STATE OF MINNESOTA

IN SUPREME COURT

A18-0828

Hennepin County

McKeig, J.
Concurring in part, dissenting in part, Anderson and Hudson, JJ.
Concurring in part, dissenting in part, Thissen, J.

State of Minnesota,

Respondent,

vs.

Filed: July 15, 2020
Office of the Appellate Courts

Joshua Chiazor Ezeka,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant Hennepin County Attorney, Minneapolis, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant State Public Defender, Saint Paul, Minnesota for appellant.

S Y L L A B U S

1. A 14-day break in custody ends the protection of an individual's invocation of the right to counsel under Article I, Section 7 of the Minnesota Constitution.

2. The district court did not abuse its discretion when it denied appellant's motion to suppress his post-*Miranda* statements.

3. The error in the district court's jury instruction on the elements of premeditated murder was not plain.

4. The district court's failure to give a jury instruction on accomplice testimony did not affect appellant's substantial rights.

5. The district court erred when it imposed a 360-month sentence on the attempted first-degree premeditated murder conviction because the sentence exceeds the statutory maximum of 240 months.

Affirmed in part, reversed in part, and remanded.

O P I N I O N

McKEIG, Justice.

After waiving his *Miranda* rights during a custodial interrogation in January 2017, appellant Joshua Ezeka admitted that he fired multiple shots at a rival gang member and that one of his bullets fatally struck an innocent bystander. A grand jury indicted Ezeka for several offenses, including first-degree premeditated murder. Ezeka moved to suppress his post-*Miranda* statements, asserting three arguments. First, he argued that the protection of an earlier invocation of the right to counsel under Article I, Section 7 of the Minnesota Constitution was still in effect in January 2017. Second, he argued that his post-*Miranda* statements were inadmissible under *State v. Bailey*, 677 N.W.2d 380 (Minn. 2004). Third, he argued that his post-*Miranda* statements were involuntary. The district court denied the motion, and, on appeal, Ezeka argues this was error. Ezeka also argues that he is entitled to a new trial based on an erroneous jury instruction on the elements of premeditated murder and because the district court failed to give a jury instruction on accomplice

testimony. Further, he asserts his 360-month sentence for attempted first-degree premeditated murder was error because it exceeded the statutory maximum. Because we conclude that Ezeka's statements were admissible and that the jury instructions were not plain error, we affirm Ezeka's convictions. But because Ezeka's 360-month sentence exceeded the statutory maximum, we reverse that sentence and remand for resentencing.

FACTS

This case arises from the death of Birdell Beeks, who died as a result of a shooting on May 26, 2016. That day, at 6:03 p.m., a gunman fired nine shots at a gold Toyota Corolla driven by D.G., a known member of the "Highs" gang. One of the bullets struck and killed Beeks, who was sitting in a nearby van with her granddaughter.

Police suspected the gunman had fired the shots from a grass-covered vacant lot behind the house where appellant Joshua Ezeka lived with his parents. A K-9 unit tracked a scent from the vacant lot to the back door of Ezeka's house. Concerned that the gunman fled into the house, the police set up a perimeter and conducted a protective sweep of the house.

In the course of the sweep, four of Ezeka's family members and four of his friends were removed from the house. Ezeka was not in the house. The police obtained and executed a search warrant. In a kitchen cupboard, the officers found ammunition with Ezeka's fingerprints; in Ezeka's bedroom, they found a live .380 cartridge and a revolver; and in the basement, the officers found more .380 caliber ammunition.

Ezeka was a member of a rival gang of the Highs called the "Lows." Security camera footage from a nearby intersection captured images of a vehicle driven by Lows

gang member Freddy "Little Zoe" Scott leaving the crime scene immediately after the shooting. Cellphone records showed that the cellphones of Scott and Ezeka connected at 6 p.m. on May 26, 2016, near the crime scene.

Scott testified at trial that, during a police interview, he told police that he had called Ezeka before the shooting to tell him that D.G. was driving a gold car toward Ezeka's house and was planning to "slide," i.e. shoot someone. Scott also told police that he met Ezeka in front of Ezeka's house immediately after the shooting and they drove away in Scott's vehicle.

On June 2, 2016, police investigators conducted a custodial interrogation of Ezeka. During the interrogation, Ezeka invoked his right to counsel under Article I, Section 7 of the Minnesota Constitution and the Fifth Amendment to the United States Constitution. The investigators disregarded the invocation and continued to question Ezeka. Throughout the interrogation, Ezeka maintained that he was not involved in the shooting. Ezeka was released from custody 22 days later, on June 24, 2016.

Between July 1, 2016, and December 29, 2016, Ezeka was intermittently incarcerated on unrelated matters. Ezeka had been out of custody for 24 days—beginning on December 30, 2016, and ending on January 23, 2017—when the State filed a criminal complaint charging Ezeka with second-degree intentional murder for the shooting death of Beeks. That same day, police arrested Ezeka at gunpoint and transported him to the Hennepin County jail.

After Ezeka arrived at the jail, he was interrogated in the same room and by the same investigators as the June 2016 interrogation. Unlike the June interrogation, Ezeka

did not demand an attorney. The investigators greeted Ezeka in a cordial manner, saying, "Hi Josh" and "What's going on Josh?" The investigators then asked if Ezeka remembered the earlier interrogation. Ezeka said he did. The first investigator told Ezeka they had "some additional questions." He explained that they had talked "to a lot of people," they knew "what happened," and they believed it "wasn't an intentional act on [his] part." In response to these statements, Ezeka said, "I didn't do it."

The investigators then discussed the evidence against Ezeka. They explained the charges and the fact that Ezeka was facing 60 years in prison. When Ezeka said, "It's a long time," the second investigator replied, "it's a long time, you're too young for this." The first investigator then said, "Before we start showing you any of these pictures [from our file] and talking about that, um, we gotta read you your rights." But before the first investigator could proceed, the second investigator interjected that drive-by shootings directed at Ezeka's house might end if he talked. Expressing disbelief, Ezeka asked how an admission would stop the shootings. The first investigator told Ezeka that he did not know if it's "the [H]ighs or if it's some people that are affiliated with [Beeks] . . . who [are] shooting up your house but if you can provide us with some answers, maybe some explanations here, maybe that stuff will stop."

After reminding Ezeka that he was facing 60 years in prison, the second investigator said, "The prosecutor, I think will entertain an explanation of what happened." Ezeka then asked, "So, about this person that's in this gold car that I shooting at, what's his name, you said, Sto?" When the first investigator repeated the name "Sto," Ezeka replied, "[w]ho told you guys that?" After explaining that he could not disclose the names of witnesses, the

first investigator read Ezeka the *Miranda* warning. The pre-*Miranda* portion of the January 2017 interrogation lasted 13 minutes.

