to Burrell's defense. Minn. R. Evid. 402. Yet, in response to a question from the state, Bruggemeyer offered her opinion on Turner's truthfulness. Her response was improper because competence to testify is to be distinguished from a witness's credibility. Whether a witness is "being truthful" is within the province of the jury. Minn. R. Evid. 608(a). In addition, Bruggemeyer's response was prejudicial because, as expert opinion, it likely deprived the jury of the ability to gauge for themselves Turner's truthfulness. *DeShay,* 669 N.W.2d at 888.

When the state asked Bruggemeyer whether she believed Turner had "made up" anything he told police, even a "yes" or "no" answer would have been inadmissible vouching testimony. Therefore, the district court should have anticipated Bruggemeyer's response and sustained the objection Burrell made after the question was asked, but before the answer was given. We realize it is difficult, often impossible, and sometimes imprudent for a court to anticipate and prevent every inadmissible response. Further, we acknowledge that Burrell did not renew his objection after Bruggemeyer gave her answer. Yet, in a criminal trial, a court has a heightened duty to monitor expert testimony. *See DeShay,* 669 N.W.2d at 885, 888. In this situation, close monitoring did not occur and inadmissible testimony was given. Therefore, we hold that the court abused its discretion when it failed to sustain Burrell's objection to the state's question of Bruggemeyer and in not directing the jury to disregard Bruggemeyer's response.

V.

Next, we must address the appropriateness of expert testimony from a Minnesota Gang Strike Force officer, who testified about Minneapolis gangs, Burrell's purported gang affiliation, and the 10-point criteria Minnesota police use to determine gang affiliation. Admission of expert testimony falls within the district court's broad discretion. *Litzau,* 650 N.W.2d at 185.

Burrell argues that the gang-affiliation testimony was neither necessary nor helpful, unduly gave credence to Oliver's testimony, and suggested that Burrell's "mere association" with gang members made him guilty. Burrell relies largely on *DeShay* and *State v. Lopez-Rios,* 669 N.W.2d 603 (Minn. 2003), cases we decided after Burrell's trial but while Burrell's case was pending on direct appeal. In *DeShay* and *Lopez-Rios,* we cautioned against expert gang testimony that is duplicative, based on hearsay testimony, more prejudicial than probative, and conclusory about a defendant's gang affiliation. We directed that expert gang testimony should be weighed

"preferably outside the presence of the jury" to ensure that it goes toward a fact in issue. *DeShay*, 669 N.W.2d at 887-88. We also questioned the "helpfulness" of the gang criteria and warned that expert testimony about a defendant's gang membership "comes close to, although not completely within, the exclusion of expert opinion as to the mental state of a defendant constituting an element of the charged crime." *Id.* at 886-87 nn.7-8; *Lopez-Rios*, 669 N.W.2d at 612-13.

Much of the officer's testimony was precisely the type of testimony we criticized in *DeShay* and *Lopez-Rios*. Nevertheless, we realize the district court did not have the benefit of those two decisions during Burrell's trial. Accordingly, on remand we direct the court to weigh our directives in *DeShay* and *Lopez-Rios* carefully as it exercises discretion over what expert gang testimony is admitted.

VI.

Next, we must examine whether the district court erred in refusing to allow testimony from jail inmates and a jail visitor who purportedly heard Tyson admit that he was the shooter and that Burrell was not involved in Tyesha's shooting. Evidentiary rulings on hearsay statements against penal interest are reviewed for clear abuse of discretion. *State v. Henderson*, 620 N.W.2d 688, 696 (Minn. 2001). When a hearsay statement against penal interest is offered to show an alternative perpetrator or to exculpate the accused, corroborating circumstances must clearly indicate its trustworthiness. Minn. R. Evid. 804(b)(3). However, to ensure due process, a hearsay rule "may not be applied mechanistically" to exclude evidence of an alternative perpetrator. *Chambers v. Mississippi*, 410 U.S. 284, 298, 302 (1973).

In this situation, the proffered statements are hearsay because they were uttered outside of court. Minn. R. Evid. 801(c). The district court properly required Burrell to prove "sufficient indicia of reliability" before admitting the statements against penal interest. The court was correct when it concluded in its Omnibus Order before trial that "[t]he fact that a statement is alleged to have been made contrary to the penal interest of a non-party does not by itself provide indicia of reliability." Before trial, Burrell provided a notice of potential witnesses that included several persons who were in the Hennepin County jail with Tyson as well as someone who had spoken with Tyson before he was arrested. Burrell's notice suggested that each witness would testify to a conversation or conversations in which Tyson said that Burrell was not present at the shooting and/or that Tyson fired the shots. Burrell's notice included no information about the circumstances of the conversations. Burrell referenced a letter from one of the inmates that supposedly sets out details of the proposed testimony, but the record contains no such letter. The record does contain letters that appear to be from two of the inmates

Burrell wanted to testify, but these letters are difficult to read, do not contain a clear description of any statements by Tyson, and at most describe a statement that "the seventeen year old had nothing to do with it * * *."

Burrell argues that the sheer number of witnesses and the similarity of their statements demonstrate trustworthiness. Before trial, he argued the fact that the witnesses "are not getting anything for" testifying provided the needed reliability, but the district court nevertheless excluded the testimony. We agree that Burrell did not meet his burden of providing an adequate offer of proof to show that his proffered witnesses would meet the reliability requirement, i.e., that they could establish the necessary foundation for their testimony. Although the sheer number of witnesses would appear to provide reliability and corroboration if an adequate offer of proof had been made, Burrell's failure to make an adequate offer substantiates the court's conclusion that reliability had not been shown.

Burrell was free to prove reliability at any time during trial, but the district court concluded he failed to do so. Here, the court did not apply hearsay rules "mechanistically" in violation of due process or clearly abuse its discretion in excluding testimony from persons who purportedly heard Tyson admitting to being the shooter and exonerating Burrell. Therefore, we hold that the court did not err when it refused to allow testimony from jail inmates and a jail visitor who purportedly heard Tyson make comments that exculpated Burrell.

VII.

Burrell's next argument is that the district court erred by refusing to compel discovery of the state's plea negotiations with codefendants Tyson and Williams amid indications that the state may have pressured these codefendants to not testify on Burrell's behalf. District courts have wide discretion on discovery rulings. *State v. Davis*, 592 N.W.2d 457, 459 (Minn. 1999). However, if a criminal defendant's due process rights are violated because the state has suppressed evidence material to guilt or innocence that is favorable to the accused, a new trial is warranted. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 152, 154-55 (1972); *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992).

Tyson pleaded guilty two months before Burrell's trial.[15] Burrell suspects a *Brady* violation occurred during the plea negotiation because the state reserved the right to rescind Tyson's plea if Tyson ever testified contrary to what he said at his plea hearing. Williams pleaded guilty a month after Burrell's trial. Burrell criticizes the state for requiring Williams to disclaim at Williams' guilty plea hearing, which was held after

Burrell's trial, any prior statements that Burrell was not involved in the shooting and testify instead that Williams did not know the identity of the third person in the car.

Concerned by what he regarded to be the unusual circumstances of the plea agreements and in an attempt to safeguard his due process rights, Burrell attempted through discovery to obtain the details of the state's plea negotiations with Tyson and Williams. The district court refused to compel discovery stating that doing so would have violated the attorney-client privilege and because plea negotiations are inadmissible under the Minnesota Rules of Evidence.

While we share concerns for making plea negotiations public, we conclude that the district court erred in its analysis. Although attorney-client privilege may attach to communications between the codefendants and their attorneys, no such privilege existed between codefendants and the state, even though the attorneys may have had a duty to keep the negotiations confidential. *State v. Blom*, 682 N.W.2d 578, 620 (Minn. 2004).[16] In addition, the court erred by applying the Rules of Evidence instead of the Rules of Criminal Procedure to Burrell's discovery request. An accused in Minnesota receives access to "all matters within the prosecuting attorney's possession or control which relate to the case," and specifically any evidence "that tends to negate or reduce the guilt of the accused." Minn. R. Crim. P. 9.01, subd. 1, subd. 1(6). Minnesota's criminal discovery rule is broader than what many states and the federal courts require. *Kaiser*, 486 N.W.2d at 386. Therefore, it is premature for a court to presume that whatever a criminal defendant secures in discovery invariably will be offered as evidence. *See, e.g.*, Minn. R. Civ. P. 26.02(a) (discoverable material "need not be admissible at the trial").

Confidential plea negotiations "foster meaningful dialogue between the parties and * * * promote the disposition of criminal cases by compromise." *Blom*, 682 N.W.2d at 620. Yet, as we have said, criminal defendants enjoy wide latitude in requesting and receiving discovery, and district courts are afforded broad discretion to make discovery rulings. Superior to discovery procedures, however, is the court's duty under *Brady* to ensure that a defendant's prosecution proceeds consistent with due process. For these reasons, we conclude that Burrell's inquiry is best characterized not as a discovery request, but as an invocation of his due process rights.

The Supreme Court has endorsed *in camera* review when the public's interest in keeping documents confidential must be balanced against due process rights. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).[17]

We have ordered *in camera* review in several circumstances when confidentiality was a chief concern.[18] For instance, in *State v. Paradee*, which involved a criminal defendant's request for confidential medical records, we held that *in camera* review was preferable to an "approach which in effect allows defense counsel easy access to various types of privileged and confidential records simply by asserting that the records might contain material relevant to the defense." 403 N.W.2d 640, 642 (Minn. 1987).

A defendant requesting *in camera* review must make at least some "plausible showing" that the information sought would be material and favorable to his defense. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (denying *in camera* review because defendant provided "no theories on how the [confidential medical] file could be related to the defense or why the file was reasonably likely to contain information related to the case"). *See also* Minn. R. Crim. P. 9.03, subd. 6 (stating procedure for *in camera* review of discovery material). Here, we acknowledge that it is a close call whether Burrell has made a "plausible showing" that would trigger *in camera* review. We also acknowledge that Burrell could be engaging in a proverbial fishing expedition and that the state may have nothing of use to him. In addition, we note that while Tyson pleaded guilty before Burrell's trial, Williams pleaded guilty afterward, so scrutinizing the state's offer to Williams may be especially problematic.

Nevertheless, we share Burrell's concern about the circumstances of the two plea agreements—Tyson's in particular. It appears that the state conditioned Tyson's plea on his agreeing *not to testify* about prior contradictory statements he had made about whether Burrell was the shooter and whether Oliver was the intended target. Typically, pleas are conditioned on a codefendant agreeing *to testify*, not to keep quiet. Had Tyson taken the stand, the state could have impeached him if he gave conflicting testimony.

