STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0814

State of Minnesota,
Respondent,

vs.

Daniel Anthony Cruz Hernandez,
Appellant.

Filed April 20, 2020
Affirmed in part, reversed in part, and remanded
Segal, Judge

Dakota County District Court
File No. 19HA-CR-18-1074

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

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Ross, Judge; and Segal, Judge.

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

SEGAL, Judge

In this direct appeal, appellant challenges his convictions for aiding and abetting the crimes of second-degree intentional murder, second-degree felony murder and first-degree aggravated robbery. He argues he is entitled to a new trial, claiming that the district court abused its discretion by disqualifying his retained attorney and by committing reversible error in evidentiary rulings and in instructing the jury. Appellant also argues that the district court erred in declining his request for a downward durational departure from the presumptive guidelines sentence and by entering multiple convictions in violation of Minn. Stat. § 609.04 (2016). We affirm in part, reverse in part and remand.

FACTS

This case arises out of an altercation that occurred in the parking lot of a townhouse complex in the early hours of August 2, 2017, that resulted in the stabbing death of J.P. and the theft of his backpack. J.P. and his friend E.D. were in the parking lot of the townhouse complex after E.D. had been kicked out of one of the townhouse units. J.P. was carrying a backpack that contained one large plastic bag and several smaller bags of marijuana.

At about the same time, appellant Daniel Anthony Cruz Hernandez and his brother (Brother), left their friend's townhouse (Friend) that was located in the same complex. Friend lived in the townhouse with his mother J.H. and her girlfriend A.C. Appellant and Brother were walking toward their red car when E.D. saw the two men and yelled out to ask them for a ride. J.H. and A.C. were in a van also in the parking lot, when they noticed E.D. J.H. and A.C. knew E.D. and had banned him from their townhome because he had

previously robbed them. A.C. exited the van and asked E.D. what he wanted. The two began to argue. The argument eventually intensified and J.H. also got out of the van, stood between E.D. and A.C., and began arguing with E.D. herself. A physical fight ensued.

Neighbors began calling 911 at about 3:15 a.m. When police arrived, J.P. was unconscious and bleeding from a chest wound. Police found E.D. on the roof of a nearby townhome. J.P. died at the hospital. The medical examiner testified that the cause of death was multiple stab wounds to the chest.

Police spoke to appellant later in the day on August 2. At that first interview, appellant denied being at the townhomes at the time of the incident. Police, however, obtained video footage from a nearby gas station that showed appellant, Brother and Friend together at the gas station about 2:30 a.m. (shortly before the incident) in a red car owned by appellant's father.[1] At a subsequent interview, appellant again denied being at the scene, but changed his position when confronted with the gas station footage. At a third interview, appellant admitted there was an altercation between J.H. and J.P. and that a fight had broken out.

Police eventually seized and searched the red car that appellant was seen with at the gas station. The car appeared to have been recently vacuumed and cleaned. But police found three drops of blood in the vehicle. A small amount of blood was found on the center console and two spots were found on the back seat.

[1] Police also noted that, in the video footage, appellant had facial hair, but when they interviewed him later that same day, appellant had changed clothes and shaved off his facial hair.

Minnesota Bureau of Criminal Apprehension (BCA) scientists compared DNA found on a sample of the blood drop on the center console to a known DNA sample from J.P. The blood drop on the center console was J.P.'s blood. The two blood spots on the back seat were not suitable for DNA comparison. The BCA also tested two plastic baggies that were found at the scene. One of the baggies had a major DNA profile that was a match for appellant.

In March 2018, police contacted a person named T.L. and took a recorded statement from him. T.L. told police that appellant came to his house in St. Cloud on August 2, the date of the homicide, and told T.L. that he had stabbed J.P. and thrown the knife into Lake McCarron. T.L. also reported that appellant told T.L. that he believed J.P. was reaching for a gun so he stabbed him. T.L. had a child with appellant's sister, and told police he wanted to remain anonymous because the mother might not allow him to see the child if it got out that he had talked to the police. Police searched Lake McCarron and could not find a knife.