Ezeka waived his *Miranda* rights. He then told the investigators he wanted to see the evidence in their file. The investigators showed Ezeka an aerial photograph of the crime scene and asked him to point to the location of his house. After discussing who was present in the house, the investigators showed Ezeka records that placed his cellphone at the crime scene and documented a call from Freddy Scott's cellphone at approximately 6 p.m. on May 26, 2016. Ezeka repeatedly denied that the caller was Scott. In the end, however, Ezeka provided the investigators a detailed description of his conduct. During his post-*Miranda* statements, he admitted receiving the phone call from Scott (who told him that D.G. was driving toward his house), leaving the backdoor of his house with a handgun, firing nine bullets at D.G.'s car, and then running to the front of his house, where he fled the scene with Scott.

In March 2017, a Hennepin County grand jury indicted Ezeka with several offenses, including first-degree premeditated murder, Minn. Stat. § 609.185(a)(1) (2018). The charge of first-degree premeditated murder alleged that Ezeka, "acting alone or intentionally aiding, advising, hiring, counseling or conspiring with another, or otherwise procures the other to commit the crime, caused the death of [Beeks], a human being, with premeditation and with intent to effect the death of that person, or another, while using a firearm."[1] The indictment also charged Ezeka with second-degree intentional murder of

[1] The "intentionally aiding, advising, hiring, counseling or conspiring with another, or otherwise procures the other to commit the crime" language comes from Minn. Stat.

Beeks, attempted first-degree premeditated murder of D.G., attempted second-degree murder of D.G., and second-degree assault of Beeks' granddaughter. Each of these charges included an aiding and abetting theory of criminal liability.

In May 2017, Ezeka moved to suppress the post-*Miranda* statements he made to the investigators during the January 2017 custodial interrogation.[2] Ezeka argued that the district court should suppress his statements for three reasons. First, he argued that the investigators obtained the statements in violation of his right to counsel under Article I, Section 7 of the Minnesota Constitution. Second, he argued that his statements were inadmissible under *State v. Bailey*, 677 N.W.2d 380 (Minn. 2004). Third, he argued that his statements were involuntary.

At a suppression hearing, the district court heard testimony from Ezeka and both investigators and also admitted a video recording and transcript of the January 2017 custodial interrogation. After considering the evidence, the district court denied Ezeka's motion to suppress as to the post-*Miranda* statements.

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§ 609.05, subd. 1 (2018), which articulates the aiding and abetting theory of criminal liability. For more than 50 years, Minnesota has recognized that "aiding and abetting" is *not* a separate substantive offense, but rather is "a theory of criminal liability." *See, e.g.*, *Dobbins v. State*, 788 N.W.2d 719, 729–30 (Minn. 2010) ("[A]ccomplice liability is a theory of criminal liability, not an element of a criminal offense or separate crime."); *State v. Britt*, 156 N.W.2d 261, 263 (Minn. 1968) ("[T]here is no separate crime of criminal liability for a crime committed by another person.").

[2] Ezeka also argued that the district court should suppress his pre-*Miranda* statements and his statements from June 2, 2016. Because the court suppressed these statements, neither of these arguments are relevant on appeal.

The court found that immediately before the January 2017 custodial interrogation, Ezeka had been out of custody for 24 days. Relying on *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010), and *State v. Scanlon*, 719 N.W.2d 674, 683 (Minn. 2006), the court concluded that the June 2016 invocation of Ezeka's right to counsel had ended before the January 2017 custodial interrogation. With regard to Ezeka's argument that his post-*Miranda* statements were inadmissible under *Bailey*, the court began its analysis by quoting the following passage from the case:

> [W]here a suspect is apprehended under coercive circumstances, is subjected to lengthy custodial interrogation before being given a *Miranda* warning, does not have the benefit of a significant pause in the interrogation after the *Miranda* warning is given, and essentially repeats the same inculpatory statements after the *Miranda* warning as before, the statements made after the *Miranda* warning are inadmissible.

Bailey, 677 N.W.2d at 392. The district court concluded that the facts of Ezeka's case were materially distinguishable from the facts of *Bailey* because the investigators did not subject Ezeka to a lengthy custodial interrogation before the *Miranda* warning was given, and because Ezeka did not simply repeat the same inculpatory statements after the *Miranda* warning. Finally, the court concluded that Ezeka's statements were voluntary. The court found that the two investigators were "cordial and encouraging during the interview, and never threatening or coercive in their demeanor." The court also found that Ezeka contributed to the 13-minute delay in the reading of the *Miranda* warning and that the investigators did not deprive Ezeka of any physical needs.

Ezeka's case proceeded to trial. During the trial, Scott testified that he called Ezeka and ordered the death of D.G. Without objection, the district court instructed the jury that,

in connection with the charge of first-degree premeditated murder, the State was required to prove, among other things, that "[Ezeka], or someone he intentionally aided and abetted, acted with premeditation," even though the evidence presented at trial indicated that Ezeka was acting as a principal when he fired the shots. Also without objection, the district court failed to instruct the jury on corroboration of accomplice testimony. During closing argument, the prosecutor emphasized Scott's involvement in calling Ezeka and "order[ing] the hit" on D.G. The jury found Ezeka guilty as charged, and the district court convicted him of all counts with the exception of two lesser-included offenses.

The district court imposed separate sentences for each victim. For the first-degree premeditated murder of Beeks, the court imposed a sentence of life without the possibility of release. For the attempted first-degree premeditated murder of D.G., the court imposed a 360-month sentence. And, for the second-degree assault committed against Beeks' granddaughter, the court imposed a 36-month sentence. The court ordered that all three sentences be served consecutively.

ANALYSIS

On appeal, Ezeka makes five arguments. First, he asks us to hold that an invocation of the right to counsel under Article I, Section 7 of the Minnesota Constitution provides greater protection than an invocation of the right to counsel under the Fifth Amendment to the United States Constitution, which ends after the suspect has been out of custody for 14 days. Second, he argues that the district court abused its discretion when it denied his motion to suppress his post-*Miranda* statements. Third, he argues that the district court committed plain error in its jury instructions on the elements of first-degree premeditated

murder. Fourth, he argues that the district court erred by its failure to instruct the jury on accomplice testimony. Fifth, he argues that his 360-month sentence for attempted first-degree premeditated murder was error because it exceeded the statutory maximum sentence. We consider each argument in turn.

I.

Ezeka asks us to hold that an invocation of the right to counsel under Article I, Section 7 of the Minnesota Constitution provides greater protection than an invocation of the right to counsel under the Fifth Amendment to the United States Constitution, which ends after the suspect has been out of custody for 14 days. We decline to do so.