Any testimony that would exonerate Burrell is undeniably material to his defense. *State v. Gates*, 615 N.W.2d 331, 339 (Minn. 2000) (stating that evidence is material if there is a reasonable probability that disclosure would yield a different result). Moreover, an *in camera* review of the circumstances surrounding the pleas would sufficiently balance the state's interest in confidentiality against Burrell's interests under *Brady*. We conclude that to ensure Burrell's due process rights under *Brady*, the court should have performed an *in camera* review of circumstances surrounding the codefendants' plea negotiations to ascertain whether the state, through its plea agreements, suppressed evidence material to Burrell's guilt or innocence and favorable to his case. We hold that the district court erred when it did not take affirmative steps when Burrell requested discovery

surrounding plea negotiations that plausibly violated *Brady*.

At this point, a final comment is in order. The facts of this case are tragic. That an 11-year-old girl can be killed by a stray bullet while doing homework in the safety of her own home is disturbing and difficult to comprehend. Any life lost to gang warfare, regardless of whether the person killed was an intended victim, is one life too many. Nevertheless, it is fundamental that any criminal defendant, regardless of circumstances surrounding his alleged crime and regardless of any alleged gang affiliation, has a constitutional right to a fair trial. Here, we conclude that because of multiple errors, Burrell did not receive a fair trial and that he is entitled to a new trial. Because we remand for a new trial, we need not address Burrell's challenge to his sentence.

Reversed and remanded.

ANDERSON, G. Barry, J., not having been a member of this court at the time of submission, took no part in the consideration or decision of this case.

C O N C U R R E N C E & D I S S E N T

HANSON, Justice (concurring and dissenting).

Although I agree with the conclusion of the majority that some errors were made in Burrell's trial, I do not agree that any error has been shown to be so prejudicial as to warrant a new trial. I would conclude that: (1) the admission of the videotape of Burrell's interrogation was not error because Burrell voluntarily waived his *Miranda* rights and, even if the admission was error, it was harmless because Burrell's statements were exculpatory; (2) to the extent that Dr. Bruggemeyer's expert testimony included vouching for the testimony of James Turner, any error was harmless; (3) to the extent that expert testimony about criminal gangs was overboard and conclusory, any error was harmless; (4) a remand to the district court to conduct a hearing on whether Marketta Burrell's statements were "testimonial" is the appropriate remedy for Burrell's *Crawford* claim; and (5) a remand for an *in camera* review of the Tyson and Williams plea negotiations is the appropriate remedy for Burrell's *Brady* claims.

1. Videotape of Burrell's Interrogation

At the pretrial hearing on Burrell's motion to suppress the videotaped interrogation, Burrell relied on the argument that his *Miranda* waiver was ineffective because he was denied access to his mother. On appeal,

Burrell expands his challenge to the videotaped interrogation by also arguing that investigators mischaracterized statements that had been made by Burrell's codefendants about Burrell's involvement in the murder, investigators failed to advise Burrell that any statements he made could be used in adult court, and investigators delayed giving the *Miranda* warning. I would conclude that Burrell waived these additional grounds by not including them in his motion to suppress. *See, e.g., State v. Roby*, 463 N.W.2d 506, 508 (Minn. 1990). But even if we were to consider all grounds argued on appeal, as does the majority opinion, I would conclude that the totality of the circumstances demonstrate that Burrell's waiver of his *Miranda* rights and his statements to police were made knowingly, intelligently and voluntarily.

a. Denial of access to mother

The repeated references in the majority opinion to the number of times Burrell asked to speak to his mother implies that police should have honored that request. But we have held that a juvenile does not have a right to interrupt interrogation to speak to a parent and that interrogation must cease only when a juvenile unambiguously invokes the right to speak with counsel or the right to remain silent. *See, e.g., State v. Jones*, 566 N.W.2d 317, 323-24 (Minn. 1997). Although Burrell asked to speak to his mother three times before the *Miranda* warning was given, he appears to have done so in the context of wishing to notify her of his whereabouts. He did not say that he wanted to speak to her about his right to counsel or to remain silent, and he did not condition his waiver of his *Miranda* rights on consultation with his mother. Burrell's requests cannot reasonably be interpreted as a request to consult with counsel or to remain silent, neither of which were ever mentioned.

These requests to talk to his mother can be considered as one factor in a totality of the circumstances analysis, but under the circumstances of this record and the way in which the requests were made, I would not give them significant weight. And I would give no weight to the additional requests that Burrell made after he waived his *Miranda* rights, particularly those that came after police had begun interviewing Burrell's mother separately.

b. Mischaracterizations by interrogators

I agree with the conclusion reached by the majority that investigators mischaracterized information they had from Tyson and Williams when they said "they're putting you in the middle of some stuff" and "they're hooking you into this stuff." But the investigator's statements and suggestive questions were general, they did

not suggest precisely how Burrell was said to have been involved, and any mischaracterization was slight. We have said that investigators may use mischaracterizations without rendering the resulting statements involuntary unless the "deceit is the kind that would make an innocent person confess." *Jones*, 566 N.W.2d at 326. The statements by the investigators were part of the preliminary explanation about why Burrell had been brought in for interrogation. The videotape reveals that they were made in a cordial manner, were not coercive and were not designed to overcome Burrell's will. In fact, the statements did not overcome Burrell's will because he did not confess. Accordingly, I would not give the investigator's mischaracterizations any significant weight in the analysis of the totality of the circumstances.

c. Possibility of prosecution as an adult

I agree with the conclusion of the majority that the failure of the investigators to inform Burrell that he could be prosecuted as an adult and that any statements that he made could be used in adult court, did not materially affect the validity of Burrell's waiver of his *Miranda* rights. Under the circumstances of the interrogation, it is fair to impute to Burrell knowledge of the possibility that he could be prosecuted in adult court.

d. Delay in providing a Miranda warning

The investigators did not give Burrell the *Miranda* warning until about 10 minutes after they began talking to him in the interrogation room. Although the majority does not find it necessary to consider this circumstance, I would conclude that it did not taint the interrogation. We have criticized a process where the investigator's seek to obtain inculpating statements before giving the *Miranda* warning, and then to have the suspect repeat those statements after giving the warning. *State v. Bailey*, 677 N.W.2d 380, 390 (Minn. 2004), *rehearing denied* (Minn. Apr. 22, 2004). Recently, in *Missouri v. Seibert*, the United States Supreme Court likewise condemned any deliberate attempt to make an "end run" around *Miranda.* __ U.S. __, 124 S. Ct. 2601, 2606-07 (2004). The circumstances here do not present the concerns raised in *Bailey* and *Seibert* because the investigators did not ask Burrell any questions about the shooting during the pre-*Miranda* segment. They only used this time for preliminary matters, such as to explain why they wanted to question Burrell. They actually tried to prevent him from making any statements about the shooting until after the *Miranda* warning was given. The investigators were undoubtedly trying to put Burrell at ease and to encourage him to talk. These are appropriate law enforcement goals and they did not violate Burrell's constitutional rights.

e. Totality of the circumstances

I disagree slightly with the majority's statement of the standard of review. The majority opinion states that we "make a subjective factual inquiry to determine whether under the totality of the circumstances the waiver was valid" and later that "we subjectively analyze the totality of the circumstances to determine whether the district court committed clear error by ruling that the state has proven by a preponderance of the evidence that Burrell's *Miranda* waiver was knowing, intelligent, and voluntary." (pp. 17 and 27-28.) These statements are drawn from *State v. Camacho*, 561 N.W.2d 160, 168-69 (Minn. 1997), but there the court appears to have conflated the review of the district court's fact-findings and conclusions of law into one test (stating that "the district court's *conclusion* that a waiver was knowing, voluntary and intelligent will normally not be reversed unless that *finding* is clearly erroneous.") (Emphasis added.) The better statement is that contained in *Jones*, that

> we will not reverse the trial court's specific findings unless they are clearly erroneous, but we will make an independent determination, on the basis of the facts as found, of whether the state has shown by a fair preponderance of the evidence that the waiver was knowing, intelligent and voluntary.

566 N.W.2d at 324. In *Jones*, we gave some deference to the district court's findings. The majority's analysis gives no deference to district court's findings.

At the omnibus hearing, the district court heard testimony from two of the interrogating officers and viewed the entire videotape of Burrell's interrogation. The lead investigator explained that he did not accede to Burrell's request to talk to his mother because it became apparent that Burrell intended to use his mother as an alibi witness and it would go against good police practice to interview two fact witnesses together or to allow them to speak freely to each other before giving a statement. The investigator also testified that he fully explained to Burrell why police wanted to speak to him and he gave an extensive *Miranda* warning and asked questions to test Burrell's comprehension of that warning.

Another investigator testified about the arrival of Burrell's mother at the station, that investigator's conversation with her, and the subsequent interrogation of Burrell based on information obtained from his mother. The investigators testified about Burrell's demeanor during their respective interrogations, stating that he was alert, focused, relaxed, responsive, not unduly nervous, not angry, and not intoxicated or otherwise disabled. Both testified that no threats were made and no coercion was used. The second investigator testified that when he disagreed with Burrell or confronted him with a conflict with his mother's statement, Burrell stood his ground. A review of the videotape confirms that the investigators' firsthand observations are accurate.

The lead investigator also testified about his knowledge of Burrell's previous contacts with law enforcement, which included several contacts with Minneapolis police, four arrests and at least one prior *Miranda* warning.

The district court made detailed findings. The court determined that no questions were asked of Burrell until after a full *Miranda* warning was given; that Burrell demonstrated his knowledge and understanding of the *Miranda* rights "by repeating a number of the rights in his own language"; that Burrell demonstrated that he "accurately understood what rights were involved"; that Burrell demonstrated his understanding of the questions asked and his "willingness to speak to the officers"; that Burrell was provided with water, was allowed to use the restroom and was not restrained; that Burrell appeared to be comfortable and without physical distress; and that the questions were not overly coercive. The court found that Burrell "made a knowing, intelligent waiver of his rights" and that the "statements that he gave to the police were given freely and voluntarily."