Police searched the cell phones of appellant, Brother and J.H. Brother's phone had a picture, taken later in the morning on the day of the incident, of one large bag of marijuana and two smaller bags. Appellant's phone showed that he made several calls beginning at 3:07 a.m. on the date of the homicide.

The state charged appellant with six offenses. Three counts alleged that appellant, as a principal, committed (1) second-degree intentional murder under Minn. Stat. § 609.19, subd. 1(1) (2016); (2) first-degree aggravated robbery under Minn. Stat. § 609.245, subd. 1 (2016); and (3) second-degree felony murder under Minn. Stat. § 609.19, subd. 2(1) (2016).

The remaining three counts alleged that appellant was guilty of aiding and abetting the three offenses. *See* Minn. Stat. § 609.05, subd. 1 (2016).

Thirty-five witnesses testified at the trial. The individuals involved in the incident presented differing accounts of what had transpired. E.D. testified at the trial that Friend came from the townhouse and started kicking him, saying "you hit my mom. You all hit my mom." E.D. heard J.H. yell, "Let's go. I got him." And then everyone got into their cars and left. E.D. ran around and eventually found J.P. on the ground. E.D.'s clothes and belongings had fallen out of his backpack and were strewn about.

J.H. and A.C. testified that after J.H. got out of the car and started arguing with E.D., somebody hit J.H. Then both A.C. and J.H. saw everyone run, including E.D. and the person who hit J.H. J.H. testified that she saw E.D. get his backpack out of the red car and then saw appellant and Brother drive away.

J.H. admitted that she often carries knives and that she was carrying a knife on the night of the incident. In fact, when police searched near the crime scene, they found a folding knife down the street near the curb, which J.H. admitted belonged to her. Police later searched J.H.'s townhome and found numerous knives, but did not observe blood on any of them.

Friend testified that he heard yelling from inside the townhome and had gone outside to see what was happening, but went back inside almost immediately with his mother (J.H.) and A.C. He saw that J.H.'s chin was bleeding. Police testified that appellant later told them that Friend sent appellant a message asking who had the knife. Friend also admitted

that he sent a message to E.D. later that morning that said, "Hey, bro. I'm bad about this. I just reacted. Let's talk about this sh-t later."

T.L. testified at the trial, but recanted his prior out-of-court statement to police that appellant had admitted stabbing J.H. and threw the knife in Lake McCarron. T.L. testified that he was "unreliable" and that he was under the influence of methamphetamine when he made the statement. He claimed that the recorded out-of-court statement was based on rumors.

C.L., T.L.'s brother and roommate, testified that appellant had called him several times between 4:00 a.m. and 5:00 a.m. that morning. C.L. testified that he answered one of the calls and that appellant told him he had gotten into a fight. Consistent with T.L.'s recorded out-of-court statement to police, C.L. also testified that appellant was at his and T.L.'s house later on August 2.

One of the witnesses at the trial, K.M.-M., described herself as appellant's best friend. She testified that appellant called her at about 3:00 a.m. on August 2, but she did not answer the call. She testified that appellant later told her that he tried to break up the fight. On cross-examination, defense counsel attempted to elicit testimony from K.M.-M. regarding her opinion of appellant's character. The state objected to the question and the district court sustained the objection on the ground that it called for character evidence.

The district court accepted a partial verdict. The district court declared a mistrial on counts one (second-degree felony murder) and three (second-degree intentional murder) because the jury could not reach a unanimous verdict. The jury found appellant not guilty of first-degree aggravated robbery, but found him guilty of all three aiding and abetting

charges—aiding and abetting second-degree intentional murder, second-degree felony murder and first-degree aggravated robbery.

At sentencing, appellant sought a downward durational departure from the presumptive guidelines sentence. After considering the arguments of both parties, the district court imposed the presumptive guidelines sentence of 306 months for aiding and abetting second-degree intentional murder. The district court did not impose a sentence for the other two counts, but the warrant of commitment shows convictions for all three offenses of which he was found guilty. This appeal follows.