The interpretation and application of the Minnesota Constitution is a legal question, which we review de novo. *State v. Castillo-Alvarez*, 836 N.W.2d 527, 534 (Minn. 2013). We acknowledge that "state constitutions are a separate source of citizens' rights and that state courts may reach conclusions based on their state constitutions, independent and separate from the U.S. Constitution." *Kahn v. Griffin*, 701 N.W.2d 815, 824 (Minn. 2005). Generally, however, we do "not construe our state constitution as providing more protection for individual rights than does the federal constitution unless there is a principled basis to do so." *Id.* Because we favor uniformity with the federal constitution, we will not reject the Supreme Court's interpretation of the Constitution merely because we desire a different result. *Id.*

Under the Fifth and Fourteenth Amendments to the United States Constitution, procedural safeguards protect an individual who is in custody and subjected to questioning. Such an individual "must be warned prior to any questioning that he has the right to remain

silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966). The Supreme Court has said an individual must unequivocally and unambiguously invoke his or her right to counsel before the police are required to stop the questioning. *See Davis v. United States*, 512 U.S. 452, 461–62 (1994). Under our constitution, however, when an individual makes an equivocal request for counsel, "officers must cease questioning the suspect except as to narrow questions designed to clarify the suspect's true desires respecting counsel." *See State v. Ortega*, 813 N.W.2d 86, 98 (Minn. 2012) (citation omitted) (internal quotation marks omitted).

Importantly, "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). But an individual's request for counsel does not forever bar police questioning. *See Shatzer*, 559 U.S. at 108–09 (noting that, absent some limitation, "every *Edwards* prohibition of custodial interrogation of a particular suspect would be eternal"). To avoid an eternal prohibition, the Supreme Court held in *Shatzer* that once an individual has been out of custody for 14 days or longer, the right to counsel must be unequivocally and unambiguously invoked again, even if properly invoked previously. *Id.* at 110. The Supreme Court reasoned that 14 days was "plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior

custody." *Id.* In other words, when an individual who was in custody and cut off from his or her normal life is out of police custody for a period of time, a 14-day break in questioning is sufficient to "preserve the integrity of an accused's choice to communicate with police only through counsel." *Id.* at 106 (quoting *Patterson v. Illinois*, 487 U.S. 285, 291 (1988)). At this point, the likelihood of a coerced confession is greatly reduced. *See id.* at 106–07.

Ezeka asks us to provide greater protection for the people of Minnesota than that provided by the federal constitution and hold that a 14-day break in custody does not end the protection of a suspect's invocation of the right to counsel under Article I, Section 7 of the Minnesota Constitution. According to Ezeka, such a holding is necessary because the *Shatzer* rule is unsound. More specifically, he argues that the 14-day period is arbitrary and that a totality-of-the-circumstances test is necessary to ensure that any residual coercive effects of a prior custody have been shaken off. We disagree.

We consider the *Shatzer* Court's analysis to be well-reasoned, including its justification for rejecting a totality-of-the-circumstances test.[3] Specifically, the *Shatzer* Court explained that "clarification in future case-by-case adjudication" is impractical because "law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful." *Id.* at 110. We agree with that reasoning.

Consequently, in this context, there is no principled basis to construe the right to counsel under Article I, Section 7 of the Minnesota Constitution as providing greater

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[3] The majority of states have adopted and applied the 14-day rule under *Shatzer*. *See, e.g.*, *State v. Yonkman*, 297 P.3d 902, 904 (Ariz. 2013); *Smith v. Commonwealth*, 520 S.W.3d 340, 347–48 (Kan. 2017); *State v. Wessells*, 37 A.3d 1122, 1130 (N.J. 2012); *State v. Edler*, 833 N.W.2d 564, 566 (Wis. 2013).

protection than the right to counsel under the Fifth Amendment to the United States Constitution. Additionally, our conclusion is consistent with our case law, both before and after the 2010 *Shatzer* decision. *See Scanlon*, 719 N.W.2d at 683 (holding that a break in custody of several months between the defendant's invocation of the right to counsel and his subsequent statements meant that he was not protected from interrogation under the *Edwards* rule); *see also State v. Borg*, 806 N.W.2d 535, 546 n.3 (Minn. 2011) (relying on the 14-day rule, post-*Shatzer*, when discussing the shortcomings of the dissent's theory). We therefore hold that a 14-day break in custody ends the protection of an individual's invocation of the right to counsel under Article I, Section 7 of the Minnesota Constitution.

II.

We next consider whether the district court abused its discretion by denying Ezeka's pretrial motion to suppress his post-*Miranda* statements. For the reasons that follow, we conclude the district court did not abuse its discretion.

When reviewing a pretrial order denying a motion to suppress, we review the district court's factual findings for clear error and its legal determinations de novo. *State v. Edstrom*, 916 N.W.2d 512, 517 (Minn. 2018). "A factual finding is clearly erroneous if it does not have evidentiary support in the record or if it was induced by an erroneous view of the law." *State v. Roberts*, 876 N.W.2d 863, 868 (Minn. 2016). When a defendant claims a confession was not voluntary, we "independently determine, on the basis of all the factual findings that are not clearly erroneous, whether or not the confession was voluntary." *State v. Anderson*, 396 N.W.2d 564, 565 (Minn. 1986).

As discussed above, there is no principled basis to construe the right to counsel under Article I, Section 7 of the Minnesota Constitution as providing greater protection in this context than the right to counsel under the Fifth Amendment to the United States Constitution, which ends after the suspect has been out of custody for 14 days. The district court's finding that Ezeka had been out of custody for 24 days before the January 2017 interrogation is not clearly erroneous. Because this break in custody exceeds 14 days, we conclude that the district court did not abuse its discretion when it determined that the protection of Ezeka's invocation of his right to counsel had ended before the January 2017 interrogation.

But, Ezeka argues, his post-*Miranda* confession was also inadmissible under *Bailey*, 677 N.W.2d 380. Ezeka's reliance on *Bailey* is misplaced. In *Bailey*, we explained that, in the absence of "any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," it is an unwarranted extension of *Miranda* to hold that the investigatory process is so tainted that "a subsequent voluntary and informed waiver is ineffective for some indeterminate period." 677 N.W.2d at 391 (quoting *Oregon v. Elstad*, 470 U.S. 298, 309 (1985)). In *Bailey*, we noted that the pre-Miranda interrogation "was accompanied by actual coercion." *Id*.

Here, the district court found there was no actual coercion during the pre-*Miranda* portion of the January 2017 custodial interrogation. After reviewing the video recording and transcript of the custodial interrogation, we conclude that the district court's findings regarding the absence of actual coercion are not clearly erroneous because they have evidentiary support in the record. This case is therefore materially different from *Bailey*.