I would conclude that the district court's findings are supported by the evidence, are not clearly erroneous and support the conclusion under the totality of the circumstances that Burrell's waiver of his *Miranda* rights was intelligently and knowingly made and that his statements were voluntary. Even if no deference is given to the district court's findings and we were to review the evidence independently, I would likewise conclude that the evidence concerning Burrell's age, experience, education, background and intelligence demonstrated that he was fully capable of understanding, and did understand, the warnings about the nature of his rights and the consequence of waiving those rights. Given the comprehensive discussion with Burrell of the *Miranda* warning, the open and non-coercive nature of the interrogation, Burrell's frequent volunteering of information and ready responses to questions, the absence of any confessions by Burrell, the fact that his requests to speak with his mother did not suggest any unwillingness to continue the interrogation and did not invoke his right to counsel or to remain silent, and the fact that the mischaracterizations of evidence made by the interrogators in preliminary discussions were slight and did not appear to intimidate or otherwise influence Burrell, I would conclude that Burrell's statements were voluntary. Accordingly, I would rule that the videotape was admissible.

Even if the admission of the videotape was error, I would conclude that it was harmless. The tape does not contain any confessions. Burrell consistently denied any involvement with the shooting and even denied that he had been with Tyson and Williams. In fact, Burrell's failure to object to admission of the videotape suggests a deliberate trial strategy. The admission of the tape allowed Burrell to present his exculpating story to the jury without subjecting himself to cross-examination. Having chosen this strategy, Burrell cannot genuinely argue

that the admission of the tape affected his substantial rights. *See State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002); Minn. R. Crim. P. 31.02.

The majority finds that Burrell's substantial rights were "at risk" because the investigator's mischaracterizations were presented to the jury. But those mischaracterizations were slight and nonspecific and the court instructed the jury that they were not evidence. Further, I disagree with the statement of the majority that we "cannot say whether [the codefendants'] statements * * * turned out to be true." Although Tyson and Williams did not testify to their eyewitness accounts, the intended victim, Oliver, did. When Oliver testified that Burrell was the shooter, he provided evidence that was far more specific, detailed and relevant than the investigator's generalized statements that Tyson and Williams were "putting [Burrell] in the middle of some stuff."[19]

The majority opinion understates the impact of Oliver's testimony in its harmless error analysis. It acknowledges that there was "testimony from Oliver, a potential rival gang member who said, 'Little Skits' was the shooter." (p. 31.) But Oliver went much further. He said that Burrell was "Little Skits," he identified Burrell as the shooter in a photo lineup, and, during his trial testimony, he identified Burrell as the person who was standing alone in the area where the shots had been fired and who pointed a gun at him and pulled the trigger. Thus the case against Burrell was not circumstantial, but was based on direct eyewitness testimony.

Oliver's testimony was corroborated by the physical evidence. The trajectory rod placed in the bullet hole in the wall of the home where Tyesha Edwards was shot, pointed to an area in the side yard across Chicago Avenue. Police found discharged cartridge casings in that yard, in the same general area where the trajectory rod from the bullet hole pointed. Oliver testified that he heard nine or ten shots coming from the location where the casings were found and, when the shots stopped, he saw Burrell standing alone in that yard pointing a gun at him and trying to fire it, but there were no more shells in the gun. Oliver testified that there was daylight and there were no obstructions to his view. He saw Burrell standing there alone with the gun in hand, aimed at Oliver. After the shooting, Oliver observed two holes in his pants that had not been there before the shots were fired. Oliver's testimony was also partially corroborated by admissions that Burrell made to his cousin and to James Turner.

The slight mischaracterizations by police in the videotape, which were presented to the jury without objection by Burrell, were insignificant in the face of Oliver's eyewitness testimony about Burrell's actions, as

corroborated by the physical evidence and Burrell's own admission that he had been with Williams and Tyson when Edwards was shot.

2. Dr. Bruggemeyer's testimony

Dr. Bruggemeyer's statement that she believed that James Turner was "being truthful" was improper expert opinion, but was an isolated statement. Further, it was not responsive to the state's question and Burrell failed to move to strike the answer after it was given. In the context of Oliver's direct evidence identifying Burrell as the shooter, this "vouching" was harmless.

3. Gang expert's testimony

Although the Gang Strike Force officer's testimony about criminal gangs went beyond the guidelines we suggested in *DeShay* and *Lopez-Rios*, this trial took place before those decisions were filed. Moreover, each of those decisions held that similar gang testimony was harmless error. *See State v. DeShay*, 669 N.W.2d 878, 888 (Minn. 2003); *State v. Lopez-Rios*, 669 N.W.2d 603, 613 (Minn. 2003). I would reach the same conclusion here because the officer's testimony was no more prejudicial than that in *DeShay* and *Lopez-Rios*, and because Burrell admits that "there was ample other testimony indicating that the shooting was committed for the benefit of a gang."

ANDERSON, Russell A., J. (concurring and dissenting).

I join in the concurrence/dissent of Justice Hanson.

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[1] Timothy Oliver died on January 28, 2004. The state sought to make a newspaper story containing details of Oliver's death part of the record on appeal. Burrell moved to strike the news article as being outside the record. *See* Minn. R. Civ. App. P. 110.01. By Order of May 28, 2004, we granted Burrell's motion to strike the article. Accordingly, in this appeal we did not consider the news article or any facts surrounding Oliver's death.

[2] The case's lead investigator was asked: "Some of those things were not true, correct?" The investigator replied: "Some of them were not true." Later, the investigator who resumed Burrell's interrogation after interviewing Marketta Burrell was asked: "[I]n this interview, you said some things that were not true to try to get a reaction out of Mr. Burrell, correct?" The investigator replied: "I believe once or twice—I recall one time, yeah. * * * [This was] in regard to people that had seen him at the scene."

[3] "No person shall be * * * compelled in any criminal case to be a witness against himself * * *" Minn. Const. art. I, § 7.

[4] A minority of states have enacted per se rules requiring parental presence, with some of those

subsequently rejecting the per se rules. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 Minn. L. Rev. 141, 177-80 (1984) (noting that Georgia, Indiana, Louisiana, and Pennsylvania are among states that have experimented with per se rules and that a few other states equate a juvenile's request for a parent with a request for an attorney); Note, *The Court Giveth and the Court Taketh Away: State v. Fernandez—Returning Louisiana's Children to an Adult Standard*, 60 La. L. Rev. 605, 614-15 n.81 (2000) (listing 13 states that have at some point adopted per se rules).

[5] Rule 2-2(1) read in relevant part:

> The right to remain silent shall include the right of the child in custody not to be interrogated by a representative of the state except in the presence of at least one of his parents and the right of the child to be informed, in the presence of at least one of his parents:
>
> (a) that the child has a right to remain silent; and
>
> (b) that any statement made by the child might be used in a juvenile court cause against him or his parent; and
>
> (c) of the child's right to counsel as set forth [in these rules]; and
>
> (d) that the child has a right to consult with counsel prior to the making of any statement.

[6] The dissent cites *Jones* to assert that a juvenile has no broad right to interrupt an interrogation. The dissent's reliance on *Jones* is misplaced because, as we said, in that case, the juvenile's request for a parent came only after the interrogation had ended, and in that case we refused to adopt a per se rule requiring police officers to provide a juvenile access to a parent before interrogation. 566 N.W.2d at 320-21, 324-25.

[7] The dissent suggests that Burrell asked to speak with his mother *only* to "notify her of his whereabouts." But as we have indicated, Burrell's remarks to police officers suggest he also sought his mother's counsel. After being led into an interrogation room, Burrell asked an officer whether he could "talk to my mom before I get to talk to (inaudible)." Before being advised of his *Miranda* rights, Burrell remarked: "What * * * me being a juvenile interrogation, don't I get to um, can I call my mother cause (inaudible) supposed to be going (inaudible) * * * at 12 o'clock?"

[8] Burrell does not challenge the district court's factual determinations that during interrogation he was not in physical distress, was provided water, visited the restroom, demonstrated understanding of the questions, appeared willing to talk for more than two and a half hours, was in the 11th grade, had a son, and was not subjected to overly coercive questioning or "angry" exchanges. In addition, the record shows that Burrell had been advised of *Miranda* rights at least once before and had prior contacts with police. The record shows that Burrell's interrogators inquired about his age, education, and past contacts with police before advising him of his *Miranda* rights, but we take exception with the dissent's characterization that the officers took "painstaking" efforts to ensure Burrell's comprehension of his rights.

[9] The state maintains that because Burrell indicated during interrogation that his mother would provide him an alibi, it was necessary to keep the two sequestered. However, when Marketta Burrell arrived at the police station, the police officers could have halted her son's interrogation, interviewed her, and then allowed him access to his mother.

[10] Burrell claims that several other circumstances contributed to the ineffectiveness of his waiver—e.g., that he was interrogated for a "significant time" before receiving his *Miranda* warning, that he waived his rights only after being "pressured and cajoled" into doing so, that he was no more capable of waiving *Miranda* rights than any other juvenile, that police officers improperly claimed they were looking out for his "best interests," and that it was improper for police officers to pressure him to make a statement "so he could be there for his

children." Because we conclude that Burrell's having been denied access to his mother and specific mischaracterizations made during interrogation are enough to render the *Miranda* waiver ineffective, we need not examine these other circumstances.

[11] In *Tovar*, by contrast, a police interrogator testified on cross-examination as to specific misstatements he had made—that while he had said a person on a store videotape "looked like" the defendant, the officer had not in fact viewed the videotape at that time. 605 N.W.2d at 725.

[12] It appears from the record that the court was generally concerned that if Burrell were allowed to specify that at the time of interrogation neither Tyson nor Williams had identified Burrell by name, the door would be opened for the state to offer evidence of any subsequent conflicting testimony, which would have been a probable violation of Burrell's constitutional right to confront witnesses against him because the codefendants did not testify at Burrell's trial. U.S. Const. amend. VI; *see also Bruton v. United States*, 391 U. S. 123 (1968).

[13] The dissent suggests that we have given insufficient weight to Oliver's testimony about seeing Burrell in the area from where the shots were fired. We disagree. Oliver's testimony is a mixture of direct and circumstantial evidence, and it is not clear whether Oliver actually identified Burrell or "Little Skits" as firing a live round that could have killed Tyesha. Without more, the importance of Oliver's testimony should not be overstated.

[14] The record indicates that Marketta Burrell died in a motor vehicle accident on her way home to Bemidji after visiting her son at the Hennepin County Jail.