D E C I S I O N

Appellant challenges his convictions, arguing that he is entitled to a new trial because the district court abused its discretion by disqualifying Udeani, admitting T.L.'s prior out-of-court statement, excluding character evidence, and omitting a burden-of-proof instruction from the aiding and abetting jury instruction. He further claims the district court abused its discretion at sentencing by failing to consider a mitigating circumstance and by entering multiple convictions in violation of Minn. Stat. § 609.04. We address each issue in turn.

I. The district court did not abuse its discretion by disqualifying Udeani.

Appellant argues that the district court denied him the right to counsel of choice by disqualifying his retained counsel, Ignatius Udeani. Appellant also maintains that the district court erred by failing to consider whether the state had waived its ability to seek disqualification of Udeani by not making the motion until jury selection had begun. Udeani

represented appellant from the very beginning of the case and filed a certificate of representation shortly after the state filed the complaint.

The case was originally scheduled for a jury trial in July 2018. After a jury was selected but not yet sworn, the prosecutor sent a letter to the district court informing the court that Udeani had a potential conflict of interest in representing appellant. While reviewing evidence in preparation for trial, the prosecutor discovered that Udeani had represented both appellant and Brother when they were questioned individually by police during the investigation of this case. After hearing from both sides, the district court determined there was a potential conflict, but that the conflict was such that it could be waived by appellant and Brother under rules 1.7(b) and 1.9 of the Minnesota Rules of Professional Conduct. Appellant waived the conflict, but Brother declined to do so after having the opportunity to consult with appointed advisory counsel. The district court disqualified Udeani, appellant retained new counsel, and the trial of the case was delayed until December 2018.

Criminal defendants have a constitutional right to their counsel of choice. *State v. Patterson*, 812 N.W.2d 106, 111 (Minn. 2012). "[T]he right stands on its own and does not derive from the Sixth Amendment's purpose of ensuring a fair trial." *Id.* (quotation omitted). But the right is not without limits—a defendant "does not have an absolute right to retain counsel who has actual or potential conflicts of interest." *Id.* To determine whether a defendant has the right to keep his counsel of choice when an actual or potential conflict of interest exists, Minnesota has adopted a framework first set out by the Supreme Court of the United States:

> The district court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.

Id. (quoting *Wheat v. United States*, 486 U.S. 153, 164, 108 S. Ct. 1692, 1700 (1988)).

Appellate courts review a district court's decision to disqualify a defendant's attorney for an abuse of discretion, affording "substantial latitude" to the district court's decision. *Id.* The district court is afforded significant discretion because it has "an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* (quoting *Wheat*, 486 U.S. at 160, 108 S. Ct. at 1698).

A. The district court did not abuse its discretion by determining that there was a conflict of interest.

To determine whether a lawyer has a conflict of interest, appellate courts turn to the Minnesota Rules of Professional Conduct. *Pearson v. State*, 891 N.W.2d 590, 601 (Minn. 2017). "[A] lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a former client . . . ." Minn. R. Prof. Conduct 1.7(a)(2). The rules also address the duties a lawyer owes to a former client and provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

. . . .

> (c) A lawyer who has formerly represented a client in a matter . . . shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client . . . when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Minn. R. Prof. Conduct 1.9(a), (c). If a lawyer has a conflict of interest under rule 1.7(a), he or she may still represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

Minn. R. Prof. Conduct 1.7(b).

Appellant argues that the district court's finding that there was a conflict of interest is erroneous. Udeani advised the district court that he had not received any "confidential" information from appellant or Brother and that the brothers had shared with the police the same information they had told him. He further advised the court that, even though Brother was on the witness list for both the prosecution and the defense, Udeani saw no need to call or cross-examine Brother. The district court accepted these assertions at face value, but concluded that there was still a conflict, but that it was a conflict that could be waived

by appellant and Brother. The district court noted that Brother may still be charged in the case and that the conflict of interest could not be ignored.

Appellant seeks to distinguish his case from the facts in *Patterson*. 812 N.W.2d 106. In *Patterson*, even though the defendant waived his right to conflict-free counsel, the supreme court upheld the disqualification. The court expressed concern that the lawyer would be hampered in his ability to cross-examine witnesses because he had represented the witness in a prior case that was tangentially related. In affirming the disqualification, the supreme court, as did the district court in this case, noted the interests not only of the defendant, but the interests of the state and public in the integrity of the proceedings and avoiding grounds for reversal of any judgment. The supreme court advised that "substantial latitude" must be given to district court decisions on disqualification "[i]n light of the trial court's legitimate interests in upholding the ethical standards of the profession, ensuring both that [a] trial was actually fair and that it also appeared to be fair, and in keeping its judgments intact on appeal." *Id.* at 111, 113.