Rather than *Bailey*, the more apposite case is *State v. Scott*, 584 N.W.2d 412 (Minn. 1998) (discussed in *Bailey*, 677 N.W.2d at 391–92). There, we said that the defendant "was not disabled from waiving his rights and confessing after he was given the requisite *Miranda* warning," simply because he "responded to [15 minutes of] unwarned yet noncoercive questioning." *Id.* at 420. The facts here are comparable to what happened in *Scott*. Ezeka responded to 13 minutes of unwarned, noncoercive questioning. By comparison, Scott responded to 15 minutes of unwarned, noncoercive questioning. *See Scott*, 584 N.W.2d at 415. Moreover, like the defendant in *Scott*, Ezeka did not make any incriminating statements during the pre-*Miranda* portion of the January 2017 custodial interrogation. *See id.* Because the facts of Ezeka's case are materially indistinguishable from the facts of *Scott*, the admission of his post-*Miranda* statements did not violate *Bailey*. *See* 677 N.W.2d at 392.

We next consider Ezeka's argument that his post-*Miranda* statements were not voluntary. "The central question in determining whether a confession is voluntary is whether the defendant's 'will was overborne at the time he confessed.' " *State v. Nelson*, 886 N.W.2d 505, 509 (Minn. 2016) (quoting *State v. Farnsworth*, 738 N.W.2d 364, 373 (Minn. 2007)). Our inquiry is not whether "police actions contributed to the utterance of inculpatory statements," but "whether [the] actions, together with other circumstances surrounding the interrogation, were so coercive, so manipulative, so overpowering that [the defendant] was deprived of his ability to make an unconstrained and wholly autonomous decision to speak as he did." *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991). Relevant factors include: the defendant's age, maturity, intelligence, education, experience,

and ability to comprehend; the nature of the interrogation; the lack of or adequacy of warnings; the length and legality of the detention; and whether the defendant was deprived of physical needs or denied access to friends. *Farnsworth*, 738 N.W.2d at 373.

According to Ezeka, the following factors demonstrate that his post-*Miranda* statements were not voluntary:[4] he was 20 years old at the time of the interrogation; he stuttered until eleventh grade; his family experienced police harassment in the past; he was unfamiliar with custodial interrogation; the investigators who conducted the January 2017 custodial interrogation ignored his June 2016 request for counsel; the investigators also suggested that, if he talked, he might receive a more lenient sentence and the shootings directed at his house might end; and he was deprived of his physical needs as evidenced by the fact that he urinated into a trashcan before the investigators entered the room.

The record shows that Ezeka was 20 years old at the time of the January interview. Although he was a young man, he was not a child. *See Pilcher*, 472 N.W.2d at 333–34 (discussing a defendant who was "twenty years old, high school educated, and had prior experience with the criminal justice system"). The record also suggests that Ezeka was familiar with the collateral consequences of a felony conviction, and his demeanor in the interrogation suggests that he was aware of the investigators' adversarial role. *See Nelson*, 886 N.W.2d at 510; *see also Pilcher*, 472 N.W.2d at 334. Although Ezeka makes credible points about his family history and his experiences with law enforcement, particularly the

[4] A challenge to the voluntariness of a confession is not the same as a challenge to the waiver of *Miranda* rights. Ezeka does not claim that his *Miranda* waiver was invalid and we observe that, during the January 2017 custodial interrogation, Ezeka was advised of his *Miranda* rights, indicated he understood his rights, and agreed to waive those rights.

investigators involved in this case, we cannot say that these factors make his statement involuntary.

As for the nature of the interrogation, we conclude that the investigators did not engage in coercive tactics. The first allegedly coercive tactic was implying that Ezeka's sentence would be more lenient if he confessed. The district court found that the investigators told Ezeka "that the prosecutor might entertain what he had to say" and informed him of the maximum sentence for the charges. Ezeka argues that, in informing him of the 60-year maximum sentence, the investigators implied that there was room for leniency in the sentence, and that a confession might have consequences for his sentence and trial.

Investigators may "inform a defendant of the possible charges or evidence marshalled against the defendant," *Pilcher*, 472 N.W.2d at 334, but "police invite suppression of [a] statement when they use promises, express or implied, in seeking to persuade a suspect to confess to a crime." *State v. Thaggard*, 527 N.W.2d 804, 811 (Minn. 1995); *see also State v. Jungbauer*, 348 N.W.2d 344, 346–47 (Minn. 1984). Not all offers to help are coercive promises, however, and promises do not render a confession involuntary in all cases. *See generally Farnsworth*, 738 N.W.2d at 374–75 (collecting cases); *Thaggard*, 527 N.W.2d at 811.

In *State v. Clark*, investigators said they knew that the defendant "didn't plan this," that his future could be "spotless," and that he might not receive life without parole if he confessed. 738 N.W.2d 316, 333–34 (Minn. 2007). The investigators appealed to the defendant's morality, and encouraged him to "get every f*ckin' demon off [his] back." *Id.*

at 334. We held that their conduct was not so coercive as to render the defendant's confession involuntary. *Id*. at 336. Similarly, in *State v. Nelson*, we concluded that appeals to the defendant's conscience and personal integrity were not coercive. 886 N.W.2d at 510. We found especially persuasive that the defendant was aware of the officers' "adversarial role" and that "he did not confess until he was confronted with the likelihood that the physical evidence would not match his story." *Id.*

There are strong parallels to *Nelson* and *Clark* here. Most importantly, the investigators did not promise that Ezeka would be charged with a lesser offense or imply that the investigators could control the prosecution. *See Clark*, 738 N.W.2d at 335 ("[I]t is important to distinguish between comments identifying the potential sentences imposed for different degrees of murder and express promises that a defendant will be charged with a lesser offense in exchange for his confession."). Moreover, the record shows that Ezeka was fully aware of the investigators' adversarial role. *See Nelson*, 886 N.W.2d at 510; *see also Pilcher*, 472 N.W.2d at 334 (concluding that the defendant was not fooled by the empathic approach because he continued to display "wariness of the police and their tactics").

Applying the principles that we articulated in *Nelson* and *Clark*, we conclude that the investigators' comments to Ezeka about the charges were not coercive. The statements were used to encourage Ezeka and appeal to his conscience, but they were not the kind of promises that would make an innocent person confess. *See State v. Slowinski*, 450 N.W.2d 107, 112 (Minn. 1990).

The second allegedly coercive tactic was implying that the safety of Ezeka's family might be affected by his decision to confess. The district court found that, during the interview, "there was discussion about shootings that had been aimed at [Ezeka's] house." The investigators "suggested that an explanation from [Ezeka] might dissuade those involved from continuing to shoot at his home."