[15] Burrell made the transcript of Tyson's plea hearing part of the record on appeal. The transcript reveals that Tyson said Oliver was among Gangster Disciples who had previously robbed and pointed guns at Williams. Tyson admitted that he, Williams, and Burrell were riding together in Williams' car on Chicago Avenue South on November 22, 2002, when Williams recognized Oliver. According to Tyson, Oliver ran toward the car, "acting like he was pulling out a gun." Tyson said that he, Williams, and Burrell drove away and discussed their response. Tyson testified that "Burrell said, let's get him or something like that." Tyson stated that he, Williams, and Burrell then planned to return to the 3400 block of Chicago Avenue South to shoot Oliver. Tyson said that Burrell had a .40-caliber gun and that Tyson picked up a gun before the three returned to where they had seen Oliver. They parked Williams' car one block over from Chicago so that it could not be identified. Tyson said that he and Burrell, both carrying guns, walked through an alley and some yards and then spotted Oliver in front of a house mid-block. Tyson said that he did not fire his gun, but that Burrell did fire seven to nine shots toward Oliver.

[16] In *Blom*, we noted that a criminal defendant may negate the confidentiality of plea negotiations, such as by directing his attorney to speak with the news media about plea negotiations. 682 N.W.2d at 620.

[17] In *Ritchie*, a defendant charged with sexually abusing his minor daughter sought discovery of records retained by a Pennsylvania agency charged with investigating child mistreatment and neglect. The Court noted: "Although we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances. * * * An *in camera* review by the trial court will serve Ritchie's interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations." *Ritchie*, 480 U.S. at 57, 61.

[18] *See In re Rahr Malting Co.*, 632 N.W.2d 572, 577 (Minn. 2001) (whether Tax Court hearing should be closed to protect trade secrets); *State v. Turner*, 550 N.W.2d 622, 629 (Minn. 1996) (whether newspaper retained unpublished photographs relevant to a criminal defense); *State v. Logan*, 535 N.W.2d 320, 325 (Minn. 1995)

(whether Bureau of Alcohol, Tobacco and Firearms records contained impeachment evidence); *Erickson v. McArthur*, 414 N.W.2d 406, 409-10 (Minn. 1987) (whether police department's internal affairs files were proper for civil discovery); *Syrovatka v. State*, 278 N.W.2d 558, 562 (Minn. 1979) (whether confidential informant's testimony was necessary for a fair trial). *See also Anderson v. United States*, 788 F.2d 517, 519-20 (8th Cir. 1986) (ordering *in camera* review when faced with insufficient *Brady* disclosure).

[19] The majority mentions a "post-*Miranda* suggestion that Tyson had 'blamed' Burrell for the shooting." To be completely accurate, the investigator did not say, pre-*Miranda*, that Tyson "blamed" Burrell for the shooting. Further, this is not an accurate description of what was said post-*Miranda*. Instead, the investigator only asked: "Is it wrong if Ike's blamed it on you?"

STATE OF MINNESOTA

IN SUPREME COURT

A08-1271

Hennepin County

Magnuson, C.J.
Took no part, Gildea, J.

State of Minnesota,

Respondent,

vs.

Filed: August 20, 2009
Office of Appellate Courts

Myon Demarlo Burrell,

Appellant.

Lori Swanson, Minnesota Attorney General, St. Paul, Minnesota, and;

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Benjamin J. Butler, Assistant State Public Defender, St. Paul, Minnesota, for appellant.

S Y L L A B U S

1. Admitting evidence of defendant‟s prior shootings to show motive was not an abuse of discretion.

2. Admitting certain gang expert testimony, if error, was harmless.

3. Admitting grand jury testimony of a deceased witness was harmless.

4. Imposing a harsher sentence after defendant‟s second trial was error under *State v. Holmes*, 281 Minn. 294, 296, 161 N.W.2d 650 (1968).

Affirmed in part, reversed in part, and remanded.

O P I N I O N

MAGNUSON, Chief Justice.

Appellant Myon Demarlo Burrell was twice convicted of first-degree murder and attempted first-degree murder and sentenced to life in prison for the shooting death of Tyesha Edwards, an 11-year-old girl who was struck and killed by a stray bullet in her south Minneapolis home. On appeal from his second trial, Burrell challenges his conviction and sentence, arguing that the district court erred in (1) admitting evidence of prior bad acts, (2) admitting the testimony of a gang expert, (3) admitting the grand jury testimony of a deceased witness, and (4) imposing a harsher sentence than the sentence Burrell received after his first trial. We affirm in part, reverse in part, and remand.

On November 22, 2002, Timothy Oliver was standing in the front yard of his aunt‟s house in south Minneapolis. Oliver belonged to a gang known as the Gangster Disciples. At approximately 3 p.m., a maroon Chevy Malibu drove toward the house where Oliver was standing. Oliver believed the car belonged to "Hans," who belonged to a rival gang, the Bloods. Oliver observed a man he knew as "Ike" driving the car, and a man whom Oliver knew as "Little Skits" riding in the front passenger seat. Oliver testified that he and Ike "mean-mugged" each other before the car sped away.

Minutes later, Oliver was standing on the front porch of his aunt‟s house when he heard gunshots from across the street. Oliver testified that he heard nine to ten gunshots

and then ran to the side of the house. After the shooting ceased, Oliver returned to the front of the house and looked across the street. Oliver testified that he saw Little Skits standing between two houses, pointing a gun at him and pulling the trigger. Oliver further testified that he was not harmed in the shooting but his pants had a bullet hole in them.

Shortly after 3 p.m. on November 22, police responded to a report of a shooting at the house next door to Oliver‟s aunt‟s home. When the police arrived, they found Tyesha Edwards lying on the dining room floor of her home. Edwards had been struck in the chest and killed by a .40 caliber bullet that had penetrated the wall of her home.

The police recovered seven .40 caliber shell casings on the ground across the street from Edwards‟ and Oliver‟s aunt‟s houses. All seven shell casings were fired from the same gun.

On November 25, 2002, the police arrested Oliver. Oliver told the police that Little Skits had shot at him, but that he did not know Little Skits‟ real name. Oliver correctly identified photos of Ike Tyson and Hans Williams. Oliver also identified a photo of appellant Myon Burrell as Little Skits.

Later on November 25, the police arrested Tyson and Williams. Tyson told the police that Little Skits often stayed in Bemidji. When the police contacted the authorities in Bemidji, they learned that Little Skits was 16-year-old Myon Burrell. Tyson identified photos of Burrell as Little Skits. The police arrested Burrell on November 26, 2002.

A Hennepin County grand jury indicted Burrell on eight counts: premeditated first-degree murder, Minn. Stat. § 609.185(a)(1) (2008); premeditated first-degree murder

committed for the benefit of a gang, Minn. Stat. § 609.229, subd. 2 (2008); first-degree murder committed during a drive-by shooting, Minn. Stat. § 609.185(a)(3); first-degree murder committed during a drive-by shooting and committed for the benefit of a gang, Minn. Stat. § 609.229, subd. 2; attempted premeditated first-degree murder, Minn. Stat. § 609.185(a)(1); attempted premeditated first-degree murder committed for the benefit of a gang, Minn. Stat. § 609.229, subd. 2; attempted first-degree murder committed during a drive-by shooting, Minn. Stat. § 609.185(a)(3); and attempted first-degree murder committed during a drive-by shooting and committed for the benefit of a gang, Minn. Stat. § 609.229, subd. 2.

After a jury trial before Hennepin County District Court Judge Steven A. Pihlaja, Burrell was found guilty as charged and sentenced to life in prison plus 198 months. On direct appeal, we reversed Burrell's convictions and remanded for a new trial on the grounds that (1) Burrell's *Miranda* waiver was ineffective, (2) expert testimony vouching for a witness's credibility was error, and (3) the district court erred by refusing to compel discovery of the State's plea negotiations with Burrell's codefendants. *State v. Burrell*, 697 N.W.2d 579, 597, 601, 605 (Minn. 2005).

On remand, Burrell's case was reassigned to Hennepin County District Court Judge Charles A. Porter. The State pursued the same eight charges handed up by the grand jury and tried at Burrell's first trial. Before the second trial, over Burrell's

objection, the district court issued an order admitting prior bad act and gang-related evidence.[1]

At Burrell's second trial, the State elicited the following evidence implicating Burrell in the shooting. Esque Dickerson, a friend of Burrell's, testified that she spoke with Burrell shortly after his arrest. She admitted that she told her boyfriend that Burrell told her he was present at the "shooting [where] that little girl got killed." Dickerson also told her boyfriend that Burrell said that he and Tyson were in a red car, the model of which began with an "M."

James Turner was housed in a jail cell adjacent to Burrell's while Burrell was awaiting trial. According to Turner, Burrell admitted to him that he was in jail because he had shot someone. Turner claimed that Burrell stated that he was shooting at a rival gang member but shot and killed "the little girl." Defense counsel impeached Turner

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[1] Prior to Burrell's second trial, Judge Porter ruled on a number of pretrial motions, two of which resulted in lengthy appellate review. The State made a motion to admit the expert testimony of police officers who specialized in criminal gangs. The district court denied the State's motion, but certified the question as important and doubtful, warranting interlocutory review. *See* Minn. R. Crim. P. 28.03. The court of appeals dismissed the State's appeal and we denied further review. *State v. Burrell*, No. A06-149, 2006 WL 2807166, at *5 (Minn. App. Oct. 3, 2006), *rev. denied* (Minn. Dec. 20, 2006).

On March 26, 2007, the district court accepted Burrell's waiver of his right to a jury trial. Believing Judge Porter had made statements prejudicial to its case, the State requested that Judge Porter recuse himself. Judge Porter declined to recuse himself. The State petitioned the court of appeals for a writ of mandamus directing Porter's removal from the case. The court of appeals denied the State's petition and we affirmed. *State v. Burrell*, 743 N.W.2d 596, 598 (Minn. 2008).

with evidence that he is a paranoid-schizophrenic sex-offender who suffers from hallucinations.

Dameon Leake is a member of the Rolling 60s Crips, a rival gang to the Gangster Disciples. Leake was a friend of Oliver‟s. According to Leake, while in jail, Burrell told him that he was "trying to smoke Little Timmy" when the "little girl" got killed. Defense counsel impeached Leake, arguing that Leake was hoping to receive a downward departure on an unrelated drug charge in exchange for his testimony.

Terry Arrington is a member of the Black Stones, a gang which is affiliated with the Family Mob. Arrington testified that Burrell told him in jail that the bullet that hit Edwards went through "your boy" before it hit the house. Defense counsel elicited testimony on cross-examination that Arrington could reduce his own prison sentence by testifying against Burrell and others.

Kiron Williams is a member of the Family Mob. He testified that while in jail in 2005, he accused Burrell of "killing kids." According to Williams, Burrell responded that the intended target was Williams‟ "homeboy." Williams interpreted this to refer to Oliver. Burrell‟s defense counsel elicited testimony from Williams that he received a downward departure on his sentence for testifying against Burrell and others.