Appellant maintains that his case is different from *Patterson* based on Udeani's claim that he had no conflicting information from his brief representation of Brother and that whatever he was told privately mirrored what Brother told police so that the information was no longer confidential.[2] We do not agree. In this case, Udeani represented

[2] Appellant also argues that, because Brother did not testify at trial, the potential conflict never came to fruition. But we do not evaluate a district court's decision to disqualify based on hindsight analysis; we give deference to the district court's determination of the known circumstances and recognize the difficulty in determining the seriousness of potential conflicts. *See Wheat*, 486 U.S. at 162, 108 S. Ct. at 1699 ("Unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of a

Brother, at least during a police interview, in the very same matter he was representing appellant; Brother faced possible charges in connection with the case; and Brother refused to waive the potential conflict after conferring with independent advisory counsel.

Under these circumstances, it was reasonable to conclude that Udeani's prior representation of Brother created "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a former client." Minn. R. Prof. Conduct 1.7(a)(2). The disqualification of Udeani did not constitute an abuse of discretion.

B. The district court did not err by failing to consider whether the state had waived its right to seek disqualification.

Appellant also argues that, aside from whether there was a conflict, the district court erred because the state waived the issue of disqualification. The state maintains that it did not waive the issue because it brought it to the district court's attention as soon as the prosecutor learned that Udeani had represented Brother.

Generally, the right to seek disqualification of opposing counsel may be waived. *State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808, 818 (Minn. 2014). A criminal prosecution, however, triggers unique concerns related to an attorney's potential conflicts of interest. "[M]ultiple representation of criminal defendants engenders special dangers of which a court must be aware." *Wheat*, 486 U.S. at 160, 108 S. Ct. at 1697. "[A] court

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conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly."); *Patterson*, 812 N.W.2d at 113 ("We recognize the difficulty associated with determining the seriousness of potential conflicts . . . .").

confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel." *Id.*

The special dangers that arise in a criminal matter may lead the district court to maintain legitimate "[c]oncerns about the finality of the proceedings," if it were to proceed to a criminal trial without disqualifying an attorney with a conflict on the ground that the state had waived the right to seek disqualification. *Patterson*, 812 N.W.2d at 112. "On appeal from a conviction, a defendant might argue that his right to conflict-free counsel was violated, even if the defendant waived that right, creating the possibility that the trial court might be 'whip-sawed by assertions of error no matter which way they rule.'" *Patterson*, 812 N.W.2d at 111 (quoting *Wheat*, 486 U.S. at 161, 108 S. Ct. at 1698).

Here, the prosecutor learned of the potential conflict only while reviewing data collected from appellant's cell phone as part of his final trial preparation. The cell phone contained a recording of a meeting between appellant, Brother and Udeani. The prosecutor represented to the court that there was nothing contained in the police reports that revealed the name of the attorney(s) who represented appellant and Brother while they were being questioned by law enforcement. After listening to the recording on appellant's cell phone, the prosecutor promptly disclosed the potential conflict to the district court. Considering the unique concerns regarding conflicts of interest in criminal matters, and the facts and circumstances surrounding Udeani's disqualification, we conclude that the district court did not abuse its discretion by disqualifying Udeani without considering whether the state waived the disqualification issue.

II. The district court did not abuse its discretion by admitting T.L.'s prior statement under Minn. R. Evid. 807.

The district court allowed the state to introduce T.L.'s recorded statement to police under Minn. R. Evid. 807. Appellant argues that the district court abused its discretion in admitting the statement because it did not carry sufficient circumstantial guarantees of trustworthiness.