Regardless of the propriety of the investigators' statements, we conclude that those statements, without more, were "not so coercive as to render the confession involuntary." *See Farnsworth*, 738 N.W.2d at 374. When the investigators' statements are considered in context, the record reflects that Ezeka did not take the investigators' assertions seriously. Ezeka immediately replied, "some people are still gonna [*sic*] come and do that." *See id.* at 375 (finding a confession was voluntary when the defendant's prior experience gave him reason to disbelieve that the police had the power to carry out their threats); *see also State v. Spaeth*, 552 N.W.2d 187, 195 (Minn. 1996). It is unreasonable to conclude that Ezeka was coerced into making a confession by an investigator's comment that he did not believe. The record simply does not support the conclusion that Ezeka's will was overborne by these statements. *See Nelson*, 886 N.W.2d at 509.

Finally, Ezeka's decision to urinate into the trash can—rather than asking to be escorted to a restroom—has no persuasive value. The record does not show that Ezeka relieved himself in the trash can because police refused a request to use the restroom. Rather, the video shows that Ezeka urinated into the trash can within seconds of entering and being left alone in the interrogation room—hardly an intentional deprivation of his needs. *See, e.g.*, *Nelson*, 886 N.W.2d at 511; *State v. Camacho*, 561 N.W.2d 160, 170

(Minn. 1997); *State v. Moorman*, 505 N.W.2d 593, 600 (Minn. 1993) (concluding that defendant's hunger did not render a statement involuntary because "the police were totally unaware of it and did not use it to coerce an involuntary confession").

Based on the district court's factual findings, which are not clearly erroneous, and our independent review, we find nothing "so coercive, so manipulative, [or] so overpowering" as to suggest that Ezeka's will was overborne when he confessed. *See Nelson*, 886 N.W.2d at 509; *Pilcher*, 472 N.W.2d at 333. For these reasons, the district court did not abuse its discretion when it denied Ezeka's pretrial suppression motion.

III.

Ezeka also argues the district court committed an error that was plain when it instructed the jurors on the elements of premeditated murder. We disagree.

Without objection, the district court instructed the jury that, in connection with the charge of first-degree premeditated murder, the State was required to prove, among other things, that "[Ezeka], or someone he intentionally aided and abetted, acted with premeditation." According to Ezeka, these instructions misstated the law because they permitted the jury to find that the premeditation element was satisfied if the jury believed Freddy Scott acted with premeditation. Ezeka further argues that the impact of this misstatement of law was amplified by the prosecutor's closing argument, which emphasized Scott's undisputed act—calling Ezeka and "order[ing] the hit" on D.G.

A defendant forfeits appellate review of a jury-instruction issue when he fails to object to the instruction in the district court. *State v. Zinski*, 927 N.W.2d 272, 275 (Minn. 2019). But, under the plain-error standard, we have the discretion to consider a

forfeited issue if the defendant establishes (1) an error, (2) that is plain, and (3) that affects his substantial rights. *Id.* The error requirement is satisfied when the jury instructions "confuse, mislead, or materially misstate the law." *State v. Smith*, 674 N.W.2d 398, 401–02 (Minn. 2004). An error is plain if it is "clear" or "obvious." *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). A defendant's substantial rights are affected when "there is a reasonable likelihood that the giving of the instruction in question had a significant effect on the jury verdict." *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006)). If the defendant establishes all three requirements, "we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Mouelle*, 922 N.W.2d 706, 718 (Minn. 2019).

A brief discussion of aiding and abetting liability is necessary to fully assess Ezeka's claim that the jury instructions materially misstate the law. Ordinarily, a person is "responsible only for criminal acts committed by himself." 8 Am. Jur. 2d *Proof of Facts* § 1 (1976). But the aiding and abetting statute, Minn. Stat. § 609.05, subd. 1 (2018), provides that "[a] person is criminally liable for *a crime committed by another* if the person intentionally aids, advises, hires, counsels, or conspires with or *otherwise procures the other to commit the crime*." (Emphasis added.). We commonly use the word "principal" when referring to the person who committed the crime and the word "accomplice" when referring to the person who intentionally aided the principal's commission of the offense. *See State v. Huber*, 877 N.W.2d 519, 524 (Minn. 2016). "We have long held that aiding and abetting is not a separate substantive offense . . . ." *State v. DeVerney*, 592 N.W.2d

837, 846 (Minn. 1999). Instead, it is "a theory of criminal liability." *Dobbins v. State*, 788 N.W.2d 719, 729–30 (Minn. 2010). In other words, section 609.05 makes accomplices criminally liable as principals. *State v. Lee*, 683 N.W.2d 309, 315 (Minn. 2004); *State v. King*, 622 N.W.2d 800, 804 (Minn. 2001). There is no need to rely on section 609.05 when the criminal act is committed by the accused because a person is directly liable for his or her actions as a principal.

After reviewing the jury instructions as a whole, we conclude that the district court erred when it instructed the jury on aiding and abetting liability. There was no evidence that Ezeka acted as an accomplice, and the State's theory at trial was that Ezeka was the shooter and, therefore, directly liable for his actions as a principal. Consequently, there was no need for the district court to instruct the jurors on an aiding and abetting theory of criminal liability.

In addition, the district court used confusing and misleading language to describe this unnecessary theory of criminal liability. For example, in instructing the jurors that the State needed to prove "[Ezeka], or someone he intentionally aided and abetted, acted with premeditation," the district court's use of the word "acted" allowed the jury to find Ezeka guilty of premeditated murder if the State proved either that Ezeka *fired the shots* with premeditation or that Scott *ordered the hit* with premeditation. To be clear, if Ezeka fired the shots with premeditation, his liability as the principal could have been extended to Scott under an aiding-and-abetting theory of criminal liability because Scott procured Ezeka to commit the crime. *See* Minn. Stat. § 609.05, subd. 1. But Scott's premeditation in ordering

the hit cannot be used to satisfy a necessary element of the principal crime, namely Ezeka's premeditation in firing the shots.

Having concluded that the district court improperly provided the jury an aiding and abetting instruction, we consider whether the error was clear and obvious. In two cases within the last decade, we have *discouraged* instructions that combine accomplice liability and the underlying elements (commonly referred to as "hybrid instructions"). In *Huber*, "we encourage[d] district courts to separately instruct the jury on accomplice liability and on the underlying elements of the substantive offenses." 877 N.W.2d at 524 n.3. And in *State v. Bahtuoh*, "we encourage[d] district courts to separately instruct the jury on accomplice liability and the underlying substantive offense because of the different state-of-mind requirements for criminal liability as a principal rather than as an accomplice." 840 N.W.2d 804, 815 n.1 (Minn. 2013). But discouraging words do not create a well-established rule. Because the district court's erroneous instruction did not violate a well-established rule, we conclude that the error was not plain. We take this opportunity, however, to emphasize that district courts must separately instruct the jury on accomplice liability and on the underlying elements of the substantive offenses. The era of hybrid instructions has ended.