The State also introduced several incidents of Burrell‟s prior bad acts, pursuant to the district court‟s pre-trial ruling.

During Leake‟s testimony, he claimed that in 2002, Burrell shot at him and three other men as they stood on the corner of Portland and Franklin in south Minneapolis.

Leake stated that Burrell yelled "Rolling 30s Bloods gang" while shooting. No one was hurt in the incident.

Arrington testified that at some point before the Edwards shooting, Burrell shot from a car at Arrington, Oliver, and two other men as the men sat in Peavey Park in south Minneapolis. Arrington testified that Burrell wore a red rag on his hand and said "What up; Blood." as he fired.

Deleon Walker, who was friends with Oliver and other members of the Family Mob and Gangster Disciples, testified that Burrell shot at him on November 25, 2002. Walker said that Burrell and another man walked past him and others in front of a Lake Street coffeehouse in south Minneapolis. According to Walker, Burrell shot at him, missed, and hit a Somali man.

Brady Bell is Burrell's ex-girlfriend. She testified that at some point in 2000, Burrell shot at a car. According to Bell, she, Burrell, and two others were walking on a sidewalk. When a suspicious car approached the group, Bell became nervous that the occupants of the car would open fire on the group. Bell stated that she did not know who was in the car, but testified that the occupants of the car fired shots at the group and that Burrell shot at the car.

During Burrell's second trial, the State called Isaac Hodge as its primary gang expert. Hodge has been a gang member since 1992, and described himself as the leader of the Family Mob beginning 1996. Hodge testified generally about the culture, colors, and territory of the Rolling 30s Bloods. Hodge stated that Bloods commit crimes, including drive-by shootings and drug sales. Hodge also described the violent rivalry

between the Family Mob and the Bloods. Hodge stated that in gang culture, "[r]etaliation is a must." Hodge also testified that when someone joins a gang, that person is expected to "earn his stripes." According to Hodge, a gang member earns his stripes by becoming a rider, a person whose job is to ride around in vehicles and shoot at members of rival gangs. Hodge testified that Oliver was a rider and that Oliver had "shot the most Bloods out of everybody in our whole neighborhood." Hodge also claimed that some "older Bloods" had told him that a standing order existed among the Bloods to "blast [Oliver] on sight." Hodge gave his opinion that killing Oliver would have earned stripes for a young Blood. Finally, Hodge testified that it was common for gang members to "take" a case for a fellow gang member, meaning one gang member will take the fall for a crime committed by another, and that gang members do not cooperate with the police.

Between Burrell's first and second trials, Oliver was killed. In a pretrial ruling, the district court ruled that Oliver's testimony from Burrell's first trial was admissible as substantive evidence and that Oliver's testimony before the grand jury was admissible only to the extent necessary to impeach his trial testimony.

At the conclusion of Burrell's second trial, the district court found Burrell guilty of premeditated first-degree murder, Minn. Stat. § 609.185(a)(1); premeditated first-degree murder committed for the benefit of a gang, Minn. Stat. § 609.229, subd. 2; attempted premeditated first-degree murder, Minn. Stat. § 609.185(a)(1); and attempted premeditated first-degree murder committed for the benefit of a gang, Minn. Stat. § 609.229, subd. 2. The district court found Burrell not guilty of the four counts relating to committing a crime in the course of a drive-by shooting. The court entered a judgment

of conviction for premeditated first-degree murder committed for the benefit of a gang, and attempted premeditated first-degree murder committed for the benefit of a gang. The court sentenced Burrell to life plus 60 months in prison for the first conviction and to a consecutive term of 186 months in prison for the second conviction.

Burrell appealed his conviction and sentence.

I.

Burrell argues that the district court erred in admitting evidence of four prior shooting incidents. We review a district court's evidentiary rulings for abuse of discretion. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). A defendant appealing the admission of evidence has the burden to show it was erroneous and prejudicial. *Id.*

Generally, evidence is admissible only if it is relevant. Minn. R. Evid. 402. Evidence of a defendant's other crimes or bad acts is not admissible to prove the defendant's character for committing crimes. Minn. R. Evid. 404(b). Such evidence, often referred to as *Spreigl* evidence, may be admissible to show motive, intent, absence of mistake, identity, or a common scheme or plan. *State v. Gomez*, 721 N.W.2d 871, 877 (Minn. 2006); *see State v. Spreigl*, 272 Minn. 488, 491, 139 N.W.2d 167, 169 (1965); Minn. R. Evid. 404(b).

For *Spreigl* evidence to be admissible, the State must first provide notice of its intent to use the evidence. *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006). The State must also clearly indicate what the evidence is being offered to prove. *Id.* In addition, there must be clear and convincing evidence that the defendant was involved in the other crime or bad act, the evidence must be relevant and material to the State's case, and the

probative value of the evidence must not be outweighed by the potential for unfair prejudice to the defendant. *Id.* If it is "a close call" whether the evidence should be admitted, the trial court should exclude it. *Id.* at 685.

In this case, the district court ruled that Burrell's prior bad acts were relevant and material to Burrell's motive, and that the probative value of the evidence was not outweighed by the risk of unfair prejudice to Burrell. The court relied extensively on our decision in *State v. Ness*, 707 N.W.2d 676 (Minn. 2006), where we stated that "[m]otive is not an element of most crimes, but the state is usually entitled to prove motive because 'motive explains the reason for an act and can be important to a required state of mind.' " *Id.* at 687 (citing 8 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice-Criminal Law and Procedure* § 32.19 at 451 (3d ed. 2001)). The court also found that although admitting the evidence of the bad acts created a risk of unfair prejudice to Burrell, the prior acts would be "highly probative" of Burrell's motive, "why a person would have been at the scene," and the "nature of the relationship between the Bloods gang" and Oliver.

Burrell concedes that Minn. R. Evid. 404(b) allows for the admission of prior bad acts showing motive. But, according to Burrell, the only facts relevant to showing that the motive for the crime was gang retaliation were: (1) Burrell's membership in the Bloods, (2) Oliver's membership in the Family Mob, and (3) the ongoing rivalry between the two gangs. The prior acts of shooting at Leake, Arrington, Walker, or Oliver did not provide the "reason for [the] act" of shooting at Oliver, according to Burrell. Thus, according to Burrell, his prior bad acts were not relevant and material to the State's case,

and the probative value of the evidence was outweighed by the potential for unfair prejudice.

Burrell cites a handful of cases for the proposition that in order for a prior bad act to demonstrate motive, the prior act must show a clear, non propensity-based motive theory for why the defendant committed the prior bad acts: "if not for the bad acts, the defendant would have had no reason to commit the charged offense." *See State v. Kendall*, 723 N.W.2d 597, 608 n.8 (Minn. 2006) (holding that evidence of prior murder was admissible to prove motive for a defendant who subsequently killed a witness to the original murder); *State v. Ferguson*, 581 N.W.2d 824, 834 (Minn. 1998) (holding graffiti evidence admissible to show that gang affiliation was motive for murder was proper); *State v. Nunn*, 561 N.W.2d 902, 907-08 (Minn. 1997) (holding prior kidnapping conviction admissible where kidnapping victim told the defendant that the subsequent murder victim had stolen drugs and money from the defendant); *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988) (approving the admission of prior bad acts where State proved that the defendant killed the witness to prevent the witness from providing the police with information regarding the defendant"s involvement in the crime).

Burrell also relies on *State v. Ness*, 707 N.W.2d 676 (Minn. 2006). In *Ness*, we held that a prior sex offense was not relevant to show the defendant"s motive for committing a subsequent child sex abuse crime. *Id.* at 687. We said that Ness" motive for committing the subsequent crime was a desire for sexual gratification—not the commission of a prior sex crime. *Id.*

In defending the district court‟s order allowing the evidence of Burrell‟s prior bad acts, the State relies heavily on *Ferguson*, 581 N.W.2d at 834. As noted, *Ferguson* upheld the admission of prior gang graffiti to show that the defendant‟s gang affiliation was the motive for the charged crime. *Id.* Here, according to the State, the prior bad acts are "even more compelling."

We reject Burrell‟s argument. As a threshold matter, we do not agree that a prior bad act must provide the but-for reason for committing the charged offense. The touchstone of the inquiry is simply an evaluation of whether the evidence is material and relevant and whether the probative value of the evidence weighed against the potential for unfair prejudice. In cases where the prior bad act provides a clear motive for committing the charged offense, *see, e.g.*, *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988), the evidence could be characterized as highly probative. In such a case, the likelihood that the risk of unfair prejudice outweighs the probative value of the evidence is diminished.

Here, although the value of Burrell‟s prior bad acts is not overwhelming, we cannot say that these prior shooting incidents are irrelevant or immaterial to Burrell‟s motive. Rather, the prior shooting incidents shed light on why Burrell shot at Oliver on November 22, 2002. The pattern of shooting incidents shows a young man caught up in a violent rivalry with another street gang. This rivalry, illustrated by the prior shooting incidents, helps explain why Burrell would have shot at Oliver.

Having concluded that the prior shootings are probative of Burrell‟s motive, we must next examine whether the probative value of the evidence was outweighed by the

risk of unfair prejudice to Burrell. The evidence offered by the State was prejudicial. The evidence, although relevant to Burrell‟s motive, could also be used improperly to establish that Burrell has a propensity for committing violent crimes. In addition, the evidence could distort the integrity of the fact-finding process by appealing to emotion and passion over reason.

In Burrell‟s second trial, however, the evidence was presented to Judge Porter, and not to a jury. The distinction between a jury trial and a bench trial is important. The risk of unfair prejudice to Burrell is reduced because there is comparatively less risk that the district court judge, as compared to a jury of laypersons, would use the evidence for an improper purpose or have his sense of reason overcome by emotion. *Cf. Schultz v. Butcher*, 24 F.3d 626, 631-32 (4th Cir. 1994) (holding that evidence should not have been excluded from a bench trial on the grounds of unfair prejudice); *United States v. J.H.H.*, 22 F.3d 821, 829 (8th Cir. 1994) ("[I]n a bench trial the prejudicial impact of erroneously admitted evidence, if any error there may be, „is presumed to be substantially less than it might have been in a jury trial‟" (quoting *United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir. 1993)). Indeed, excluding relevant evidence at a bench trial on the grounds of unfair prejudice "is in a sense ridiculous." 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:13, at 655 (3d ed. 2007). After all, it is the district court judge who is called upon in the first instance to rule on the admissibility of the evidence. This is not to suggest that judges are immune from emotional appeals or the temptation to misuse evidence—they are not. But, taking into account the district court judge‟s experience and familiarity with the operation of the rules of evidence, the risk of

unfair prejudice is lessened. *Cf. State v. Sailer*, 587 N.W.2d 756, 764 (Iowa 1998) (stating that a reviewing court should place "great confidence" in judges' ability to follow the law and should not assume that evidence was considered for an improper purpose without a clear showing).

While the probative value of Burrell's prior shooting incidents is not great, the risk of unfair prejudice to Burrell in the context of a bench trial is similarly small. Therefore, we conclude that the district court acted within its discretion in admitting the evidence of Burrell's prior bad acts.

II.

Burrell next argues that the district court erred in admitting the expert testimony of Isaac Hodge as the State's "primary gang expert," and that this error was not harmless.

Minnesota Rules of Evidence 702 allows expert testimony if the testimony will assist the jury in evaluating evidence or resolving factual issues. *State v. Grecinger*, 569 N.W.2d 189, 195 (Minn. 1997). The admissibility of expert testimony generally rests within the sound discretion of the district court. *State v. Lopez-Rios*, 669 N.W.2d 603, 613 (Minn. 2003); *State v. Koskela*, 536 N.W.2d 625, 629 (Minn. 1995). The district court's decision on whether to admit expert testimony is reviewed for a clear abuse of discretion. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999).

In *State v. DeShay* and in *Lopez-Rios*, we stated that gang-expert testimony should be admitted only if it is helpful to the jury in making the specific factual determinations that jurors are required to make. *State v. DeShay*, 669 N.W.2d 878, 884 (Minn. 2003);

Lopez-Rios, 669 N.W.2d at 613. We added that, in order to be admissible, gang-expert testimony must

> add precision or depth to the jury‟s ability to reach conclusions about matters that are not within its experience. Moreover, this testimony must be carefully monitored by the [district] court so that the testimony will not unduly influence the jury or dissuade it from exercising its independent judgment. Even if acceptable under Rule 702, expert testimony should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

DeShay, 669 N.W.2d at 888 (citing Minn. R. Evid. 403).

In *DeShay* and *Lopez-Rios*, we held that the admission of expert testimony on general gang activities and gang affiliation was error. *DeShay*, 669 N.W.2d at 888; *Lopez-Rios*, 669 N.W.2d at 613. In *DeShay*, we held that much of the gang expert‟s testimony was admitted erroneously because the testimony was duplicative of other lay testimony, giving little assistance to the jury in evaluating the evidence. 669 N.W.2d at 888. In *Lopez-Rios*, we held that much of the gang expert‟s testimony on general gang activities and gang affiliation was similarly erroneously admitted as the testimony was duplicative of previous witness testimony. 669 N.W.2d at 612-13. We also expressed our concern over the expert‟s testimony that the defendant was a member of a criminal gang. *Id.* In addition, we cautioned that expert testimony should not be used as a means to launder otherwise inadmissible hearsay. *DeShay*, 669 N.W.2d at 886. Despite our concerns, in both cases, we concluded that any error in admitting the evidence was harmless because the key facts—the defendant‟s involvement in a gang and the rivalry between two rival gangs—was thoroughly proved by other competent evidence. *Id.* at 888; *Lopez-Rios*, 669 N.W.2d at 612-14. *See also State v. Blanche*, 696 N.W.2d 351,

362, 374 (Minn. 2005) (disapproving of gang expert testimony that gang members sho[o]t at each other, gang members have to retaliate, and that gang members are not cooperative with the police.).

We have not always rejected gang expert testimony. In *State v. Jackson*, 714 N.W.2d 681 (Minn. 2006), we upheld the admission of certain aspects of the State"s gang expert"s testimony. In *Jackson*, the State"s gang expert testified about the Bloods gang generally, discussing the gang"s identifying hand signs and colors and the criminal activities in which Bloods gang members are involved. The expert also testified about the role of respect in Bloods culture. In addition, he stated that the defendant was associated with the Bloods gang and that, in his opinion, the victim was "murdered for the sake of the Bloods, [for] showing disrespect." *Id.* at 692.

We held that the expert"s testimony "about the general criminal activities of Bloods gang members was admissible because it assisted the jury in deciding whether the commission of crimes is one of the primary activities of the Bloods gang, a prerequisite for proving that the Bloods gang meets the statutory definition of a „criminal gang" " under Minn. Stat. § 609.229. *Id.* Further, we held that the testimony was helpful in proving motive and neither "belabored nor excessive," *id.*, and noted that none of the expert"s testimony relied on otherwise inadmissible hearsay. *Id.* at 692-93.

Burrell contends that the district court erroneously admitted Hodge"s testimony that "[r]etaliation is a must," that gang members are expected to "earn their stripes," do not cooperate with the police, and commit crimes, including drive-by shootings and drug sales. In addition, Burrell argues that Hodge"s statement that a gang member will take a

case for another gang member was inadmissible because it potentially vouched for the veracity of certain witnesses. Finally, Burrell argues that Hodge‟s testimony that "a couple [of] older Bloods" told him that an order had gone out to kill Oliver was inadmissible hearsay. *See DeShay*, 669 N.W.2d at 886.

We assume, without deciding that Burrell is correct in his assertion, that portions of Hodge‟s testimony were inadmissible under *DeShay*, *Lopez-Rios*, and *Blanche*. However, at Burrell‟s trial, it was largely uncontested that the Bloods and the Family Mob were engaged in a violent rivalry, and that Burrell and Oliver were gang members. Instead, Burrell took the position at trial that he was not the shooter. Given that the identity of the shooter was the primary contested issue at trial, the potential prejudicial effect of Hodge‟s expert testimony is lessened. Because none of Hodge‟s testimony directly implicated Burrell as the shooter, we conclude that the admission of Hodge‟s expert testimony, if error, was harmless beyond a reasonable doubt.

III.

Burrell argues that the district court committed reversible error by including in its findings of fact two facts drawn from Oliver‟s grand jury testimony: (1) testimony that Burrell was a member of the Bloods gang, and (2) testimony that Burrell was the shooter. Burrell alleges that this testimony is inadmissible hearsay. As previously discussed, in a pretrial ruling, the district court ruled that Oliver‟s testimony from Burrell‟s first trial was admissible as substantive evidence and that Oliver‟s testimony before the grand jury was admissible only to the extent necessary to impeach his trial testimony.

A statement is hearsay if it was made outside of court and is offered in evidence to prove what it asserts. Minn. R. Evid. 801(c). Evidentiary rulings on hearsay statements are reviewed for clear abuse of discretion. *State v. Henderson*, 620 N.W.2d 688, 696 (Minn. 2001).

Burrell asserts that the district court violated its own pretrial ruling when it made the factual finding that "Oliver[] testified that he knew Skits was a member of the Bloods gang," because the testimony came from Oliver"s grand jury testimony and not from Oliver"s testimony at Burrell"s first trial. Burrell makes the same objection to Oliver"s grand jury testimony identifying Burrell as the shooter.

We reject Burrell"s argument that the admission of the grand jury testimony prejudiced him. First, there was no dispute that Burrell was a member of the Bloods, as five witnesses testified to this point at Burrell"s trial. Further, Oliver testified at Burrell"s first trial that the shooter was Little Skits, and correctly identified a photo of Burrell as Little Skits. Therefore, to the extent that the district court relied on Oliver"s grand jury testimony as substantive evidence, Burrell"s claim that he was prejudiced fails.

IV.

Finally, Burrell argues that the district court erred in imposing a longer sentence than the sentence imposed following Burrell"s first trial. After his first trial, Burrell received a sentence of life plus 12 months in prison for committing first-degree murder. After his second conviction, the district court sentenced Burrell to life plus 60 months in prison for committing first-degree murder.

The longer sentence is unlawful under *State v. Holmes*, 281 Minn. 294, 296, 161 N.W.2d 650, 652 (1968). As a matter of judicial policy in Minnesota, "a court cannot „impose on a defendant who has secured a new trial a sentence more onerous than the one he initially received.‟ " *Hankerson v. State*, 723 N.W.2d 232, 241 (Minn. 2006) (quoting *State v. Holmes*, 281 Minn. 294, 296, 161 N.W.2d 650, 652 (1968)). *See also State v. Jackson*, 749 N.W.2d 353, 358 (Minn. 2008).

The State concedes that Burrell‟s sentence violates the rule we adopted in *Holmes*. We therefore vacate Burrell‟s sentence for his first-degree murder conviction, and remand for resentencing with instructions to the district court to impose a sentence of no longer than life plus 12 months for Burrell‟s first-degree murder conviction.

Affirmed in part, reversed in part, and remanded.

STATE OF MINNESOTA

IN SUPREME COURT

A13-1769

Hennepin County

Anderson, J.
Took no part, Gildea, C.J.

Myon Demarlo Burrell,

Appellant,

vs.

Filed: February 4, 2015
Office of Appellate Courts

State of Minnesota,

Respondent.

Daniel S. Adkins, The Adkins Law Group, Chartered; and

Mark J. Miller, Mark J. Miller, P.A., Minneapolis, Minnesota, for appellant.

Lori Swanson, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant Hennepin County Attorney, Minneapolis, Minnesota, for respondent.

S Y L L A B U S

1. The postconviction court did not abuse its discretion when it denied appellant's request for a new trial after an evidentiary hearing, when it refused to compel the appearances of favorable witnesses at the evidentiary hearing, and when it excluded the cumulative testimony of a proposed witness.

2. Appellant's claim of ineffective assistance of trial counsel fails as a matter of law.

Affirmed in part, and remanded for sentencing as directed.

Considered and decided by the court without oral argument.

O P I N I O N

ANDERSON, Justice.

Appellant Myon Demarlo Burrell was convicted of premeditated first-degree murder and attempted premeditated first-degree murder for the 2002 shooting death of 11-year-old Tyesha Edwards and the attempted murder of Timothy Oliver. In this postconviction appeal, Burrell argues that he is entitled to a new trial primarily based on newly discovered evidence and the recantation of two witnesses. After granting multiple continuances for Burrell to attempt to secure the appearance of favorable witnesses and then holding an evidentiary hearing, the postconviction court denied his petition. On appeal, Burrell argues that the court abused its discretion when it failed to compel the appearances of favorable witnesses. He also challenges the effectiveness of his trial counsel and the legality of the sentence imposed after a remand from his direct appeal. Because we conclude that (1) the postconviction court did not abuse its discretion when it refused to compel the appearance of witnesses at an evidentiary hearing, and (2) Burrell

forfeited his ineffective-assistance-of-counsel argument, we affirm on the merits. Because the sentence was improper, we remand for resentencing consistent with our direction in *State v. Burrell* (*Burrell II*), 772 N.W.2d 459 (Minn. 2009).