We review a district court's evidentiary rulings for an abuse of discretion. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (quotation omitted). The defendant bears the burden of showing error. *Id.*

Hearsay is generally not admissible. Minn. R. Evid. 802. But there are several exceptions to the hearsay rule, including the catchall "residual exception" that allows admission of a hearsay statement that does not fall under any specific exception but nonetheless carries "equivalent circumstantial guarantees of trustworthiness." *See* Minn. R. Evid. 807. A hearsay statement that carries such circumstantial guarantee of trustworthiness may be admissible if the court determines:

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id.

"The decision to admit hearsay statements under Rule 807 has two steps. First, the district court must look at the totality of the circumstances to determine whether the hearsay

statement has circumstantial guarantees of trustworthiness." *Hallmark*, 927 N.W.2d at 292 (quotation omitted). "The second step in evaluating a statement's admissibility under the residual hearsay exception requires the district court to determine whether the three enumerated requirements of Rule 807 are met." *Id.* at 293.

The district court did not expressly analyze the rule 807 factors. Appellate courts may, however, independently evaluate the admissibility of a hearsay statement under rule 807. *See id.* at 294.

When evaluating whether a hearsay statement carries sufficient circumstantial guarantees of trustworthiness, the Minnesota Supreme Court has instructed courts to consider, among other things,

> whether the statement was given voluntarily, under oath, and subject to cross-examination and penalty of perjury; the declarant's relationship to the parties; the declarant's motivation to make the statement; the declarant's personal knowledge; whether the declarant ever recanted the statement; the existence of corroborating evidence; and the character of the declarant for truthfulness and honesty.

Id. at 292 (quoting *State v. Griffin*, 834 N.W.2d 688, 693 (Minn. 2013)). The supreme court has identified four additional factors that, "if present, contribute to the trustworthiness of a statement under the residual hearsay exception." *Id.* at 292-93 (citing *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985)). Those factors are:

> (1) there is no Confrontation Clause issue because the declarant testifies, admits to making the prior statement, and is available for cross-examination by the defense counsel; (2) the statement is recorded, removing any real dispute about what the declarant said; (3) the statement is against the declarant's penal interest; and (4) the statement is consistent with the state's other evidence that "pointed strongly toward" the defendant's guilt.

Id. at 293. Minnesota courts have determined that the third factor noted above may also be satisfied if the hearsay statement is against the declarant's "interests in a relationship with [the defendant]." *State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

Other relevant factors in assessing the trustworthiness of a hearsay statement include whether the declarant "has a strong motivation to bend the truth and implicate others," whether there is a significant "gap in time between the event and the statement," and whether the declarant had "first-hand knowledge." *Hallmark*, 927 N.W.2d at 293.

> And while recantation of a prior statement may detract from trustworthiness, a recanted statement may nevertheless possess sufficient circumstantial guarantees of trustworthiness under the residual hearsay exception where (1) other uncontradicted evidence discredits the declarant's recantation; (2) the declarant possesses a motive to falsely recant; (3) the declarant's recantation is itself inconsistent; and (4) the prior hearsay statements are "strongly corroborated" by evidence admitted at trial.

Id.

Appellant argues that T.L.'s prior statement to police does not carry sufficient circumstantial guarantees of trustworthiness because (1) the statement was not voluntarily given because police came to T.L.; (2) the statement was not made under oath; (3) T.L. had a child with appellant's sister; (4) T.L. recanted; (5) T.L. only accused appellant once and has since maintained that the accusation was false; (6) there is no evidence to corroborate that appellant threw a knife into the lake; and (7) T.L. was a known drug user and claimed that he was under the influence when he made the statement.

The state counters that T.L.'s statement to police contained sufficient circumstantial guarantees of trustworthiness because (1) T.L. testified at trial and was subject to cross-examination; (2) his statement was recorded so there could be no dispute over its content; (3) T.L.'s prior statement was against his relationship interest based on his fear he would not be allowed to see his child if appellant's sister found out he had talked to the police; (4) T.L. was hostile to the prosecution and supportive of appellant at trial; (5) aspects of T.L.'s statement were consistent with the state's evidence; and (6) T.L. had no motive to lie when he provided the statement.