IV.

Ezeka argues that a second jury-instruction error—the district court's failure to instruct the jurors on uncorroborated accomplice testimony—also requires reversal. Ezeka argues that because Scott was an accomplice, the district court was required to instruct the jury that it could not convict Ezeka based on Scott's uncorroborated testimony.

Ezeka failed to request, or object to the absence of, an accomplice-testimony jury instruction. We therefore review the failure to give the instruction under the plain-error standard. *State v. Barrientos-Quintana*, 787 N.W.2d 603, 611 (Minn. 2010). As above, Ezeka must establish (1) an error, (2) that is plain, and (3) that affected his substantial rights. *See Zinski*, 927 N.W.2d at 275. If he does so, "we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Mouelle*, 922 N.W.2d at 718.

It is undisputed that the district court's failure to provide an accomplice testimony jury instruction was plain error under our case law. *See State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002). We therefore turn to the error's effect, if any, on Ezeka's substantial rights. Ezeka bears the burden of showing that "there is a 'reasonable likelihood' that the absence of the error would have had a 'significant effect' on the jury's verdict." *See State v. Reed*, 737 N.W.2d 572, 583–84 (Minn. 2007). In determining whether a defendant has met this burden, we consider whether the jury relied on corroborating evidence and not just the accomplice testimony standing alone. We conduct an independent review of the record and consider all relevant factors that may bear on the question. Our recent cases have highlighted four non-exclusive factors that we consider as part of that review. *See, e.g.*, *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (considering " 'whether the testimony of the accomplice was corroborated by significant evidence, whether the accomplice testified in exchange for leniency, whether the prosecution emphasized the accomplice's testimony in closing argument, and whether the court gave the jury general witness credibility instructions.' " (quoting *State v. Jackson*, 746 N.W.2d

894, 899 (Minn. 2008)); *State v. Lee*, 683 N.W.2d 309, 316–17 (Minn. 2004) (concluding based on evidence in the record, closing argument, and other instructions that an "independent review of the record compels the conclusion" beyond a reasonable doubt that an omitted accomplice instruction "did not have a significant impact on the verdict").

Here, Ezeka argues that Scott's testimony is the only evidence of Ezeka's premeditation and intent to kill D.G. Accordingly, Ezeka asserts the failure to instruct the jury that it could not rely solely on Scott's testimony means that the jury may have convicted Ezeka in violation of Minn. Stat. § 634.04 (2018) ("A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense . . . ."). We disagree.

First, significant corroborating evidence was introduced that supported Ezeka's premeditation and intent.[5] Cellphone records showed that Scott called Ezeka just before the shooting and that he was in the same area as Ezeka during and after the shooting. Security camera footage shows Scott's vehicle leaving the crime scene immediately after the shots were fired. Ezeka also corroborated Scott's testimony himself, admitting during his January 2017 interrogation that he received a phone call from Scott regarding D.G., left his house with a handgun, fired nine bullets at D.G.'s car, and fled the scene in Scott's car after the shooting. Further, the jury was instructed on the general credibility of witnesses

[5] "Corroborative evidence need not, standing alone, be sufficient to support a conviction, but it must 'affirm the truth of the accomplice's testimony and point to the guilt of the defendant in some substantial degree.' " *Reed*, 737 N.W.2d at 584 (quoting *State v. Sorg*, 144 N.W.2d 783, 786 (Minn. 1966)). The evidence "need only be sufficient to restore confidence in the truthfulness of the accomplice's testimony." *State v. Clark*, 755 N.W.2d 241, 256 (Minn. 2008).

and the jury knew that Scott was an accomplice who received a plea deal in exchange for his testimony. Viewing the record together with all relevant factors, we conclude that Ezeka failed to show a reasonable likelihood that the failure to provide an accomplice-testimony jury instruction had a significant effect on the jury's verdict. The evidence reasonably supports a conclusion that the jury believed, and relied upon, more than just Scott's testimony. Accordingly, although the district court committed an error that was plain when it failed to provide an accomplice-testimony jury instruction, the error did not affect Ezeka's substantial rights.

V.

The district court sentenced Ezeka to 360 months imprisonment on the conviction of attempted first-degree premeditated murder. The parties agree that this was error because the statutory maximum for this offense is 240 months. *See* Minn. Stat. § 609.17, subd. 4(1) (2018) (providing that "[w]hoever attempts to commit a crime may be sentenced as follows: (1) if the maximum sentence provided for the crime is life imprisonment, to not more than 20 years."). We therefore reverse Ezeka's 360-month sentence and remand to the district court for resentencing on this offense.

CONCLUSION

For the foregoing reasons, we affirm Ezeka's convictions, reverse his sentence for attempted first-degree premeditated murder, and remand for resentencing on that offense.

Affirmed in part, reversed in part, and remanded

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

ANDERSON, Justice (concurring in part and dissenting in part).

The issue presented in this appeal is how best to safeguard individual liberty when a suspect is detained. Because appellant Joshua Ezeka was out of custody during the 14 days prior to the custodial interrogation, I concur in the court's conclusion that the protection of his earlier invocation of the right to counsel had ended. But because I conclude that Ezeka's post-*Miranda* statements were obtained using unconstitutional coercive custodial interrogation methods, I respectfully dissent.

The Fifth Amendment, as applied to Minnesota through the Due Process Clause of the Fourteenth Amendment, protects a defendant from self-incrimination. *See* U.S. Const. amends. V, XIV; *see also Miranda v. Arizona*, 384 U.S. 436, 442 (1966). When the police interrogate a person who is in custody, "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444; *see also State v. Walsh*, 495 N.W.2d 602, 605 (Minn. 1993) (requiring a *Miranda* warning for custodial interrogations). This is because "[t]he underlying purpose of *Miranda* was to stop certain coercive practices used by police in custodial interrogation." *State v. Champion*, 533 N.W.2d 40, 43 (Minn. 1995). Any waiver of this right by an individual must be made "voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. at 444. For a statement to be voluntarily given, a person must give those statements without the presence of "promises, trickery, deceit, and stress-inducing techniques." *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991).

I first turn to a review of the district court's factual findings relating to Ezeka's confession, which are reviewed under the clearly erroneous standard. *See State v. Anderson*, 396 N.W.2d 564, 565 (Minn. 1986). "A factual finding is clearly erroneous if it does not have evidentiary support in the record or if it was induced by an erroneous view of the law." *State v. Roberts*, 876 N.W.2d 863, 868 (Minn. 2016). When reviewing confessions, a reviewing court considers all the factual findings that are not clearly erroneous and independently determines whether a confession was voluntary. *Anderson*, 396 N.W.2d at 565. I then consider the voluntariness of Ezeka's confession before addressing why a new trial is necessary.