I.

Burrell originally was convicted of four counts of attempted first-degree murder in Oliver's shooting and four counts of first-degree murder for Edwards's 2002 death, and sentenced to life in prison. We reversed and remanded. *State v. Burrell* (*Burrell I*), 697 N.W.2d 579 (Minn. 2005). On remand, following a bench trial, Burrell was acquitted of four of the counts, but convicted again of two counts of murder and two counts of attempted murder. We affirmed the convictions on direct appeal, but remanded to correct Burrell's sentence, holding that the district court in the second trial erred in imposing a longer sentence than that imposed in Burrell's first trial. *Burrell II*, 772 N.W.2d at 469-470.

The facts underlying Burrell's convictions are set forth in detail in *Burrell II*, 772 N.W.2d at 461-65, so we only briefly recount them here. On November 22, 2002, Tyesha Edwards, whose family lived next door to the aunt of Gangsters Disciple gang member Timothy Oliver, was killed by a stray bullet that pierced the wall of her family's South Minneapolis home and struck her in the chest. *Id.* at 461-62. At Burrell's first trial, Oliver testified that on the day of the murder he saw a maroon car that he believed belonged to rival gang member Hans Williams drive toward his aunt's house. *Id.* A man he knew as "Ike" was driving the car, and a man he knew as "Little Skits" was in the front passenger seat. *Id.* at 462. Oliver also testified that he heard nine or ten gunshots

minutes after observing the car, and that he saw Little Skits standing between two houses, pointing a gun at him and pulling the trigger. *Id.* When police responded to calls from Edwards's house, they found Edwards lying on the dining room floor, having been killed by a .40 caliber bullet. *Id.* Oliver later identified photos of Isaiah "Ike" Tyson as having been in the maroon car, and Burrell as Little Skits, the shooter. *Id.*

A Hennepin County jury found Burrell guilty of four counts of first-degree murder, Minn. Stat. §§ 609.185(a)(1), (3); 609.229, subd. 2 (2014) (premeditated murder, premeditated murder for the benefit of a gang, intentional drive-by murder, and intentional drive-by murder for the benefit of a gang); and, four counts of attempted first-degree murder, Minn. Stat. §§ 609.185(a)(1), (3); 609.229, subd. 2 (attempted premeditated murder, attempted premeditated murder for the benefit of a gang, attempted intentional drive-by murder, and attempted intentional drive-by murder for the benefit of a gang). The district court convicted Burrell of two of the eight counts and sentenced him to life in prison plus 12 months for first-degree murder for the benefit of a gang and to a consecutive 186-month term for attempted first-degree murder for the benefit of a gang.

On Burrell's direct appeal, we reversed and remanded for a new trial on the grounds that (1) Burrell's *Miranda* waiver was ineffective, (2) the admission of expert testimony vouching for a witness's credibility was error, and (3) the district court erred when it refused to compel discovery of the State's plea negotiations with Burrell's codefendants. *Burrell I*, 697 N.W.2d at 597, 601, 605.

In 2004, between Burrell's first and second trials, Oliver, the intended target of the shooting, was shot and killed. After a second trial, Burrell was found guilty of four of the original eight felony counts—premeditated first-degree murder, premeditated murder for the benefit of a gang, attempted premeditated first-degree murder, and attempted premeditated murder for the benefit of a gang. *Burrell II*, 772 N.W.2d at 464. The district court convicted Burrell of premeditated first-degree murder committed for the benefit of a gang and attempted premeditated first-degree murder committed for the benefit of a gang. *Id.* The court sentenced Burrell to life in prison plus 60 months for the first-degree premeditated murder conviction and to a consecutive term of 186 months in prison for the conviction of attempted premeditated first-degree murder committed for the benefit of a gang. *Id.* at 465. We affirmed Burrell's convictions following the second trial but remanded to correct the sentence because the district court had improperly imposed a longer sentence in the second trial, in violation of *State v. Holmes*, 281 Minn. 294, 296, 161 N.W.2d 650, 652 (1968). *Burrell II*, 772 N.W.2d at 469. We therefore vacated Burrell's sentence for his first-degree murder conviction and remanded for resentencing with instructions to the district court to impose a sentence of no longer than life plus 12 months on that count. *Id.* at 470.

Burrell filed a petition for postconviction relief in August 2011, seeking relief under four theories: newly discovered evidence, witness-recantation evidence, ineffective assistance of counsel for failure to call a witness, and police misconduct in coercing witness statements. In the petition, Burrell claimed the following: a new witness, Rita Brown, had come forward with allegedly exculpatory evidence; two witnesses from the

second trial, Terry Arrington and Anthony Collins, had recanted their testimony; codefendant Isaiah Tyson, who had testified at the second trial that he was the actual shooter, had recalled new details that would prove he was the shooter; and Antoine Williams, a witness from the first trial who did not testify at the second trial, also had "new evidence" about the shooting. None of this information was presented to the postconviction court in the form of affidavits directly from the witnesses or in sworn, notarized statements. Instead, Burrell submitted affidavits from a private investigator, Michael Morley,[1] who interviewed the witnesses and summarized their prospective testimony. In some instances, Morley attached handwritten, unnotarized statements or transcriptions of audio-recorded phone interviews to his own summaries. Brown, however, refused to write a letter or sign an affidavit, and there is no transcript of her interview with Morley.

The postconviction court summarily denied Burrell's claims based on ineffective assistance of counsel and police misconduct, but granted an evidentiary hearing to permit the testimony of Brown, Collins, Arrington, and Tyson. At the evidentiary hearing, on May 29, 2012, just one of the four witnesses, Tyson, appeared to testify. Collins and Brown could not be located. Burrell's counsel told the court that he had talked with Collins's supervised-release agent, and that there was a warrant out for Collins's arrest because he had failed to check in. Arrington did not testify because he was in federal

[1] Morley died between the time he submitted the affidavits and the postconviction court's first evidentiary hearing. The record provides no details regarding the cause or circumstances of his death.

custody in Sherburne County, and according to counsel, had not been "writted over." The court continued the hearing for two days to provide time to locate Brown and to arrange transport for Arrington.

When the hearing reconvened on May 31, 2012, the three witnesses again did not appear. Burrell's counsel told the postconviction court he had reached Brown via telephone, and "she said she was not going to come testify and that she recanted her statements . . . ." Counsel did not pursue the Brown matter further at that time. Instead, he moved to declare Collins an unavailable witness and to admit a recorded statement that Collins previously had provided. He also moved for a continuance to "attempt to secure" Arrington's testimony after indicating that it would take one week for the U.S. Marshals to transport him to the hearing. The court denied both motions.

In June 2012, following a substitution of counsel, Burrell requested that the court reconvene the evidentiary hearing, based on assurances that proof would be provided that the witnesses had been subpoenaed again and that their whereabouts were known. In an offer of proof submitted in support of the request, counsel stated that he would provide new affidavits from the witnesses "or alternatively, proper notarization or attestation to its previously offered affidavits." The postconviction court granted the request and scheduled another evidentiary hearing for December 12 and 13, 2012. But, no new affidavits or notarizations were in fact provided to the postconviction court.

Because defense counsel did not subpoena witnesses in time for the December 2012 evidentiary hearing, the postconviction court granted a continuance until January 31, 2013. Following an in-chambers discussion regarding the transport of in-custody

witnesses, the postconviction court stated that it was not taking responsibility for making transport arrangements, nor did it order Burrell or the State to take any specific course of action to bring in the witnesses. On January 9, 2013, Burrell's counsel verbally requested an order to compel the Hennepin County Attorney's Office to secure the transport of three in-custody witnesses. The county attorney's office declined to assist with the witness transport, and the postconviction court refused to compel the county attorney's assistance. Although Brown was served with a subpoena on January 29, 2013, Brown, Arrington, and Collins did not appear at the January 31, 2013, hearing. The postconviction court did not issue any bench warrants, but granted a fourth continuance, to March 26, 2013, to allow additional time to secure witnesses and for counsel to contact the Minneapolis City Attorney's Office to pursue contempt charges against Brown.

The three witnesses did not appear at the March 26, 2013 evidentiary hearing, and no new subpoenas or orders of transport were issued for them. However, a fifth witness, Burrell's codefendant Hans Williams, had been transported from prison to the hearing to testify. The State successfully moved to exclude his testimony because Burrell had not included any allegation regarding Williams in his postconviction petition, nor was an offer of proof of Williams's testimony submitted to the postconviction court. The court recessed for one day to allow counsel to subpoena Brown or to otherwise secure her attendance. Defense counsel's efforts were unsuccessful, and the postconviction court denied Burrell's requests to issue a bench warrant for Brown or have law enforcement transport her to court.

On July 17, 2013, the postconviction court denied Burrell's postconviction petition. The court determined that Burrell had "provided virtually no additional evidence," and that the substance of any new evidence was "highly speculative" and "likely cumulative." The court concluded that it had provided Burrell with opportunities to present evidence from the witnesses, time for counsel to explore possible remedies to secure the witnesses' testimony, and multiple continuances. The court also held that it had no authority to issue a bench warrant for Brown's failure to appear at the March 26 or March 27, 2013, hearings because Brown had not been properly served with a subpoena for those dates.

II.

The first issue is whether the postconviction court erred when it refused to compel the attendance of Burrell's witnesses—primarily Rita Brown—for an evidentiary hearing and thus, whether it erred when it denied Burrell's request for a new trial. We review the decision by the postconviction court to grant or deny a new trial based on new evidence for an abuse of discretion. *State v. Hurd*, 763 N.W.2d 17, 34 (Minn. 2009). In doing so, we review the postconviction court's underlying factual findings for clear error and its legal conclusions de novo. *Martin v. State*, 825 N.W.2d 734, 740 (Minn. 2013).

Burrell argues that, having decided Brown could provide relevant testimony, the postconviction court was required to either issue a bench warrant when she failed to appear on a subpoena for the January 31, 2013, hearing, or to "compel the creation of a criminal complaint for contempt of court." The postconviction court's failure to take either action, Burrell argues, deprived him of a meaningful postconviction review. These

arguments require consideration of the statutory and constitutional implications of disobedience of a subpoena.

A.