We recognize that there are factors that both support and undermine the trustworthiness of T.L.'s prior statement to police. T.L.'s admission that he was under the influence of methamphetamine when he gave the statement and his adamant recantation at trial undercut the credibility of his prior statement. But we are not persuaded that the district court abused its discretion. T.L. had several compelling reasons he shared with police about why he did not want others to know that he had spoken with them, including that he was friends with appellant, did not want to be known as a "snitch," and might not be allowed to see his child if appellant's sister knew what he had told police. Thus, T.L. had strong motivations to recant his statement when called to testify at trial.

Moreover, the state's evidence corroborated aspects of T.L.'s recorded out-of-court statement. For example, T.L.'s brother testified that appellant was at the home he shared with T.L. later on August 2, which is the same date T.L. said appellant came to the house and made the admissions. Similarly, T.L.'s assertion in the recorded statement that

appellant found out about the death of J.P. from social media is consistent with what appellant said in his interview with the police.

Given the strong indications that it was against T.L.'s personal and relationship interests to provide the recorded statement and the fact that defense counsel was able to cross-examine T.L. at the trial, when combined with the other factors, we ultimately conclude there were sufficient circumstantial guarantees of trustworthiness to allow the district court to admit the statement under rule 807.

III. The district court did not commit reversible error by precluding appellant from eliciting testimony about his good character.

The state called K.M.-M. to testify about phone calls that she received (but did not answer) from appellant following the incident. K.M.-M. testified that she was appellant's "best friend" and that appellant told her he tried to break up the fight. On cross-examination, defense counsel attempted to elicit testimony from K.M.-M. regarding her opinion of appellant 's character. The district court sustained the prosecutor's objection to the question "How would you describe Mr. Cruz [Hernandez]?" on the ground that it called for character evidence. The defense attorney clarified her questions and asked, "We won't get into specific things that he's done or not done, but how would [you] describe his general personality?" The district court again sustained the prosecutor's objection based on character evidence.

Appellant maintains that the district court denied him his constitutional right to present a complete defense by not allowing him to present testimony of his own character. The state argues that the issue is not properly preserved for review because appellant did

not make an offer of proof as to the expected testimony and that, even if the district court erred by precluding appellant to elicit this testimony, the error was harmless beyond a reasonable doubt. An appellate court reviews "evidentiary rulings under an abuse of discretion standard even when it is claimed that the exclusion of evidence deprived the defendant of his constitutional right to present a complete defense." *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006).

The admissibility of character evidence is governed by Minn. R. Evid. 404. Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Minn. R. Evid. 404(a). But a criminal defendant is permitted to offer evidence of a "pertinent trait" of his or her own character. Minn. R. Evid. 404(a)(1). The exception that allows a criminal defendant to introduce evidence of his own character trait is "so deeply imbedded in our jurisprudence as to assume almost constitutional proportions." *State v. Pak,* 787 N.W.2d 623, 628 (Minn. App. 2010).

As a preliminary matter, we conclude that the issue is properly preserved for appeal. Ordinarily, to preserve an issue for appeal, a party whose evidence is excluded must make an offer of proof to "provide the court with an opportunity to ascertain the admissibility of the proffered evidence and to provide a record for a reviewing court to determine whether the lower court ruling was correct." *Id.* at 627 (quotations omitted). But, "an offer of proof is not necessary where the substance of the excluded evidence is apparent from the context." *Id.* Given K.M.-M.'s testimony that she is appellant's "best friend," we are able to ascertain that defense counsel expected K.M.-M. to testify that appellant had a positive

character trait that made it less believable that appellant was involved in a murder or robbery.

We conclude, however, that even assuming that the district court erred by failing to allow appellant to elicit character testimony from K.M.-M., the error would be harmless. If the district court erroneously excludes defense character evidence in violation of the defendant's constitutional right to present a defense, "the decision will not be reversed if it is found to be harmless beyond a reasonable doubt." *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989) (citing *State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986)); *see also Pak*, 787 N.W.2d at 628 ("We will not reverse a district court's exclusion of defense character evidence if our examination of the record satisfies us beyond a reasonable doubt that the jury would not have acquitted even if it had the benefit of the defendant's character evidence." (quotation omitted)). "The error will be found prejudicial if there is "'a reasonable possibility' that the error complained of might have contributed to the conviction." *Larson*, 389 N.W.2d at 875. To conclude that an error was harmless under this standard, the reviewing court must be "satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (i.e., a reasonable jury) would have reached the same verdict." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). The state has the burden of demonstrating that the error was harmless. *State v. Hannon*, 703 N.W.2d 498, 505 (Minn. 2005).

We conclude that the state has satisfied its burden. First, K.M.-M. described herself as appellant's best friend and, thus, the jury may not have given substantial weight to her character evidence. Moreover, she did testify that appellant told her he had tried to break

up the fight, which would have painted appellant in a more positive light, likely with greater credibility than an opinion about character. Finally, the state presented voluminous evidence regarding appellant's involvement in the incident that led to J.P.'s death and the guilty verdicts were only for aiding and abetting offenses, not for any offense as a principal actor. Based on this, we conclude that K.M.-M.'s testimony regarding appellant's character would not have had a significant impact on the jury's verdicts. Consequently, we are convinced beyond a reasonable doubt that any error in the preclusion of character testimony from K.M.-M. is harmless and therefore does not compel reversal. *See Pak*, 787 N.W.2d at 628 (determining that error in precluding brother's testimony about defendant's character was harmless beyond a reasonable doubt based, in part, on the conclusion that the jury would have given little, if any, weight to the brother's testimony).

IV. The district court did not commit plain error in the jury instructions on the burden of proof for aiding and abetting liability.

Appellant argues that the district court erred in its aiding and abetting jury instruction. The instructions set out the two required "mental state" elements for each of the three aiding and abetting counts: that appellant (1) knew that another person was going to commit a crime and (2) intended that his presence or actions aid the commission of the crime. But this discussion was included at the end of the instruction for each aiding and abetting count, immediately *after* the burden-of-proof instruction. Appellant argues that the instructions were in error because they failed to clarify that these two elements were also subject to the state's "beyond a reasonable doubt" burden of proof.

An appellate court reviews the district court's jury instructions "in their entirety to determine whether they fairly and adequately explain the law of the case." *State v. Peterson*, 673 N.W.2d 482, 486 (Minn. 2004). Appellant did not object to the district court's jury instructions, and so we review for plain error. *See State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002); *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). "To establish plain error, an appellant must show that a district court's ruling (1) was error, (2) that the error was plain, and (3) that the error affected appellant's substantial rights." *Ihle*, 640 N.W.2d at 916.

The jury instructions in this case included general instructions at the outset including two standard paragraphs, titled "presumption of innocence" and "proof beyond a reasonable doubt," that clearly set out the state's burden to prove guilt beyond a reasonable doubt. The general instructions also contain a standard instruction, titled "instructions to be considered as a whole," advising jurors that they must consider the instructions as a whole and regard each instruction in light of the others. The individual instructions for each of the three aiding and abetting counts also contain specific instructions that set out each element, including the two mental-state elements required by the Minnesota Supreme Court in *State v. Milton*, 821 N.W.2d 789, 808 (Minn. 2012).

Appellant correctly points out that, in the jury instructions for each of the aiding and abetting counts, a burden of proof instruction precedes the discussion of the two mental-state elements required to prove that appellant "intentionally aided" the underlying crimes. The instructions, however, repeatedly advised the jury that it must find all "elements" beyond a reasonable doubt to find appellant guilty of a given offense, and they properly

describe the two mental-state elements as "elements." Moreover, the last sentence of each of the aiding and abetting counts summarized the instruction as follows: "you shall apply this instruction to determine whether the defendant aided another person in committing the offense of" second-degree intentional murder, felony murder or first-degree aggravated robbery. This sentence reinforces for the jury that not only the instructions as a whole, but that the full instructions for each count, are to be applied in determining guilt for that offense. This further decreases the risk of any confusion about the applicability of the burden of proof to each element of aiding and abetting.

Appellant relies on *State v. Mahkuk*, 736 N.W.2d 675 (Minn. 2007), for legal support. The court found reversible error in *Mahkuk* because the jury instructions used permissive language advising the jury that it "could *consider*" a series of factors in determining whether a defendant had the requisite mental state for an aiding and abetting conviction instead of advising the jury on the mental-state elements as mandatory elements of the offense. 736 N.W.2d at 682. *Mahkuk* is not controlling in this case because the district court properly advised the jury that the mental-state elements are mandatory.