I.

I begin my analysis by considering whether any of the district court's findings are clearly erroneous. After reviewing the record, I conclude that two of the findings made by the district court—those related to the delay in providing Ezeka with the *Miranda* warning and those related to the demeanor of the investigators—are clearly erroneous.

The first factual error was the finding of the district court that Ezeka caused the delayed reading of the *Miranda* warning. This finding is not supported by the record. During the 13 minutes in which Ezeka is interrogated prior to being read his *Miranda* warning, every time the first investigator indicates that he intends to read the *Miranda* warning, it is the second investigator, not Ezeka, who interjects. For example, when the first investigator says, "we gotta read you your rights," the second investigator interrupts, saying:

> Before you read that, we, we know what's going on at your house there, your house has been shot up twice last weekend. Maybe, maybe some admi, admission on your part . . . we don't wanna see your mom get killed or your dad get killed because they're in the house when it gets shot up.

At a minimum, the officers used their team interrogation tactics to prolong the police interview without reading Ezeka his *Miranda* warning. The district court's factual finding that Ezeka was the cause of the delay of his *Miranda* warning is clearly erroneous.

Second, the district court erred when it found that the investigators were "cordial and encouraging during the interview, and never threatening or coercive in their demeanor." This finding is not supported by the record. For the first 13 minutes of the interrogation before reading Ezeka his *Miranda* rights, the investigators used body language, conduct, false legal advice, and the nature of custodial interrogation to create a coercive atmosphere. The second investigator frequently leans into Ezeka, and in response Ezeka is seen showing common signs of stress, such as crossing his arms, hunching over, covering his face, and fidgeting. At one point Ezeka says, "[Y]'all trying [to] yell at me."

The investigators provided Ezeka with the false legal advice that speaking with them might be Ezeka's "only opportunity to get [his] story out" because he might be barred from testifying at trial.[1] This conduct by the investigators is troubling because "giving false legal advice" is one of the deceptive stratagems that contributes to the coercive nature of custodial interrogations. *See Miranda*, 384 U.S. at 455. After explaining that he was facing up to 60 years in prison, the investigators also suggested that an admission could lead to

[1] This advice was false because "the right of a criminal defendant to testify is a personal right and the decision whether to testify is ultimately for the defendant." *State v. Smith*, 299 N.W.2d 504, 506 (Minn. 1980).

leniency from the prosecutor. The investigators repeatedly told Ezeka that they did not want to see his parents killed and that an admission might end the drive-by shootings at his family home and the threat to the lives of his parents. The coercive effect of repeated suggestions that a confession could lead to the end of drive-by shootings at his family home and the threat to the lives of his parents cannot be overstated. Finally, the fact that Ezeka was questioned in the same room (which now smelled of urine) by the same investigators who disregarded his previous request for counsel added to the coercive nature of the unwarned portion of the January 2017 custodial interrogation. In light of these facts, the district court's findings related to the nature of the encounter and the demeanor of the investigators were clearly erroneous.

These clearly erroneous findings formed the foundation of the district court's conclusion that the unwarned portion of the custodial interrogation did not create such a coercive atmosphere that Ezeka's will was overborne at the time he made his confession. As a result, the district court's conclusion, and similarly the court's conclusion, is unsound.

II.

I next turn to the question of whether, under the totality of the circumstances, Ezeka's confession was voluntary. "[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

The key question is whether the conduct of the investigators prior to administering the *Miranda* warning taints Ezeka's post-*Miranda* confession. The court concludes that

because Ezeka made no incriminating statements to police before he was read his *Miranda* rights, his confession was voluntary. This reasoning is flawed for two reasons.

I first conclude that actual coercion occurred during the first 13 minutes of Ezeka's interrogation. The failure of the investigators to administer a *Miranda* warning, by itself, does not mean that Ezeka's statements were actually coerced. *Oregon v. Elstad*, 470 U.S. 298, 310 (1985). But when, as here, events "by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings," the confession is the product of actual coercion. *Missouri v. Seibert*, 542 U.S. 600, 616 (2004). Important to my analysis is that Ezeka's unwarned confession was produced by false legal advice and repeated suggestions that an admission might end the drive-by shootings at his family home and the threat to the lives of his parents. These circumstances, along with the deliberate delay, created actual coercion.

Upon entering the interrogation room, the investigators set the tone by reminding Ezeka of their last encounter, which had occurred six months before, in the same interrogation room, and with the same investigators. This context is relevant because, when Ezeka previously met with the investigators, he requested an attorney and informed the investigators that his family had experienced negative encounters with police in the past. Rather than ceasing the interrogation, the investigators disregarded his invocation of his right to counsel and continued questioning him. The investigators reminded Ezeka of the prior interaction by stating that it was a "contentious meeting the first time." Shortly after reminding Ezeka of their previous interaction, one of the investigators attempts to begin to read Ezeka his *Miranda* rights. The second investigator quickly interrupts the first

investigator and, while leaning toward Ezeka, implores Ezeka to confess. Just as in the first interrogation where the investigators circumvented Ezeka's right to counsel, here, from the start of the interrogation, using a question-first-inform-later strategy, the investigators failed to give the *Miranda* warning in a timely and appropriate fashion.

While deliberately withholding the *Miranda* warning, the investigators then gave false legal advice to Ezeka: that he may be prevented from testifying at trial and therefore should confess to police because it may be his "only opportunity" to get his "story out." The interrogation tactics used by investigators are not new and is the type of conduct that the Supreme Court sought to deter in *Miranda*. The *Miranda* Court warned: "When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice." 384 U.S. at 455. Such a stratagem "exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.*; *see also United States v. Anderson*, 929 F.2d 96, 101–02 (2d Cir. 1991) (holding that the government agent coerced a defendant by giving false legal advice to get his confession and noting that "[i]n *Miranda* the [Supreme] Court expressly disapproved [of] deceptive stratagems such as giving false legal advice, stating: 'any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege' " (quoting *Miranda*, 384 U.S. at 476)).

