STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1402

State of Minnesota,
Respondent,

vs.

Amy Margaret Senser,
Appellant.

Filed June 24, 2013
Affirmed
Chutich, Judge

Hennepin County District Court
File No. 27-CR-11-28801

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Eric J. Nelson, Christina M. Zauhar, Halberg Criminal Defense, Bloomington, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Chutich, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

CHUTICH, Judge

Appellant Amy Margaret Senser challenges her convictions for criminal vehicular homicide, contending that the state's evidence was insufficient to prove that she knew she

had hit a person or a vehicle. She also asserts that the district court erred in interpreting a statute criminalizing failure to report an accident and in instructing the jury on the knowledge requirement underlying her two convictions. Finally, Senser claims that the district court abused its discretion by denying her change-of-venue and sequestration motions, suppressing evidence of the victim's toxicology results, preventing her from presenting a complete defense, admitting hearsay evidence, failing to disclose jury communications, and denying her motion for a *Schwartz* hearing.

Although the district court abused its discretion by admitting hearsay evidence and failing to disclose a communication from the jury, we conclude, after careful consideration of the entire record, that the errors had no effect on the jury's verdict and that Senser received a fair trial. Because the state presented more than sufficient evidence to demonstrate that Senser knew she hit a person or a vehicle, and because her arguments regarding statutory interpretation, jury instructions, and abuses of discretion are unavailing, we affirm.

FACTS

At approximately 11:10 p.m. on August 23, 2011, Minnesota State Patrol officers responded to several calls about an accident on the Riverside Avenue exit ramp of westbound Interstate 94. Several people called 911 and reported seeing a car stopped on the ramp and a man lying on the roadway. When the officers arrived at the scene, they observed a Honda Accord with its hazard lights flashing and a body lying face down on the ramp approximately 40 feet in front of the car. The victim, later identified as A.P., had severe injuries to the right side of his body. The officers also observed a blue

container that appeared to have been used as a gas can and concluded that the victim was refueling his car when he was struck by another car. The officers found multiple car parts scattered along the ramp that they identified as belonging to a Mercedes GLK300 or another Mercedes sport-utility vehicle (SUV).

The following evening, Senser's attorney called the state patrol and stated that he was releasing the Mercedes ML350 that was involved in the fatal accident. When officers arrived at Senser's home, they found the Mercedes parked inside the garage. The officers observed "[d]amage to the front passenger side of the vehicle" that included a broken headlight, broken fog light, a dented fender, and what "appeared to be blood on the front hood."

Over a week later, on September 2, 2011, Senser provided an unsolicited statement to the state patrol, which reads as follows: "I, Amy Senser was the driver of the vehicle in the accident in which [A. P.] lost his life."

Hennepin County charged Senser with criminal vehicular homicide—leaving the scene of an accident. *See* Minn. Stat. §§ 169.09, subd. 1, 609.21, subd. 1(7) (2010). The county later amended the complaint to include two additional charges of criminal vehicular homicide—failure to give notice and operating a vehicle in a grossly negligent manner. *See* Minn. Stat. §§ 169.09, subd. 6, 609.21, subd. 1(1), (7) (2010).

Senser unsuccessfully moved for dismissal, and the parties made a number of other pretrial motions as well. The district court granted the state's motion for an order precluding the introduction of A.P.'s toxicology report, denied Senser's motion to admit testimony of her chiropractors and physicians on her chronic headaches, denied Senser's

motion for a jury instruction on good faith reliance on the advice of counsel, and denied her motion for a change of venue.

During a seven-day jury trial, the state called 24 witnesses. These witnesses included several people who called 911 after seeing A.P.'s body on the ramp, officers who responded to the 911 calls, police investigators, an accident reconstruction expert, Senser's husband Joseph Senser, and Senser's daughters and step-daughter. The defense theorized that Senser did not know that she struck A.P., but believed instead that she hit a construction cone or barrel on the exit ramp. The defense called a lighting and visibility expert and its own accident reconstruction expert. Amy Senser testified in her own defense.

State's Case

The state first presented testimony from the three witnesses who called 911 the night A.P. died. All three testified that they used the Riverside exit ramp shortly after 11:00 p.m., observed the flashing lights on A.P.'s car, and saw A.P.'s body on the ramp. The state also called M.K., who was driving westbound on Interstate 94 about 30 minutes after the accident. She testified that she was driving behind an erratic driver of a Mercedes SUV. When the cars neared the Riverside exit, the Mercedes was in the right lane and appeared to be exiting, but switched abruptly to the left lane before the exit. The Mercedes then returned to the right lane and M.K. was able to pass it. As she passed, M.K. observed that the driver's-side window was open and the Mercedes's right headlight was not working. M.K. decided to call the state patrol tip line after she saw

reports about the accident and learned that the state patrol was looking for a Mercedes SUV. Senser admitted at trial that she was probably the described driver.

Senser's daughters H.S. and M.S., along with their friend M.H., testified about that night. Earlier in the evening, Joseph Senser gave the girls a ride to a concert in St. Paul. Amy Senser planned to meet the girls at the concert to drive them home, but after the concert, Senser was not there. H.S. and M.H. repeatedly called Senser but the cell phone connection was inconsistent. Eventually M.H. got through to Senser, who said she was lost and that the girls should call Joseph Senser for a ride. When Joseph Senser picked them up, M.H. overheard him speaking with Senser on the phone and giving her directions. When they got back to the Senser home, they found Senser asleep or resting on the front porch. M.H. testified that the following morning the atmosphere in the house was very tense.