Viewing the instructions "in their entirety," we conclude that they adequately convey the requirement that the jury must find each element, including the two mental-state elements, beyond a reasonable doubt. As the supreme court concluded in *State v. Brown*, "reading the instructions as a whole, the instructions did not relieve the [s]tate of its burden of proof on the elements of aiding and abetting . . . and therefore the trial court did not err in its jury instruction, much less commit plain error." 815 N.W.2d 609, 621 (Minn. 2012).

V. The district court did not abuse its discretion by denying appellant's motion for a downward sentencing departure.

Appellant challenges the district court's denial of his motion for a downward durational departure. He argues that the district court mistakenly concluded that personal culpability could not be considered in determining the sentence for an aiding and abetting offense.

We review the district court's sentencing decision for an abuse of discretion. *State v. Law*, 620 N.W.2d 562, 564-65 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000). The district court has "great discretion" in sentencing and "we cannot simply substitute our judgment for that of the [district] court." *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999).

The sentences provided by the Minnesota Sentencing Guidelines are presumed to be appropriate. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001). It is only in "rare" cases that an appellate court will reverse the district court's refusal to depart, even when substantial and compelling circumstances are present. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). If a defendant requests a downward departure, however, the district court must "deliberately consider[] the circumstances for and against departing." *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). If an appellate court "cannot conclude from the record that the district court made a deliberate decision to impose presumptive sentences by weighing reasons for and against departure," it is appropriate to remand to the district court for a resentencing hearing. *Id.* at 484. If the district court does not depart, however, it is not required to provide reasons

for imposing a presumptive sentence. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013).

Appellant argues that the district court erroneously determined that it could not consider appellant's individual culpability in deciding whether to depart from the guidelines. Appellant bases his argument on the district court's response to defense counsel's arguments at the sentencing hearing. The presentence investigation report (PSI) noted that appellant took no ownership for P.J.'s death. Defense counsel argued that the PSI's indication that appellant failed to take responsibility was misleading because appellant was not convicted of murder or robbery as a principal. The district court interrupted defense counsel's arguments and explained that, under Minnesota law, a person who aids and abets the commission of the offense is equally liable for the criminal act. *See* Minn. Stat. § 609.05, subd. 1. This statement by the district court did not foreclose the argument that appellant played such a minor role in the offense that it warranted a downward departure. In fact, the district court told defense counsel that appellant could "argue that factually" and, thus, it does not appear that the district court ruling on the departure motion was based on a mistaken understanding of the law.

From the record it is clear that the district court had considered the PSI, listened to the arguments of counsel and otherwise weighed the factors for and against departure. Ultimately, the district court agreed with the conclusions in the PSI that there were no substantial or compelling reasons to support a downward departure and sentenced defendant to the middle-of-the-box presumptive sentence. Consequently, we conclude that the district court did not abuse its discretion in declining to grant a downward departure.

VI. The district court erred by entering convictions for two counts of second-degree murder.

Appellant's final argument is that the district court erred by entering convictions for aiding and abetting both second-degree intentional murder and second-degree murder while committing a felony (felony murder). The state concedes that this was in error and we agree.

Under Minnesota statutes, a defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1. An included offense is defined as a "crime necessarily proved" if the crime charged is proved. *Id.*, subd. 1(4). Second-degree "felony murder is an included offense of second-degree intentional murder." *State v. Lory*, 559 N.W.2d 425, 428-29 (Minn. App. 1997), *review denied* (Minn. Apr. 15, 1997). The warrant of commitment shows that the district court entered convictions for both aiding and abetting second-degree intentional murder and aiding and abetting second-degree felony murder.

The proper remedy to correct this error is to reverse the lesser conviction and remand with instructions to vacate that conviction while leaving the determination of guilt intact. Accordingly, we reverse and remand for the district to vacate appellant's conviction for aiding and abetting second-degree felony murder.

Affirmed in part, reversed in part, and remanded.