Failure to appear on a properly served subpoena is constructive contempt of court. Minn. Stat. § 588.01, subd. 3(8) (2014). "The district court is empowered to order [an individual's] arrest for . . . failure to appear" as a remedy for this contempt. *Braith v. Fischer*, 632 N.W.2d 716, 724 (Minn. App. 2001), *rev. denied* (Minn. Oct. 24, 2001); *Westgor v. Grimm*, 381 N.W.2d 877, 880 (Minn. App. 1986). To effectuate arrest, Minnesota courts may issue bench warrants to compel a witness or a defendant to come to court.[2] After the court is presented with an affidavit of the facts constituting the contempt, it:

> may either issue a warrant of arrest to bring the person charged to answer or, without a previous arrest, upon notice, or upon an order to show cause, which may be served by a sheriff or other officer in the same manner as a summons in an action, may commit the person to jail, impose a fine, or both, and make such order thereupon as the case may require.

Minn. Stat. § 588.04(a)(2014).[3] Thus, under the statute's plain language, a court has multiple options it "may" use when presented with contempt, but there is no *requirement* to issue a bench warrant.

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[2] A bench warrant is a "writ issued directly by a judge to a law-enforcement officer, esp[ecially] for the arrest of a person who has been held in contempt, has been indicted, has disobeyed a subpoena, or has failed to appear for a hearing or trial." *Black's Law Dictionary* 1819 (10th ed. 2014).

[3] While the explicit statutory language requires affidavits or orders to show cause in cases of constructive contempt, we have held that a district court may issue a bench

(Footnote continued on next page.)

We note at the outset that defense counsel took little to no independent action to secure Brown's presence at the evidentiary hearing. First, counsel never presented the court with an affidavit of the facts constituting Brown's constructive contempt, as required under Minn. Stat. § 588.04(a), when Brown failed to appear for the January 31, 2013, hearing. Second, although given more than a 2-month continuance to do so, counsel failed to properly subpoena Brown to appear at the March 26 hearing and instead relied on the previous subpoena. Third, counsel never followed up on the court's suggestion to explore the possibility of criminal contempt charges against Brown. In short, Burrell cannot blame the postconviction court for failing to step in when his counsel was remiss in pursuing the remedies available to him.

In any event, even had counsel taken meaningful action, it likely would not have made a difference. The postconviction court was well within its discretion when it refused to compel the appearance of a potentially exculpatory, albeit reluctant witness. Although defense counsel repeatedly subpoenaed Brown, she refused to attend the hearings. The postconviction court, aware of Brown's refusals, granted multiple continuances. The court could have issued a bench warrant for Brown,[4] particularly after

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warrant based solely on personal knowledge, obtained in its official capacity, of the contempt at issue. *State v. Mohs*, 743 N.W.2d 607, 613 (Minn. 2008).

[4] District courts have the authority to compel witness attendance. *See Mohs*, 743 N.W.2d at 611 ("[T]he authority of courts to order that individuals who fail to appear as required by law be brought before the court is supported by the inherent authority of courts, by analogous precedent of the United States Supreme Court, and by the reasoning of other courts that have addressed this issue.").

she failed to appear at the January 31, 2013, hearing, but instead provided ample time for defense counsel to locate her, to pursue possible criminal contempt charges for disobeying the subpoena, or to otherwise secure her cooperation.[5] In addition, it would have been inappropriate for the postconviction court to issue a bench warrant for Brown after the March 2013 hearing because she had not been properly subpoenaed. In other words, the court properly exercised its discretion when it decided not to issue a bench warrant in response to a witness's failure to appear when that witness had not actually been subpoenaed to appear at the evidentiary hearing at issue.

Under the plain language of the statute governing contempt of court, a court has options at its disposal when facing a witness in contempt—it *may* issue a warrant or an order to show cause. Minn. Stat. § 588.04(a). To put it another way, the postconviction court's discretionary authority does not require the court to issue a bench warrant. We therefore decline Burrell's invitation to adopt a judicial rule requiring postconviction courts to issue bench warrants for witnesses who fail to appear on subpoenas. Such determinations are better left to the discretion of postconviction courts. Accordingly, we hold that the postconviction court did not abuse its discretion when it declined to issue a bench warrant for Brown.

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[5] Although the postconviction court seemed to assume that Brown would have been charged with misdemeanor contempt, which is handled by the City Attorney's office, the proper charge may have been felony contempt, which is prosecuted by the State. *See* Minn. Stat. § 588.20, subd. 1 (2014) (defining felony contempt as the knowing and willful disobedience of a subpoena lawfully issued in relation to a crime of violence).

B.

In addition to Minnesota's statutory framework, the United States and Minnesota Constitutions provide a criminal defendant with the right to subpoena favorable witnesses at trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6 ("The accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."). At a minimum, the Supreme Court has held, "criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). While Burrell contends that this right extends to postconviction proceedings, neither this court nor the Supreme Court have so held. *Cf. Coleman v. Balkcom*, 451 U.S. 949, 954 (1981) (Marshall, J., dissenting from denial of certiorari) ("A habeas corpus proceeding is, of course, civil rather than criminal in nature, and consequently the ordinary Sixth Amendment guarantee of compulsory process . . . does not apply.").

Even if, as Burrell contends, compulsory process is required to vindicate his right to a meaningful review of his conviction, the constitutional protection of compulsory process is not an absolute guarantee that every witness a defendant seeks must testify. Instead, assuming such a right applies to postconviction proceedings, to establish a violation of the Sixth Amendment right to compulsory process, a defendant "must at least make some plausible showing of how [the] testimony would have been both material and favorable to his defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

Here, the record provides scant support to conclude that Brown's subpoenaed testimony would indeed have been "favorable" or "material," as required under *Valenzuela-Bernal*. We have recognized that the reliability provided by a sworn, notarized statement is a significant factor in the context of both recantation and newly discovered evidence when determining whether a new trial is warranted. *Miles v. State*, 800 N.W.2d 778, 784 (Minn. 2011); *see State v. Ferguson*, 742 N.W.2d 651, 660 (Minn. 2007); *Opsahl v. State,* 677 N.W.2d 414, 423 (Minn. 2004). Burrell's offer of proof regarding Brown's testimony originated solely from hearsay affidavits provided by Morley, a deceased third party. While we have recognized that, under certain circumstances, affidavits from third parties have sufficient indicia of trustworthiness, *see Caldwell v. State*, 853 N.W.2d 766, 770 (Minn. 2014); *Dobbins v. State,* 788 N.W.2d 719, 732-34 (Minn. 2010), Morley's affidavit summarizing Brown's interview does not contain such indicia. The postconviction court was never presented with any direct offers of proof from Brown regarding the substance of her testimony. The oral statement that Brown gave to Morley was neither given under oath nor reduced to written form, let alone notarized. There is no transcript of her interview or an accompanying writing of any kind from Brown. Furthermore, the postconviction court was told that Brown had recanted her previous statements and would refuse to testify in court as to what she allegedly had told Morley privately. Because the affidavits lacked adequate (or any) indicia of reliability, it would have been reasonable for the postconviction court to conclude that it could not "justify the expense and risk of transporting the [witness] to an evidentiary hearing . . . [without] a greater showing of a genuine recantation." *Ferguson*,

742 N.W.2d at 660. Thus, the postconviction court's refusal to issue a subpoena did not violate Burrell's alleged Sixth Amendment right to compulsory process.

III.

The second question in this appeal is whether the postconviction court abused its discretion when it refused to allow a codefendant witness, Hans Williams, to testify at the evidentiary hearing because he was not previously disclosed in Burrell's postconviction petition nor included in the court's order granting the hearing. Williams submitted an affidavit to the postconviction court after the evidentiary hearing had been granted, stating that he would testify that he had always maintained that Burrell was not present at the scene of the shooting. To obtain a new trial on the basis of newly discovered evidence, a petitioner must establish:

> (1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result.

Rainer v. State, 566 N.W.2d 692, 695 (Minn. 1997).

Burrell's offer of the testimony of Williams fails on each *Rainer* factor. A review of the record indicates that Williams testified at trial that Burrell was not present at the shooting, an assertion that mirrors his affidavit. Significantly, defense counsel never submitted a new offer of proof for Williams's testimony or told the postconviction court that Williams would testify to anything other than what he had already said. Thus, the evidence already was known and discovered by counsel at the time of trial, is cumulative,

and is not likely to produce a more favorable result. The postconviction court was well within its discretion when it denied permission to call Williams as a witness.

IV.

Burrell also argues that the postconviction court, "without justification or legal support," declined to order a writ for the appearance of witness Terry Arrington, who was in the custody of the U.S. Marshals Service at the time of the evidentiary hearing. Burrell's argument is without merit. As an initial matter, the postconviction court was without authority to compel the presence of a witness in federal custody. *Cf. Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1871) ("Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other . . . ."). Furthermore, the record reveals that Burrell never requested the postconviction court's assistance in securing the assistance of federal marshals in arranging Arrington's transport. While Burrell sought a continuance at the May 31, 2012, hearing to discuss Arrington's transfer with an Assistant U.S. Attorney, the record does not support Burrell's claim that the postconviction court's assistance was requested in securing Arrington's transfer. Instead, counsel only requested leave to depose Arrington while he was in federal custody.

V.

We turn next to Burrell's claim that his trial counsel was ineffective. Burrell argues that his trial counsel was ineffective because counsel did not hire a private investigator. But in his original petition to the postconviction court, Burrell's ineffective-

assistance-of-counsel claim hinged solely on the fact that counsel did not call Antoine Williams as a defense witness at the second trial. Because he did not expressly raise the failure-to-investigate claim in his postconviction petition, Burrell forfeited it on appeal to our court. "It is well settled that a party may not raise issues for the first time on appeal" from a denial of postconviction relief. *Robinson v. State*, 567 N.W.2d 491, 494 n.2 (Minn. 1997).

VI.

Finally, Burrell argues that the district court failed to correct his sentence as we ordered in *Burrell II*, 772 N.W.2d 459, 470 (Minn. 2009). After his first trial, Burrell received a sentence of life plus 12 months in prison for committing premeditated first-degree murder. After the retrial, the district court sentenced Burrell to life plus 60 months in prison for committing the same offense. We held in *Burrell II* that the longer sentence is not permitted under *State v. Holmes*, 281 Minn. 294, 296, 161 N.W.2d 650, 652 (1968). We therefore again remand for resentencing with instructions to the district court to impose a sentence of no longer than life plus 12 months for Burrell's premeditated first-degree murder conviction.

Affirmed in part, and remanded for the sentencing as directed.

GILDEA, C.J., took no part in the consideration or decision of this case.