Joseph Senser

Joseph Senser testified and corroborated the account of the three girls about the evening's events. He further testified that he did not learn of the accident until the following morning when Senser told him "I think I hit a construction cone, construction barrel." Joseph Senser then went outside to inspect the Mercedes and, based on the damage, thought she may have hit a deer. Then he returned inside to watch the news and saw a report about a fatal accident on the Riverside exit ramp. Joseph Senser showed Amy Senser the report on their computer and asked her if she could have been the driver, but she denied it. Joseph Senser then called Senser's brother, a police officer, to ask for a referral to an attorney. At 10:30 a.m., Joseph Senser called an attorney to arrange a

meeting and, after rearranging some items in the garage, he moved the Mercedes into it. The Sensers met with the attorney and arranged to have the attorney hand the Mercedes over to law enforcement. After the meeting, the Sensers and their two daughters, H.S. and M.S., went to Stillwater so they would not be home when the officers came for the vehicle.

Expert Testimony

Several expert witnesses testified about Amy and Joseph Senser's cell phone records from the night of the accident. Cell phone tower data demonstrated that Senser placed and received calls from 11:08 p.m. until 11:54 p.m. in the area of the accident. Senser's phone records also indicated that about 45 text messages from the night of August 23 through the morning of August 25 had been deleted and that text messages during that time period had also been deleted from Joseph Senser's phone.

The state called certified crash reconstructionist and State Patrol Trooper Paul Skogland. Trooper Skogland testified that A.P.'s car was parked approximately 247 feet up the 680-foot ramp and that, because of a small shoulder, the car intruded about two feet into the ramp's single lane. Skogland found no evidence of any skid marks at the accident scene.

Skogland opined that, when struck, A.P. was likely standing and 40% of his body was visible above the hood and illuminated by Senser's headlights. Skogland further opined that A.P.'s body wrapped around the fender of Senser's Mercedes. Skogland testified that the crash likely had two sounds associated with it, one when Senser hit A.P. and the second when A.P. hit and broke off his car's mirror. The sounds would have

been much louder than if Senser had hit a construction cone or barrel, which are hollow and light-weight. He further opined that at the point of impact, the ramp was straight and nothing would have precluded Senser from seeing the Honda's hazard lights. He testified that A.P.'s car and body would also have been visible in Senser's rearview mirror from the top of the ramp after the impact.

Dr. Sarah Meyers, a medical examiner for Hennepin County, testified about the cause of A.P.'s death. She opined that A.P.'s cause of death was multiple blunt force injuries and hemorrhaging of the brain. Dr. Meyers stated that she could not say if A.P. was standing or crouching, but that he was hit on the right side of his body. To preserve the record, Dr. Meyers also testified—outside the presence of the jury—that A.P. had cocaine and its metabolite in his body, which was consistent with a person who had used cocaine "relatively recently prior to that individual passing away."

Other Evidence

The state also called Sergeant Daniel Beasley who was involved in the investigation. Over the defense's hearsay objection, Sergeant Beasley read a small portion of his interview with M.R.S., a mentor to Joseph Senser, in which M.R.S. said that Joseph Senser told him that he and Amy Senser had seen blood on the Mercedes.

During the state's case, the district court admitted numerous photographs into evidence depicting the damage to the Mercedes, the orientation and condition of the exit ramp, and the severity of A.P.'s injuries. After the state rested, the district court denied Senser's motion for judgment of acquittal.

Defense's Case

The defense called accident reconstructionist Daniel Lofgren who testified that A.P. was likely bent over next to his car when he was struck. Lofgren stated that A.P.'s body would have wrapped around Senser's SUV and had little to no involvement with the hood of her car. Lofgren further opined that any damage to Senser's Mercedes would not have been visible from the driver's seat and that she would not have been able to see the Honda's flashing lights in her rearview mirror from the top of the ramp. Lofgren admitted that accidents involving pedestrians create a loud sound that is audible up to 50 feet from the point of impact.

The defense also called Dr. Paul Olson, a visibility expert. Dr. Olson opined that the construction-related signs, barrels, and other "visual clutter" on the Riverside ramp would have made it difficult for a driver to see A.P. or his car on the dark ramp at night.

Senser's Testimony

Senser testified that on the night of the accident, she drove to St. Paul after work to meet her daughters and their friends at the concert and give them a ride home. When she arrived at the concert, Senser developed a headache and decided to leave early and have Joseph Senser retrieve the girls. While driving home, Senser began to feel better and decided to return to the concert so Joseph Senser would not have to make the trip. Senser exited westbound Interstate 94 at the Riverside ramp to return to St. Paul. While exiting the freeway, she noticed the area was under construction and looked over her shoulder to see if there was an entrance ramp in the opposite direction. Senser heard a "clunk" and was "jolted back" and checked her rearview mirror to see what she had hit. She said that

she did not see anything and assumed "that [she] hit a barrel that was at the top of the ramp." Senser admitted that her sunroof was probably open at the time of impact.

Because of construction, Senser testified that she was forced to turn right instead of left at the top of the ramp and she became lost. Senser said that she spent the next 40 minutes trying to get back to the freeway before eventually finding Snelling Avenue and returning to westbound Interstate 94. While driving home, Senser passed the Riverside exit accident scene and saw emergency vehicles, but did not associate them with her accident. Senser testified that she did not inspect her Mercedes SUV when she arrived home that night and did not notice that a headlight was out. She then waited on the porch for her family to return and slept there for part of the night.

Senser said that, the following morning, she remembered that she had hit something the night before. She went outside and observed the Mercedes from the deck. Senser told her husband that she thought he would be mad because she hit a construction barrel or cone. She and her husband went outside to inspect the SUV and saw "something that looked like mud." Joseph Senser then found the news report and had her watch it, but she told him that there was no way that she was the driver. Amy Senser testified, "I don't know how you wouldn't know you had hit somebody."

Jury's Verdict and Posttrial Proceedings

After nearly 20 hours of deliberation, the jury reached a verdict. Right before the verdict was read in open court, the jurors sent a note to the district court. The district court did not respond to the note or immediately disclose the communication to the defendant or the attorneys. The jury convicted Senser of two counts of criminal vehicular

homicide for failure to stop and failure to notify, but acquitted her of the count alleging criminal vehicular homicide—gross negligence and careless driving.

Five days after the trial concluded, the district court informed the attorneys of the jury's note for the first time. Senser moved for a judgment of acquittal or, in the alternative, a new trial and a *Schwartz* hearing to address the jury's note. The district court denied these motions and sentenced Senser to 41 months for her conviction of criminal vehicular homicide—failure to stop. This appeal followed.

D E C I S I O N

I. Sufficiency of the Evidence

We first address Senser's argument that the evidence was insufficient to convict her of criminal vehicular homicide for failure to stop. Under Minnesota law, a person is guilty of criminal vehicular homicide if she "causes injury to or the death of another as a result of operating a motor vehicle," and fails to stop. Minn. Stat. § 609.21, subd. 1(7). To support such a conviction, the state must prove that the defendant knew she had been involved in an accident with a person or another vehicle. *State v. Al-Naseer*, 734 N.W.2d 679, 688–89 (Minn. 2007); *see also State v. Al-Naseer*, 788 N.W.2d 469, 480 (Minn. 2010) ("The leaving-the-scene statute, Minn. Stat. § 609.21, subd. 1(7), only imposes a duty to stop if the person *knows*—i.e., has actual, subjective knowledge—he hit a person or vehicle.").

Senser challenges the sufficiency of the evidence concerning the knowledge element—specifically whether she knew that she hit a person or a vehicle. The state relied on circumstantial evidence to prove Senser's knowledge. "[C]ircumstantial

evidence is sufficient to sustain a conviction when all the *circumstances proved* [are] consistent with the hypothesis that the accused is guilty and inconsistent with any *rational* hypothesis except that of [her] guilt." *State v. Tscheu*, 758 N.W.2d 849, 857 (Minn. 2008) (quotation omitted) (first alteration in original). "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012) (quotation omitted).

On review, this court gives greater scrutiny to convictions based on circumstantial evidence than those based on direct evidence. *Id.* Nevertheless, "we still construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the State's witnesses and disbelieved the defense witnesses." *Tscheu*, 758 N.W.2d at 858. An appellant must show something more than mere conjecture to overturn a conviction based on circumstantial evidence. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998).

The first step in reviewing the sufficiency of circumstantial evidence is to identify the circumstances proved. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). "In identifying the circumstances proved, we defer . . . to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (quotation omitted). "[A]ll the circumstances proved must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except

that of [her] guilt." *Id.* (quotation omitted); *see also State v. Hawes*, 801 N.W.2d 659, 668–69 (Minn. 2011) ("Under this standard, we disregard testimony that is inconsistent with the verdict.").

The second step is to "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt." *Hanson*, 800 N.W.2d at 622 (quotation omitted). In this independent examination, "we give no deference to the fact finder's choice between reasonable inferences." *Andersen*, 784 N.W.2d at 329–30 (quotation omitted). "[T]he inquiry is not simply whether the inferences leading to guilt are reasonable. Although that must be true in order to convict, it must also be true that there are no other reasonable, rational inferences that are inconsistent with guilt." *Id.* at 330 (quotation omitted). This review does not require the evidence to exclude "possibilities of innocence"; it only needs to make any theory of innocence "seem unreasonable." *Tscheu*, 758 N.W.2d at 858.

Circumstances Proved

Applying these principles and construing conflicting evidence in the light most favorable to the verdict, the circumstances proved are as follows. Before 11:00 p.m. on a clear, dry, summer night, A.P. parked his car approximately 250 feet up the 680-foot Riverside exit ramp. Because the ramp has no shoulder, A.P.'s parked car occupied about two feet of the 13.5-foot wide single lane. A.P. activated his flashing lights, which were working at the time he was struck and were clearly visible to passing cars.

Construction cones and barrels were located at the top of the ramp by the stop sign, but none were near A.P.'s car.

Shortly after 11:00 p.m., Senser left Interstate 94 and entered the ramp. When she exited the freeway, A.P. was standing next to his car in a white t-shirt and dark pants. Based on Senser's rate of speed, the flashing lights on A.P.'s car were visible for approximately 3–4 seconds before impact.

When Senser struck A.P. with the Mercedes, approximately 40% of A.P.'s body was visible above the hood and he was illuminated by Senser's headlights. When struck, A.P.'s body wrapped around the side of the Mercedes. The impact knocked A.P. out of his shoes and threw him against the mirror of his parked car with such force that his body broke the mirror. A.P. was accelerated and thrown forward 50 feet from the point of impact. The impact caused substantial damage to the front-passenger side of Senser's vehicle and broke her right headlight, but her car still functioned. The noises created by the impact were loud and much greater than the noise created by striking a construction cone or barrel. Because Senser's sunroof was open, the sound of the Mercedes striking A.P. was not muffled. Senser felt a jolt and knew that she had hit something, but drove away without stopping.

No skid marks appeared at the scene of the accident. Given the angle of the road, A.P.'s car and his body would have been visible in Senser's rearview mirror following the accident. Three other drivers saw the flashing lights on A.P.'s car and A.P.'s body when they used the same exit ramp shortly after the accident.

Senser remained in the area for approximately 45 minutes after the accident. Shortly after the accident, Senser drove by the Riverside ramp and saw the emergency vehicles, but did not stop. She was driving erratically with her windows open at that time. Senser arrived home sometime before 12:15 a.m., parked the car in the driveway, and waited on the porch for her family to return. She deleted 45 text messages from her phone beginning at 11:23 p.m. on August 23 running through 11:00 a.m. on August 25. Senser's attorney contacted law enforcement officers the following night to surrender the Mercedes, but Senser did not admit that she was the driver in the accident until September 2, 2011.

Reasonable Inferences

That Senser knew that she hit A.P. or his car is a reasonable inference, consistent with guilt, which can be drawn from the circumstances proved. A.P.'s car, with its flashing lights, would have been visible to Senser for almost 250 feet before she fatally struck him and also visible in her rearview mirror after the impact. A.P. himself was illuminated by her headlights before the collision and could be seen on the road by other drivers. The violent nature of the accident, with A.P.'s body snapping off his car's mirror as it wrapped around the Mercedes, and the damage to Senser's vehicle, show that the collision was loud. Because it was a dark night, Senser would have been aware of the damage to her Mercedes, which included a broken headlight.

The relevant inquiry, therefore, is whether the circumstances proved support a reasonable hypothesis other than guilt. Senser asserts that it is also reasonable to infer that she thought she hit a construction cone or barrel.

To support her argument, Senser asserts that her case is factually similar to circumstances in *Al-Naseer*, 788 N.W.2d 469. The circumstances proved in *Al-Naseer* were that, while traveling on a highway, Al-Naseer's car gradually crossed the fog line and struck and killed the victim on the side of the highway. *Id.* at 472. The victim was crouching on the shoulder replacing the rear, driver's-side tire on his car. *Id.* The removed tire was lying next to the victim between the fog line and his car. *Id.* A friend was standing next to the victim, holding a flashlight. *Id.* The car's flashers and trunk light were illuminated. *Id.* at 476. Al-Naseer's car brushed the friend, struck the victim, and rode over the spare tire with sufficient force to drive it into the asphalt, leaving a gouge. *Id.* The impact smashed the front, right corner of Al-Naseer's car and threw the victim's body into his own car and then forward. *Id.* at 476, 477. The impact caused a loud noise as well as a jolt to the driver. *Id.* After impact, Al-Naseer's car drifted further onto the shoulder toward the ditch before gradually shifting back toward the highway and the right lane of traffic without braking or accelerating. *Id.* at 478. If Al-Naseer had looked in his rearview mirror, he would have seen the headlights of the victim's car, but not his body. *Id.*

The supreme court concluded that, based on the circumstances proved, it would be reasonable to infer that Al-Naseer knew he had hit the victim, but that guilt was not the only reasonable inference. *Id.* The court reasoned that "[t]he circumstances proved include evidence from which it could be reasonably inferred that Al-Naseer was asleep or otherwise unconscious when his vehicle hit [the victim]," because he "did not swerve, brake, or accelerate, but rather drifted past [the victim's] vehicle." *Id.* at 478, 479. If he

were asleep, Al-Naseer would not have known that he hit a vehicle or person. *Id.* at 479. Because the circumstances proved were consistent with a rational hypothesis other than guilt, the supreme court reversed Al-Naseer's conviction. *Id.* at 480–81.

We recognize that factual similarities exist between the present case and *Al-Naseer*. Nevertheless, in light of our standard of review, Senser's reliance on these similarities is unpersuasive. The *Al-Naseer* court found that the circumstances proved were consistent with a rational hypothesis other than guilt based on the witness's testimony that Al-Naseer's brake lights never came on and that the car gradually moved back onto the road. *Id.* at 479. If Al-Naseer had been asleep or otherwise unconscious, he would not have been aware of "noise and jolt of the impact," and accordingly not aware that he had struck a person or vehicle. *Id.*

Unlike *Al-Naseer*, however, the circumstances proved here are not consistent with the conclusion that Senser was asleep or otherwise unconscious at the time of the accident and was therefore unaware of the nature of the accident. Rather, Senser herself admitted that she was awake at the time of the accident and aware of the "noise and jolt of the impact."

Neither are the circumstances proved consistent with Senser's alternate hypothesis—that she believed she hit a construction cone or barrel. The noise and jolt of the accident were much greater than would have been created had she hit a cone or barrel and no construction cones or barrels were near the point of impact.

Unlike *Al-Naseer*, the circumstances proved here show that Senser actually looked in her rearview mirror and admitted that she did not see any cones or barrels. Tellingly,

expert testimony established that both the car, with its flashing lights, and A.P.'s body, in his white shirt, would have been visible to her as she looked in the mirror. Given the severity of the crash, it is also not reasonable to infer that, when passing by the scene only a short time later, Senser would not associate the emergency vehicles with her collision at the exact same location.

In sum, considering the circumstances proved and independently examining the reasonableness of all inferences that might be drawn from these circumstances, we conclude that only one reasonable conclusion can be drawn: Senser knew she hit either a person or a vehicle on the Riverside ramp that night. No other rational inference is possible.

II. Alleged Errors of Law

A. Criminal Vehicular Homicide—Failure to Notify

Senser next contends that the district court erred in interpreting Minnesota Statutes section 169.09, subdivision 6, which requires the driver of a vehicle involved in an accident involving injury or death to report the accident. The construction of a statute is a legal determination, which we review de novo. *State v. Carufel*, 783 N.W.2d 539, 542 (Minn. 2010). "Where the legislature's intent is clearly discernible from plain and unambiguous language, statutory construction is neither necessary nor permitted and we apply the statute's plain meaning." *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007).

The criminal-vehicular-homicide statute states that a person is guilty "if the person causes injury to or the death of another as a result of operating a motor vehicle" and "the

driver who causes the accident leaves the scene of the accident in violation of section 169.09, subdivision . . . 6." Minn. Stat. § 609.21, subd. 1(7). Under section 169.09, subdivision 6, "[t]he driver of a vehicle involved in an accident resulting in bodily injury to or death of any individual shall . . . by the quickest means of communication, give notice of the accident . . . to a State Patrol officer."

At a pretrial hearing, the district court held that "there's no beginning or end to the duty" imposed by section 169.09, subdivision 6, and that "most legal duties exist until they're complied with." Senser contends that the district court erroneously interpreted the statute to place an ongoing duty on Senser to notify law enforcement officials that she was the driver even after they had notice of the accident.

Based on the jury's verdict on the failure-to-stop charge, however, we find it unnecessary to address Senser's statutory-construction argument. As the district court concluded, "by its verdict in Count I, the jury found the Defendant must have *immediately* known of the facts that triggered both her duty to stop and her duty to give notice by the quickest means of communication." Thus, the district court's error, if any, in interpreting section 169.09, subdivision 6, as creating an ongoing duty to notify law enforcement is harmless. *See State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997) ("If the verdict actually rendered was surely unattributable to the error, the error is harmless beyond a reasonable doubt." (quotation omitted)).

B. Jury Instruction: Knowledge of Accident Involving a Person or Vehicle

Senser asserts that the district court improperly instructed the jury concerning the knowledge requirement for the charge of criminal vehicular homicide—failure to stop, by

including language concerning "damage to another vehicle." She claims that knowledge of damage to another vehicle only pertains to a charge under another statutory provision that specifically concerns accidents involving vehicles. *See* Minn. Stat. § 169.09, subd. 2 (2010). Applying governing supreme court authority, however, we conclude that the district court properly instructed the jury on the mens rea required by the failure-to-stop charge.

In *Al-Naseer*, the supreme court defined the mens rea standard to support a charge of criminal vehicular homicide for leaving the scene of an accident under section 609.21, subdivision 1(7). 788 N.W.2d at 480. It held that the statute "only imposes a duty to stop if the person *knows*—i.e., has actual, subjective knowledge—he hit a person or vehicle." *Id.* The supreme court explained that "the mens rea standard must relate to the culpable act (failing to stop when there was a duty to stop), not to the consequences of that act (causing property damage or bodily injury)." *Al-Naseer*, 734 N.W.2d at 687. Because a driver has a duty to stop if she knows that she has been in an accident with a person or another vehicle, *Al-Naseer* specifically held that "the failure to stop justifies an enhanced crime where the accident results in the death of another person, whether or not the driver knew that the accident caused the death of another person." *Id.* at 688.

Accordingly, the district court properly applied this controlling precedent when it instructed the jury that the knowledge element was satisfied if "the defendant knew that the accident involved either injury or death to another person, or damage to another vehicle." The instruction fairly presented the element of knowledge to the jury.

Senser further contends, however, that this jury instruction violated her right to a unanimous verdict. We disagree.

A defendant's right to a unanimous verdict is violated when the state charges a defendant with one crime, but then presents evidence of more than one distinct act to prove that crime. *State v. Stempf*, 627 N.W.2d 352, 357 (Minn. App. 2001) (finding that the state violated the defendant's right to a unanimous verdict by charging him with "only one count of possession but alleged two distinct acts to support [the] conviction"). But "unanimity is not required with respect to the alternative means or ways in which the crime can be committed." *State v. Begbie*, 415 N.W.2d 103, 106 (Minn. App. 1987) (quotation omitted), *review denied* (Minn. Jan. 20, 1988). In other words, "a jury cannot convict unless it unanimously finds that the government has proved each element of the offense; however the jury need not always decide unanimously which of several possible means the defendant used to commit the offense." *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002).

Here, the state charged Senser for her conduct during one driving accident. The jury instruction and the state's evidence did not allow for a verdict based on separate instances of conduct, such as an accident on the Riverside exit and a different accident at a separate location. Rather, the instruction allowed the jury to consider alternative means of satisfying one element of criminal vehicular homicide, knowingly hitting a person or a vehicle. Some members of the jury could have concluded that Senser saw A.P.'s car in her rearview mirror after the collision and concluded that she struck the car, while others could have thought that she knew she hit A.P. himself. The jury was not required to

agree on whether Senser knew she hit a person or a vehicle, because hitting *either* would have imposed a duty upon her to stop. Accordingly, Senser's right to a unanimous verdict was not violated by the district court's instruction.

III. Alleged Abuses of Discretion

A. Motions for Change of Venue and Sequestration

Senser contends that the district court abused its discretion in denying her motions for a change of venue and sequestration. For reasons set forth below, this contention is unavailing.

The district court has wide discretion in granting or denying motions for change of venue or to sequester the jury during trial. *State v. Blom*, 682 N.W.2d 578, 607–08 (Minn. 2004); *State v. Chambers*, 589 N.W.2d 466, 473 (Minn. 1999). We will not reverse the district court's decisions absent an abuse of discretion and a showing of prejudice to the appellant. *Chambers*, 589 N.W.2d at 473.

Minnesota Rule of Criminal Procedure 25.02 governs motions for change of venue based on prejudicial publicity. The district court must grant a defendant's change-of-venue motion "whenever potentially prejudicial material creates a reasonable likelihood that a fair trial cannot be had." Minn. R. Crim. P. 25.02, subd. 3. The district court shall order sequestration of the jury during trial if it determines that "the case is of such notoriety or the issues are of such a nature that . . . highly prejudicial matters are likely to come to the jurors' attention." Minn. R. Crim. P. 26.03, subd. 5(2).

Senser argues that she could not receive a fair trial in Hennepin County because of pretrial media coverage and statements made by the Hennepin County Attorney's Office.

But Senser offers no evidence to demonstrate that the county attorney's statements or any articles affected the specific jurors who sat on her case. *See State v. Mogler*, 719 N.W.2d 201, 209 (Minn. App. 2006) ("The district court's denial of a motion to change venue based on pretrial publicity will result in a new trial only if the defendant shows that the publicity had an effect on the minds of the specific jurors involved in the case." (quotation omitted)). Senser also failed to provide any voir dire transcripts "to permit an assessment of whether the publicity affected the impartiality of specific jurors." *Id.* at 210.

The district court denied Senser's motion to sequester the jury because it found "that many jurors were unaffected by the publicity. Although a few saw [the publicity] in recent days, I [don't] think they were influenced by it." Moreover, before the trial began and several times during trial, the district court instructed the jury not to discuss the case with anyone, or to read or to watch media reports on the case. The district court emphasized that a failure to follow these instructions could jeopardize the trial, ensuring that the jurors realized the importance of their obligations to avoid outside influences. *See State v. Morgan*, 310 Minn. 88, 95–96, 246 N.W.2d 165, 169 (1976) (affirming the district court's denial of a motion to sequester, in part, because the district court repeatedly instructed the jury to not discuss the case with anyone, including the media). Thus, we conclude that Senser has failed to demonstrate that the district court abused its discretion in denying her motions for change of venue and to sequester the jury during trial.

B. Evidentiary Rulings

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Toxicology Report

During trial, Senser sought to question the medical examiner, Dr. Meyers, about a toxicology report that revealed that A.P. had cocaine in his system when he died. The district court ruled that this evidence was not relevant because no evidence supported Senser's theory that A.P.'s behavior or conduct leading up to the accident was erratic. Senser believes that the district court abused its discretion by excluding evidence of cocaine use because A.P.'s toxicology was relevant to determining whether Senser was the sole cause of the accident.

"[E]vidence must be relevant to be admissible." *State v. Steward*, 645 N.W.2d 115, 120 (Minn. 2002). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Relevant evidence that is "repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues may be excluded." *State v. Quick*, 659 N.W.2d 701, 713 (Minn. 2003) (quotations omitted) (alteration in original); *see* Minn. R. Evid. 403.

Senser cites *State v. Nelson* to assert that A.P.'s toxicology reports were relevant. 806 N.W.2d 558 (Minn. App. 2011), *review denied* (Minn. Feb. 14, 2012). In *Nelson*, the appellant had been charged with three counts of criminal vehicular homicide for colliding with an all-terrain vehicle and killing its driver. *Id.* at 560–61. The counts included criminal vehicular homicide for operating a motor vehicle in "grossly negligent manner" and "in a negligent manner while under the influence of . . . alcohol." *Id.* at 561. At Nelson's trial, the district court excluded all evidence of the victim's alcohol consumption before the accident. *Id.* This court concluded that "[i]t was unfair to permit the jury to consider how appellant's decisions and conduct were affected by his consumption of alcohol without permitting the jury to consider how alcohol made a similar impact on [the victim]." *Id.* at 563. Thus, this court found that the victim's alcohol consumption was relevant to causation and was therefore admissible. *Id.*

Unlike *Nelson*, where the victim's conduct "affected the determination of proximate cause," *id.*, evidence of A.P.'s behavior before the crash was simply irrelevant to two of the three criminal vehicular homicide charges against Senser—failure to stop and failure to notify. Those two laws impose a duty upon any motorist who knows that she has struck a person or a vehicle to stay at the scene and to report the accident—even if the accident was entirely the fault of the victim.

To be sure, the victim's cocaine use may be relevant to the remaining count, criminal vehicular homicide–gross negligence, but only if the record shows that the victim's behavior contributed to the accident. In *Nelson*, for example, a witness saw the

victim "[drive] his ATV on a highway, without lights . . . and at the last second enter[] the ditch, directly in appellant's path." *Id.*

By contrast, no evidence here suggested that A.P. was acting erratically before the accident or that his behavior caused the accident. The accident reconstruction experts testified that A.P. was either standing or crouching near the back of his car when Senser struck him. The damage to his car's mirror and the empty gas container at the scene show that he was quite close to his car when struck and not out in the middle of the exit ramp. As the district court properly found, "there needs to be some behavior on the part of the victim to get this issue before the jury." The district court's decision to exclude the toxicology report was therefore not an abuse of its discretion. In addition, the jury's acquittal of Senser on the only count where this evidence was possibly relevant also establishes that she was not prejudiced by its exclusion.

M.R.S.'s Statement

The morning after the accident, Joseph Senser called M.R.S., his close friend and mentor. During the investigation, Sergeant Daniel Beasley interviewed M.R.S. about that phone call. At trial, over the defense's objection, Sergeant Beasley read a page of the interview transcript into the record. M.R.S. stated that Joseph Senser told M.R.S. the morning after the accident that he and Amy Senser saw blood on the SUV when they examined it. Senser contends, and we agree, that this statement was inadmissible hearsay.

The state counters that M.R.S.'s statement was admissible as impeachment evidence. Although not admissible as substantive evidence, extrinsic evidence of a

witness's prior statement may be admissible for impeachment purposes. *See* Minn. R. Evid. 613(b). During cross-examination, the state asked Joseph Senser if he told M.R.S. during a conversation the morning after the accident that he saw blood on the Mercedes. Joseph Senser admitted that he spoke with M.R.S., but denied telling him that he had seen any blood. Thus, M.R.S.'s statement arguably impeaches Joseph Senser's credibility.

Even for impeachment purposes, however, extrinsic evidence must be admissible. Although M.R.S. could have testified about his conversation with Joseph Senser, we find no applicable hearsay exception to allow Sergeant Beasley's reading of M.R.S.'s statement at trial. *See* Minn. R. Evid. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). The district court found that M.R.S.'s statement was "sufficiently reliable," but it made no specific findings as to why it was admissible under Minnesota Rule of Evidence 807, the catch-all exception to the hearsay rule. *See State v. Ahmed*, 782 N.W.2d 253, 260 (Minn. App. 2010) (stating that district courts should consider "all relevant factors bearing on trustworthiness to determine whether the extrajudicial statement has circumstantial guarantees of trustworthiness" (quotation omitted)). Moreover, no findings in the record show that M.R.S. was unavailable to testify at trial or that some other hearsay exception applied. Thus, the district court abused its discretion by allowing Sergeant Beasley to read a short excerpt of M.R.S.'s statement during trial.

Although this brief statement was improperly admitted, Senser fails to show any prejudice. *See Amos*, 658 N.W.2d at 203. Sergeant Beasley was one of 29 witnesses during a seven-day trial and the reading of M.R.S.'s statement comprised only one page of over 1,200 pages of trial testimony. In addition, other witnesses testified to the appearance of blood on the Mercedes's hood and the admitted evidence included photographs that depicted blood on Senser's Mercedes. Apart from any consideration of M.R.S.'s short statement, the jurors could use this testimony and these exhibits to evaluate the credibility of Senser's and Joseph Senser's testimony. Thus, the district court's error in allowing Sergeant Beasley to read M.R.S.'s statement was harmless.

C. Presenting a Complete Defense

Senser next contends that the district court improperly excluded testimony by her chiropractors and physicians, undermining her due-process right to present a meaningful defense. She asserts that this evidence was relevant to the issue of why she did not stay at the concert.

Due process requires that every defendant be allowed to present a complete defense, which "means that the defendant has the right to present the defendant's version of the facts through the testimony of witnesses." *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003). We review assertions that evidence was erroneously excluded for an abuse of discretion. *Id.*

The district court excluded expert testimony about Senser's headaches because it found the evidence to be cumulative and the danger of unfair prejudice outweighed the probative value. *See* Minn. R. Evid. 403. Senser had already testified that she was

suffering from a sinus and ear infection and was taking antibiotics the night of the accident. She also testified that she developed a headache while she was at the concert and therefore decided to leave.

Ultimately, the reason Senser left the concert was not relevant. Senser did not allege that the headache had any effect on the accident or that she failed to see A.P. because of it. Rather, she testified that she took the Riverside exit because she was feeling better and decided that she could return to the concert, and that she was looking back over her shoulder when she struck A.P. Critically, Senser failed to demonstrate why testimony by her physicians and chiropractors was relevant to the case. Thus, the district court acted within its discretion in excluding testimony about Senser's history of headaches.

D. Jury Communication

Senser next asserts that the district court erred by failing to immediately disclose a jury communication. After the jury reached its verdict, but before the attorneys had returned to hear it, the jurors sent a note to the district court which stated: "Can this be read in the courtroom in front of Ms. Sensor [sic]? We believe, she believed she hit a car or vehicle and not a person." The district court did not respond to the note and did not immediately disclose this communication with the attorneys.

By letter five days later, the district court informed the attorneys of the note and explained why it took no action when it received the note. The district court stated that it considered the note to be administrative in nature because the jury had already reached its verdict. The district court further explained that the note did not impeach the verdict

because, based on the jury instructions, knowledge that she hit a vehicle was sufficient to convict her of the charged crimes.

Senser argues that her absence from this written communication between the district court and the jury violated her right to be present at trial as protected by the United States Constitution and Minnesota Rule of Criminal Procedure 26.03. A defendant has a due-process right to be present at all critical stages of a trial. Minn. R. Crim. P. 26.03, subd. 1; *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005). "Responding to a deliberating jury's question is a stage of trial." *State v. Sessions*, 621 N.W.2d 751, 755 (Minn. 2001). "Thus, the general rule is that a trial court judge should have no communication with the jury after deliberations begin unless that communication is in open court and in the defendant's presence." *Id.* at 755–56.

The state counters that the district court was not required to disclose the note "because the jury's question was administrative or 'housekeeping' in nature." "[W]hen a judge communicates in writing with the jury about a housekeeping matter, the defendant's right to be present at trial is not violated." *Ford*, 690 N.W.2d at 713. But the practice the supreme court expects "is for the court to convene counsel and the defendant in the courtroom and make a contemporaneous record of all communications with the jury, both those that are housekeeping and those that are not." *State v. Martin*, 723 N.W.2d 613, 625–26 (Minn. 2006).

Applying these principles, we conclude that the district court's failure to disclose the jury note did not amount to a constitutional violation. *See Ford*, 690 N.W.2d at 713. We agree that the note was procedural in nature because the jury was asking whether it

could explain the rationale behind a verdict that it had already reached. The one-way communication did not seek instruction on a substantive point of law and, because the jury asked its question after it reached its verdict and received no response from the district court, the sanctity of juror deliberations was preserved. *Cf. Sessions*, 621 N.W.2d at 757 (concluding that the district court erred "by engaging in substantive communications with a deliberating jury outside of open court").

While no constitutional violation occurred, the district court abused its discretion by failing to follow the supreme court's recommended practice of disclosing *all* communications to the parties and making a contemporaneous record of the communication in open court. *Martin*, 723 N.W.2d at 625–26. The recommended practice not only protects the defendant's right to be present at trial, but it furthers the public's interest in the integrity and openness of court proceedings.

Careful evaluation of the record shows, however, that this abuse of discretion was harmless. Because the record shows that the note was a one-way communication by the jury, *after* it had reached its verdict, the verdict rendered "was surely unattributable to the error, [making] the error harmless beyond a reasonable doubt." *Juarez*, 572 N.W.2d at 292 (quotation omitted). Moreover, the note was consistent with the court's instructions and does not impeach the verdict.

E. Denial of Motion for *Schwartz* Hearing

Based on the jury's note, Senser contends that the district court should have granted a *Schwartz* hearing. "The purpose of a *Schwartz* hearing is to determine whether a jury verdict is the product of misconduct," such as improper contact between the district

court and the jury. *State v. Greer*, 635 N.W.2d 82, 92 (Minn. 2001). Such a hearing allows the defendant to question jurors under oath to determine whether any jury misconduct occurred or whether any outside influence improperly affected the verdict. *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960). We review the denial of a *Schwartz* hearing for abuse of discretion. *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998).

The record shows that the district court was well within its discretion to deny Senser's motion for a *Schwartz* hearing. As discussed above, the jury sent the contested note after it reached its verdict and the district court did not respond to the note. Thus, nothing in the record suggests that the verdict was the result of improper contact between the district court and the jury.

F. Denial of Motion for a New Trial

Citing "unusual occurrences and prejudicial rulings," Senser's final contention is that a new trial should have been granted in the interests of justice. It is well settled, however, "that a criminal defendant is not guaranteed a perfect trial . . . , simply a fair one." *State v. Prtine*, 784 N.W.2d 303, 312 (Minn. 2010).

Our careful review of the record in its entirety convinces us that Senser received a fair trial. The evidence presented here was more than sufficient to show that she left the scene of an accident despite knowing that she had struck a car or a person. Moreover, the district court properly instructed the jury concerning the charges and acted well within its discretion in resolving the parties' many motions and the evidentiary issues that arose in this hotly contested and high-profile case. Because any abuse of discretion relating to

admission of impeachment evidence or the timing of disclosure of the jury's note did not affect Senser's substantial rights or the jury's verdict, these two errors were harmless beyond a reasonable doubt.

Affirmed.