After giving false legal advice, the investigators also repeatedly told Ezeka that they did not want to see his parents killed and that a confession from Ezeka might end the drive-by shootings at his family home and the threat to the lives of his parents. The court waves away these threats, arguing that "[r]egardless of the propriety of the investigators'

statements," the threats to Ezeka's family were not coercive because there is no reason to think that Ezeka believed the investigators. But threats and promises by police are often more coercive when directed at someone related to the accused, rather than direct threats or promises to the accused. *Compare Lynumm v. Illinois*, 372 U.S. 528, 534–35 (1963) (police threats that the suspect's children would be taken from her invalidated confession), *and State v. Anderson*, 298 N.W.2d 63, 65 (Minn. 1980) (noting that the promise to free a relative in exchange for a confession may render a confession involuntary), *with State v. Nelson*, 886 N.W.2d 505, 510 (Minn. 2016) (holding that vague appeals by police to a suspect's "conscience" and "personal integrity" are not coercive), *and State v. Beckman*, 354 N.W.2d 432, 437 (Minn. 1984) (holding that the police statement that "any cooperation would be brought to the trial court's attention" did not invalidate confession). Importantly here, the investigators' statements neither helped Ezeka understand his rights, *see State v. Slowinski*, 450 N.W.2d 107, 111 (Minn. 1990), nor were the product of an "empathic approach" to policing, *see State v. Farnsworth*, 738 N.W.2d 364, 374 (Minn. 2007); nor was Ezeka's statement made with the benefit of being represented by an attorney, *see State v. Spaeth*, 552 N.W.2d 187, 195 (Minn. 1996). Rather, advanced today is the notion that only certain promises made by police—those that make believable offers of leniency—can be coercive.

The investigators repeatedly delayed and stalled giving the *Miranda* warning, using threats, conduct, false promises, and coercive police tactics until Ezeka confessed. The totality of the circumstances supports the conclusion that actual coercion by the investigators occurred.

Second, I conclude that the court misunderstands the relevance of the timing of events here. The existence of actual coercion during an unwarned portion of a custodial interrogation fundamentally alters the analysis that is applied in determining whether post-*Miranda* statements are admissible. The Supreme Court acknowledged the competing analyses in *Oregon v. Elstad*. The *Elstad* Court explained that when the unwarned statement "*is actually coerced*, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." 470 U.S. at 310 (emphasis added). By contrast, when the unwarned statement is "*unaccompanied by any actual coercion* or other circumstances calculated to undermine the suspect's ability to exercise his free will," it is an unwarranted extension of *Miranda* to hold that the investigatory process is so tainted that "a subsequent voluntary and informed waiver is ineffective for some indeterminate period." *Id.* at 309 (emphasis added). In other words, a voluntary and informed waiver of *Miranda* rights cleanses the taint of an unwarned statement when the statement was unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will.

Consequently, in determining whether Ezeka's post-*Miranda* statements were admissible, a reviewing court should consider the time that passed between the unwarned statement and the post-*Miranda* confession, the change in place of interrogations, and the change in identity of the interrogators. The post-*Miranda* statements directly followed the unwarned, coercive custodial interrogation, and there was no change in the place of

interrogation or the identity of the investigators. Ezeka's confession was the product of unlawful coercive police tactics.

The court does not discuss or apply *Elstad*; instead, it applies the inapplicable test for unwarned statements that are unaccompanied by actual coercion. But even if this were the proper test, relying on *State v. Scott*, 584 N.W.2d 412 (Minn. 1998), to justify the investigators' conduct here is misplaced. The unwarned questioning of Ezeka was not the "low key," 15-minute questioning of the defendant in *Scott*. *See* 584 N.W.2d at 419. In a 13-minute period, the investigators here (1) remind Ezeka of his previous encounter in which the investigators ignored his constitutionally protected request for counsel; (2) offer false legal advice; and (3) callously discuss the drive-by shootings occurring at his family home, suggesting that his confession may prevent future shootings. The nature of the questioning by the investigators, not its brevity, controls in this case.

I, therefore, conclude that the district court erred by denying Ezeka's motion to suppress and admitting the post-*Miranda* statements into evidence at trial.

III.

Because I conclude that Ezeka's post-*Miranda* statements were erroneously admitted at trial, I must next determine whether their admission entitles Ezeka to a new trial. "[T]he admission of a defendant's statements to police at trial in violation of *Miranda* does not require a new trial if the state can show beyond a reasonable doubt that the error was harmless." *State v. Farrah*, 735 N.W.2d 336, 343 (Minn. 2007). An error is harmless beyond a reasonable doubt when the jury's verdict was "surely unattributable to the error." *Id.* "[I]t is not sufficient to find that without the error enough evidence exists to support

the conviction . . . ." *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997). Independent evidence sufficient to meet the "surely unattributable" standard has included DNA evidence, possession of the victim's property, and physical evidence placing the defendant at the scene. *State v. Day*, 619 N.W.2d 745, 750–51 (Minn. 2000). But the mere presence of some independent evidence is not enough to conclude that the conviction was "surely unattributable" to the admission of a confession.

Generally, when a confession was erroneously admitted at trial, it constitutes harmful error because of the "powerful evidentiary value" of the confession. *State v. Chavarria-Cruz*, 784 N.W.2d 355, 365 (Minn. 2010). For example, in *Chavarria-Cruz*, the defendant was convicted of second-degree murder; he appealed the verdict, arguing that his confession should have been suppressed. *Id.* at 357, 360. Although a statement from a witness implicated the defendant in the murder and the State presented other evidence of his guilt, the admission of his statement was not harmless beyond a reasonable doubt. *Id.* at 365. Here, the State argues that the jury's verdicts were "surely unattributable" to the admission of Ezeka's post-*Miranda* statements. In support of its argument, the State relies on the following evidence: (1) the photographs of Ezeka "throwing up" the gang sign for the Lows, which verified that he is a member of the Lows gang; (2) the cell phone data, which confirmed that Freddy Scott called Ezeka before and after the shooting and placed Ezeka near the location of the shooting at the time of the event; (3) the surveillance camera footage that captured images of a vehicle driven by Scott leaving the crime scene immediately after the shooting; (4) the forensic evidence that showed the bullets recovered from D.G.'s car and Beeks's chest, along with other bullets

found at the crime scene, were all fired from the same firearm; and (5) the ShotSpotter audio recording proving that nine shots were fired.[2] Although this evidence arguably supports Ezeka's convictions, the question before us is not whether, without the error, there exists enough evidence to support the convictions. Instead, the question is: What effect did the error have on the jury's verdicts? *See Farrah*, 735 N.W.2d at 343. In light of the "powerful evidentiary value" of Ezeka's post-*Miranda* statements, I cannot conclude that the guilty verdicts were "surely unattributable" to the erroneous admission of the statements. *See Chavarria-Cruz*, 784 N.W.2d at 355. Ezeka is therefore entitled to a new trial.

For the foregoing reasons, I would reverse the judgment of conviction and remand to the district court for a new trial. I respectfully dissent.

HUDSON, Justice (concurring in part and dissenting in part).

I join in the concurrence and dissent of Justice Anderson.

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[2] The number of shots fired is a relevant fact to establish the nature of the killing, which is one of three categories of evidence used to infer premeditation. *See State v. Holliday*, 745 N.W.2d 556, 563–64 (Minn. 2008) (stating that the number of times the defendant uses the weapon is considered to determine his or her intent); *State v. