**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A16-0565**
**A16-0880**

State of Minnesota,
Respondent,

vs.

Andre Verlin Anderson,
Appellant.

**Filed March 27, 2017**
**Affirmed**
**Toussaint, Judge***
**Concurring specially, Ross, Judge**
**Concurring specially, Rodenberg, Judge**

St. Louis County District Court
File No. 69DU-CR-14-2925

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

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

Considered and decided by Ross, Presiding Judge; Rodenberg, Judge; and Toussaint, Judge.

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

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

**TOUSSAINT**, Judge

Appellant challenges his convictions of aiding and abetting attempted second-degree murder, aiding and abetting first-degree assault, and aiding and abetting motor-vehicle theft, arguing that the district court erred by refusing (1) to strike a juror for cause; (2) to suppress the victim's pretrial identification; and (3) to permit an expert in eyewitness identification to testify. Appellant also challenges the district court's restitution order holding him jointly and severally liable for the arson loss of the victim's truck. We affirm.

## FACTS

On August 19, 2014, C.J. was contacted by a friend, whom he knew only as "Steve," who asked C.J. to meet him at a Subway restaurant in Duluth. "Steve," later identified as Steven Hager, was looking for marijuana and C.J. did not have any. C.J. gave him the phone number of a mutual acquaintance, J.H-S. Later, Hager called C.J. to ask for a ride. C.J. met Hager and another man, whom Hager described as his boyfriend, at the Subway. C.J. had never met the other man.

C.J. was driving a pickup truck; Hager sat in the front seat, and his companion sat in the back seat. C.J. could see them "decently" because of a street light and the dome light in his pickup. Hager's companion was about six feet tall, had a beard, was "skinny," and was wearing a black hooded sweatshirt.

The two men gave C.J. directions on where to drive, ostensibly to find a cigarette pack with drugs in it. On a dark stretch of road, the three men got out to search for the cigarette pack using a flashlight from C.J.'s phone. Hager's companion called C.J. over and while C.J. was looking on the ground for the cigarette pack, the other man stabbed him a total of 12 times. As the man backed away, C.J. ran away from the truck and hid in a ditch. After the two men left in his truck, C.J. approached a house with a light and asked for help. C.J.'s injuries included a lacerated liver, lacerated kidney, and a punctured lung. C.J. told police before the ambulance came that he had been with "Steve" and another man he did not know, and that this second man had stabbed him. He told the homeowner that his friends had tried to kill him. C.J.'s truck was later found in a vacant lot in Duluth; the truck had been largely destroyed by fire.

At the hospital, C.J. initially gave police no description of Hager or his friend, could provide only a partial address for Hager, and could not remember Hager's telephone number. But he stated that it was "Steve's" friend who assaulted him. C.J.'s mother was contacted by J.H-S., who knew Hager's last name and where he lived. J.H-S. drove with police to point out Hager's residence. J.H-S. had seen Hager earlier on the day of the assault with a man whom he described as "a thinner male with a scruffy face or scruffy beard."[1] Later, J.H-S. gave police a phone number that he said Hager had used to contact him. The number was listed to appellant Andre Verlin Anderson.

[1] J.H-S. initially stated that Hager's boyfriend was named "Tim," presumably T.F. The man J.H-S. saw with Hager on the day of the offense was "skinny" and J.H-S. knew it was not "Tim" or T.F., who weighs over 300 pounds.

Police returned to the address pointed out by J.H-S. and spoke with Hager. Hager admitted that he and Anderson had been picked up by C.J. the night before. The owner of the house where Hager lived, J.F., said that Hager had been renting a room at her house and that Anderson visited a few times because "Steve was dating him." She testified that Anderson had been at her house with Hager on August 19. Her son, T.F., knew Hager well and had met Anderson, whom he described as Hager's boyfriend. He agreed that Anderson had been with Hager during the day on August 19. When police located and arrested Anderson, he had T.F.'s identification card in his wallet.

Police showed C.J. a six-person photo lineup that included Anderson's 2011 booking photo. C.J. was unable to identify anyone in the first photo lineup. After Anderson was arrested, police noted that he looked different from his 2011 photograph, in which he had short hair and was clean-shaven. Police used Anderson's new booking photo to assemble another six-person photo lineup. When shown the second lineup, C.J. identified Anderson as his assailant. C.J. also picked Hager out of a third photo lineup.

Hager pleaded guilty to arson, aiding and abetting arson, and aggravated robbery. As part of his plea, he agreed to testify against Anderson, although he was worried about testifying because he was in prison. Anderson had overdosed, and Hager picked him up from the hospital on August 19. Hager testified that after spending the day together, he and Anderson went to Subway to meet C.J. At this point in the testimony, Hager refused to testify and was threatened with contempt. Hager returned later to complete his testimony. Hager said he and C.J. chatted as they drove, while Anderson was in the back seat. Anderson indicated where they should stop to look for a cigarette pack with drugs.

The three men looked for the pack; Hager was standing by the truck when he saw Anderson stab C.J. Hager was roughly 15 feet away, and the truck headlights illuminated the area. Hager was frightened and got in the truck. Anderson jumped in the passenger side, and Hager "took off." The men planned to drive the truck into Lake Superior, but decided to burn the truck instead. Hager and Anderson drove to a vacant lot, put charcoal in the cab, and lit the truck on fire. Anderson instructed Hager to leave the windows open. During his testimony, defense counsel impeached Hager with evidence of his plea agreement.

In pretrial motions, Anderson's attorney offered the testimony of an expert on the drawbacks of eyewitness identification. The district court refused to permit the expert to testify and, when the motion was later renewed during the trial, the district court again refused to permit the witness to testify.

The jury found Anderson guilty of aiding and abetting attempted second-degree murder, aiding and abetting first-degree assault, and aiding and abetting motor-vehicle theft, and acquitted him of aiding and abetting third-degree arson. This appeal follows.

## D E C I S I O N

### I.

Anderson argues that the district court abused its discretion by refusing to strike a juror for cause after the juror stated that she would like to hear both sides of the story and that she thought "we should all speak for ourselves, especially when we're defending ourselves." After further questioning by the prosecutor, defense counsel, and the district court, the juror acknowledged that she could "put aside [her] own personal opinion about wanting to hear the defendant and decide the case only on the evidence presented in court,

even if it does not include the defendant testifying," and told the court that she was "telling you that under oath."

A juror who cannot try the case impartially and without prejudice to the substantial rights of the challenging party may be challenged for cause. Minn. R. Crim. P. 26.02, subd. 5(1)1. We review the district court's decision on a challenge for cause for an abuse of discretion. *State v. Munt*, 831 N.W.2d 569, 576 (Minn. 2013). An appellate court's "review of the district court's determination of juror impartiality is especially deferential" because of the district court's ability to make credibility determinations. *Id.* But "[t]he bias of a single juror violates the defendant's right to a fair trial" and "constitutes structural error" that requires automatic reversal. *State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007).

A defendant raising a challenge under this clause must demonstrate that the juror has "actual bias." *Munt*, 831 N.W.2d at 577. "Actual bias is a question of fact which the district court is in the best position to evaluate." *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015) (quotation omitted). We use a two-step process to determine whether the district court erred in its challenge-for-cause decision. *Id.* First, we determine if the juror expressed actual bias. *Id.* Actual bias exists when a juror exhibits strong and deep impressions that would prevent the juror from laying aside the impression or opinion and reaching a verdict based only on the evidence presented in court. *Id.* If so, we consider whether the juror was properly rehabilitated. *Id.* A juror is rehabilitated when the juror can "state[] unequivocally that he or she will follow the district court's instructions and will set aside any preconceived notions and fairly evaluate the evidence." *Id.* (quotation omitted). The district court should consider a "juror's challenged answer within the context

of the entire voir dire testimony to understand what the juror meant by the answer." *Munt*, 831 N.W.2d at 578.

Here, defense counsel began by asking the jurors if they ever had to decide an issue by listening to two sides of an argument, then noted that Anderson was presumed innocent and need not testify. Defense counsel asked if anyone needed to hear Anderson's side of the story. Two jurors responded that they would need to hear both sides. The challenged juror, A-M, stated that she felt people should speak for themselves but she would try to set aside that feeling. The prosecutor explained that the judge would give the jury instructions and that the jury must follow those instructions. A-M said that she would follow the law but could not guarantee that her individual feelings wouldn't affect her ability to follow the law. The district court explained the presumption of innocence and that the defendant did not have to offer a defense; the court asked A-M if she could "follow that law in your deliberation if you're a juror, even if you disagree with it?" The juror responded, "To the best of my ability."

The district court denied Anderson's challenge for cause, but revisited the question after a break. The district court asked both A-M and the other challenged juror, "[C]an you tell me that you can put aside your own personal opinion about wanting to hear from the defendant and decide the case only on the evidence presented in court, even if it does not include the defendant testifying?" A-M answered, "Yes," and after more questioning, said, "I am telling you that under oath." The district court denied the challenge for cause.

Cases in which actual bias was found include (1) statements that a juror would favor the testimony of police over lay witnesses and he did not know if he had the ability to be

fair but he would try, *State v. Nissalke*, 801 N.W.2d 82, 107 (Minn. 2011); (2) statements that a juror would believe the testimony of a police officer over others, and that she would try to be fair but when making a judgment call, she would favor police testimony, *State v. Prtine*, 784 N.W.2d 303, 309-10 (Minn. 2010); and (3) statements by a juror that police officers generally are truthful and do not lie under oath, *State v. Logan*, 535 N.W.2d 320, 322 (Minn. 1995).

In contrast, the supreme court in *Munt* determined that a juror, who stated that a defendant is not mentally ill if he is aware of what happened, did not express actual bias because the statement was vague and the juror had not yet received an explanation of the mental illness defense. 831 N.W.2d at 577. This matter is most similar to *Munt.* After the legal principle of the presumption of innocence was explained to A-M, she stated that she would be able to reach a decision using only the evidence presented in court, even if the defendant did not testify. And even if A-M's comment expressed actual bias, she was sufficiently rehabilitated because she "unequivocally" stated that she would follow the judge's instructions and that she was making that assurance under oath. *See Fraga*, 864 N.W.2d at 623. The district court did not abuse its discretion by refusing to strike A-M for cause.

**II.**

Anderson argues that the district court erred by admitting C.J.'s pretrial identification evidence. We review the district court's decision to admit pretrial identification evidence to determine whether the procedure was so impermissibly

suggestive that a defendant's due-process rights were violated. *State v. Hooks*, 752 N.W.2d 79, 83-84 (Minn. 2008).

Appellate courts apply a two-factor test to determine whether a pretrial identification procedure is impermissibly suggestive. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, the court considers whether the procedure unfairly singles a defendant out for identification. *Id.* Second, even if the procedure was suggestive, the court considers whether it may be reliable under the totality of circumstances. *Id.*

Anderson argues that the photo lineup from which C.J. identified him was suggestive because (1) his photo was different from the others, showing just his face and not his neck and torso, and lacking the clarity of the others; (2) C.J. had been shown Anderson's photo in a previous photo lineup, but failed to identify him; and (3) police did not employ a preferred "double-blind" procedure, in which the officer showing the lineup is not aware if the suspect is included, to avoid subconsciously influencing the witness.

The district court concluded at the omnibus hearing that the six photos in the photo lineup were similar enough so as not to be unnecessarily suggestive. "A photographic display need not be comprised of exact clones of the accused. It is sufficient if all the people in the display bear a reasonable physical similarity to the accused." *State v. Yang*, 627 N.W.2d 666, 674 (Minn. App. 2001) (quotations and citation omitted), *review denied* (Minn. July 24, 2001). Although there were some differences, the photos used were of reasonably similar individuals.

C.J. was previously shown another photo lineup that included a picture of Anderson taken in 2011, three years before this incident. C.J. did not identify Anderson in this lineup.

The second lineup included Anderson's current booking photo. Anderson argues that because he alone appeared in both photo lineups, C.J. could have been influenced to choose his picture. But the district court found that the two photos of Anderson were so distinctively different that it was not unduly suggestive. In the first photo, Anderson was clean-shaven and had short hair. In the second photo, Anderson had long hair and a beard. The court remarked that the photos differed enough so that their use was not impermissibly suggestive.

Anderson further argues that the failure to use a double-blind procedure tainted the identification. But C.J. was instructed prior to looking at the photo lineups that he did not have to identify anyone, a suspect might not be included in the lineup, and he was not to guess. When C.J. did not identify Anderson in the first photo lineup, no attempt was made to encourage him to do so. Although a double-blind procedure may be the preferred method for presenting a photo lineup, nothing in this record reflects that the officer showing the photos attempted to influence C.J.

Finally, the identification of Anderson as C.J.'s assailant did not rest solely on C.J.'s photo identification. C.J. identified his assailant as "Steve's boyfriend." J.H-S. identified "Steve" as Hager and said that he had seen Hager with a tall, skinny man. Hager's roommates, J.F. and T.F., identified Hager's boyfriend as Anderson, a tall, thin man. J.H-S. gave police a phone number that Hager used when he contacted J.H-S. on August 20, and that phone number was registered to Anderson. Police obtained the 2011 booking photo of Anderson based on this information. All of this occurred before the photo lineup was presented to C.J. At trial, Hager testified that Anderson had stabbed C.J. Under the totality

of the circumstances, the pretrial photo identification was reliable. *See Ostrem*, 535 N.W.2d at 921. Therefore, the district court did not err by admitting the pretrial identification evidence.

**III.**

Anderson argues that the district court abused its discretion by refusing to permit expert testimony about the shortcomings of eyewitness identification. Anderson moved in limine for permission to call Dr. Ralph Haber, an expert in the psychology of memory and the limitations of eyewitness identification. The district court refused to permit Haber to testify, concluding that Haber's testimony "would unduly prejudice the State because it would unfairly create 'an aura of special reliability and trustworthiness' for purported 'expert testimony' that is actually nothing more than common sense and common knowledge challenges to eyewitness identification testimony, already available to lay jurors."

Minnesota Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." We review the district court's evidentiary decisions for an abuse of discretion. *State v. Hanks*, 817 N.W.2d 663, 667 (Minn. 2012). But if the district court's evidentiary ruling prevents a defendant from presenting a defense, we review the decision to determine if the "exclusion of evidence was harmless beyond a reasonable doubt." *State v. Smith*, 876 N.W.2d 310, 331 (Minn. 2016) (quotation omitted).

In *State v. Helterbridle*, the supreme court affirmed the district court's decision not to permit the expert testimony, concluding that it was within the district court's discretion to determine whether the testimony would be helpful. 301 N.W.2d 545, 547 (Minn. 1980). The supreme court recommended that other safeguards be used to address the issue of unreliability of eyewitness identification, including (1) prosecutorial discretion in charging; (2) suppression of unreliable testimony; (3) cross-examination and persuasive argument by defense counsel; (4) jury instructions; (5) jury unanimity; and (6) a motion for acquittal if evidence is legally insufficient. *Id.*

In *State v. Miles*, the supreme court reviewed a case in which the defendant requested an expert on eyewitness identification because of "the statistically low reliability of cross-racial identifications." 585 N.W.2d 368, 371 (Minn. 1998). The supreme court repeated the safeguards set forth in *Helterbridle* and concluded that the defendant had been afforded these protections. *Id.* at 372. Furthermore, other evidence that implicated the defendant was introduced at trial, leading the supreme court to believe that the eyewitness testimony was not "crucial." *Id.* at 371-72; *see also State v. Mosley*, 853 N.W.2d 789, 799 (Minn. 2014) (discussing *Miles* and *Helterbridle* in analyzing the question of expert-identification testimony).

After Anderson's pretrial motion, the district court concluded that Haber's testimony would not be helpful because it was too general. The district court offered to implement the safeguards of *Helterbridle*, including giving a cautionary jury instruction on identification and permitting defense counsel to discuss "the problems with the accuracy of eyewitness identification testimony" during voir dire and cross-examination. Following

the district court's order, Dr. Haber submitted a more detailed report, tying the particular deficiencies in procedure to scientific conclusions. The district court again refused to permit Haber's testimony, but told defense counsel the court would reconsider if trial testimony appeared to make Haber's testimony relevant.

The district court provided *Helterbridle* safeguards: (1) defense counsel raised the issue of the accuracy of eyewitness identification during voir dire and cross-examination; (2) the district court gave a cautionary instruction; and (3) Anderson was not prevented from presenting the theory of his case. C.J.'s identification was only one element tying the offense to Anderson; Hager identified Anderson as C.J.'s assailant, and J.F., T.F., and J.H-S. corroborated elements of Hager's testimony. On this record, the district court did not abuse its discretion by excluding Haber's testimony.

**IV.**

Anderson argues that the district court abused its discretion by ordering him to pay restitution jointly and severally with Hager for the destruction of C.J.'s truck by arson. "A district court has broad discretion to award restitution, and the district court's order will not be reversed absent an abuse of that discretion." *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015). The district court's authority to order restitution is reviewed as a question of law subject to de novo review. *Id.* A district court's decision to award restitution must be supported in the record. *State v. Miller*, 842 N.W.2d 474, 477 (Minn. App. 2014), *review denied* (Minn. Apr. 15, 2014). The state bears the ultimate burden of proving the "propriety of the restitution" by a preponderance of the evidence. *State v. Thole*, 614 N.W.2d 231, 235 (Minn. App. 2000).

"The primary purpose of the [restitution] statute is to restore crime victims to the same financial position they were in before the crime." *State v. Palubicki*, 727 N.W.2d 662, 666 (Minn. 2007). Focusing on this purpose, courts favor the victim's right to restitution under the statute for "injuries that certainly exist over the assailants' right not to pay for an injury that might have been caused by another." *Miller*, 842 N.W.2d at 478.

"[J]oint and several liability for restitution is inappropriate if one defendant was not somehow responsible for the conduct of his codefendants." *Id.* at 477-78. But "when a victim sustains indivisible loss from multiple defendants' actions, the sentencing court has the authority to order restitution based on joint and several liability." *State v. Johnson*, 851 N.W.2d 60, 66 (Minn. 2014).

Anderson was acquitted of the destruction of C.J.'s truck by arson. But a district court may award restitution if it finds by a preponderance of evidence that the victim's losses are directly, and not tangentially, caused by a defendant's conduct. *Miller*, 842 N.W.2d at 477. The lesser preponderance-of-evidence standard permits a court to find grounds for restitution even when a jury has not convicted the defendant under the more stringent beyond-a-reasonable doubt standard. *See State v. Terpstra*, 546 N.W.2d 280, 283 (Minn. 1996) (affirming restitution for full amount of loss through theft by swindle despite jury's acquittal of defendant on more serious charge); *see also State v. Olson*, 381 N.W.2d 899, 900-01 (Minn. App. 1986) (affirming restitution order for stolen items when defendant was convicted of burglary but acquitted of theft).

The record supports the district court's order for joint and several liability. Anderson, not Hager, assaulted C.J.; Anderson and Hager fled from the crime scene in the

victim's truck; he and Hager discussed whether they should drive the truck into the lake; and Anderson drove with Hager to the location where the truck was burned and advised Hager to leave the windows open to make the fire burn hotter. On these facts, C.J.'s loss is the direct result of Anderson's conduct. The district court did not abuse its discretion by imposing joint and several liability for restitution on Anderson.

**V.**

Anderson filed a pro se supplementary appellate brief raising a number of issues. Because we conclude that these claims are without merit, we will address them only briefly.

First, Anderson argues that the district court deprived him of his constitutional right to a fair trial by refusing to let him produce evidence of prior plea negotiations that the state had with co-defendant Hager. Generally, evidence of offers to plead guilty or statements made in connection with negotiations over offers to plead guilty are not admissible in a criminal action. Minn. R. Evid. 410. Statements made during negotiations may not be used for impeachment purposes. *State v. Robledo-Kinney*, 615 N.W.2d 25, 30 (Minn. 2000). The district court did not abuse its discretion by refusing to permit Hager to be impeached with evidence of prior, rejected plea negotiations. Defense counsel cross-examined Hager about his final plea agreement and thus was able to present the issue of possible bias to the jury.

Second, Anderson argues that the district court erred by permitting the state to recall Hager as a witness after Hager initially refused to testify. Anderson relies on *Merriam v. Ames*, 26 Minn. 384, 4 N.W. 620 (1880), for the proposition that a court may refuse to recall a witness. But in that civil matter, the district court did not abuse its discretion by

refusing to permit the witness to be recalled because the witness had already been "fully examined," and no reason such as "oversight of counsel, nor misrecollection or forgetfulness of witness, was suggested as a reason for recalling him." *Id.* at 385, 4 N.W. at 620. Hager, on the other hand, simply refused to testify at all. Anderson has not demonstrated that the district court abused its discretion by permitting him to return and complete his testimony.

Third, Anderson contends that the district court erred by denying his motion for an acquittal. We review the district court's decision on a motion for a judgment of acquittal de novo, as a question of law. *State v. McCormick*, 835 N.W.2d 498, 506 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013). "[T]he test to be applied is whether, after viewing the evidence and all resulting inferences in the light most favorable to the state, the evidence is sufficient to present a fact question to the jury." *Id.* (quotation omitted). Based on our review of the record, the district court did not err by denying Anderson's motion for a judgment of acquittal.

Fourth, Anderson alleges that his right to a fair trial was denied by ineffective assistance of counsel after his attorney did not move for a mistrial when a police officer made a joke to the court reporter while the jury was still in the room. To sustain a claim of ineffective assistance of counsel, a defendant must show that "(1) his counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Generally, matters of trial strategy do not provide a basis for such a claim. *Id.* Counsel's failure to ask for a mistrial or to object

to alleged errors are usually viewed as trial strategy. *See White v. State*, 711 N.W.2d 106, 110 (Minn. 2006). A review of the entire trial transcript confirms that Anderson's counsel vigorously represented him in a professional manner.

Finally, Anderson argues that the district court abused its discretion by refusing to impose a downward durational departure from the presumptive sentence. We review the district court's sentencing decisions for an abuse of discretion. *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). Generally, a district court does not abuse its discretion by imposing a sentence within the presumptive range. *Id.* Rather, a defendant must demonstrate that there are "compelling circumstances" that would prompt this court to exercise its authority and overturn the district court's sentence. *Id.* (quotation omitted).

The district court found no substantial and compelling reason to depart and imposed a sentence of 213 months, which is within the presumptive range. After a review of the record, we see no abuse of discretion.

**Affirmed.**

**ROSS**, Judge (concurring specially)

I concur for the reasons stated in the opinion of Judge Rodenberg.

**RODENBERG**, Judge (concurring specially)

I concur, but write separately to note my concern with whether it is possible for a criminal defendant to meaningfully provide a jury with an adequate understanding of the known limitations and frailties of eyewitness-identification testimony under current Minnesota law.

Recently, we examined a district court's denial of a request for a jury instruction on the reliability of cross-racial eyewitness identification. *State v. Thomas*, ___ N.W.2d ___, 2017 WL 163712 (Minn. App. Jan. 17, 2017), *pet. for review filed* (Minn. Feb. 15, 2017). Noting that it is not for this court to make new rules of law, we held that, "[i]n the absence of expert testimony proffered by a party, it is not an abuse of discretion for the district court to refuse to give a jury instruction informing a jury of recent social and scientific developments in assessing [eyewitness] evidence." *Id.* at *1, *5.

Here, appellant proposed calling Dr. Haber as an expert witness on the subjects of human memory and the resulting limitations on eyewitness testimony, as stated in his written report. Relying on *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980), the district court concluded in a pretrial ruling that Dr. Haber's testimony would not be admitted because it would not be helpful to the jury. Dr. Haber authored a second report, tethering his proposed testimony to the facts of the case. Still, the district court declined to permit the proposed testimony. I agree wholeheartedly with the majority's analysis of

the district court's evidentiary ruling under the abuse-of-discretion standard and the limitations on our role as an error-correcting court. The district court applied the relevant authorities and did not abuse its discretion in its expert-testimony ruling.

Nevertheless, reliance on the *Helterbridle* "safeguards" against the jury affording potentially undue weight to eyewitness testimony seems insufficient in light of scientific advancements since that 1980 opinion. *Helterbridle* assumes that the crucible of cross-examination and other ordinary trial protections will expose to the jury the weaknesses of an inaccurate eyewitness identification. But cross-examination is of little help in the truth-seeking process when a witness sincerely believes that his testimony is accurate, even when it is not. As Dr. Haber reports, multiple peer-reviewed studies prove that the certainty of an eyewitness does not correlate with the accuracy of that witness's testimony. Given what we now know about the limitations of eyewitness testimony, a jury needs something more in its quest for the truth than cross-examination of a witness certain of what he has seen, or argument by counsel that the witness did not see that of which he himself is certain.

The authorities binding on this court do not *require* that a district court either admit expert testimony or craft a specific jury instruction concerning eyewitness testimony and its limitations. *Compare State v. Miles*, 585 N.W.2d 368, 372 (Minn. 1998) (upholding exclusion of expert testimony on eyewitness-identification evidence), *and Helterbridle*, 301 N.W.2d at 547 (same), *with State v. Ferguson*, 804 N.W.2d 586, 604-10 (Minn. 2011) (Anderson, Paul H., J., concurring) (discussing the reliability of eyewitness testimony and recent developments in other states, including New Jersey, concerning whether expert testimony or a jury instruction should be implemented to ensure jury understanding of the

limitations of eyewitness testimony), *State v. Henderson*, 27 A.3d 872, 919 (N.J. 2011) (revising framework for eyewitness identification evidence in New Jersey, including changes to jury instructions and pretrial procedures), *and State v. Clopten*, 223 P.3d 1103, 1112 (Utah 2009) (explaining application of Utah's rules of evidence to proffered expert testimony with the expectation that the result would be "liberal and routine admission of eyewitness expert testimony").

In sum, the current state of Minnesota law is that it is within a district court's discretion to decline a proposed jury instruction concerning the known limitations on eyewitness testimony when a party does not proffer supporting expert testimony, but when a party does proffer such expert testimony, it is equally within the district court's discretion whether to admit or exclude it. And it is not for this court to change the law. *Thomas*, 2017 WL 163712, at *5 (declining to require a jury instruction concerning cross-racial eyewitness identification when the supreme court has not endorsed such an instruction); *LaChapelle v. Mitten*, 607 N.W.2d 151, 159 (Minn. App. 2000) ("[T]his court is limited in its function to correcting errors . . . ."), *review denied* (Minn. May 16, 2000); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *review denied* (Minn. Dec. 18, 1987).

Although this jury was left without significant information concerning the frailties and limitations of eyewitness testimony, I concur because we, like the district court, are bound by *Helterbridle*.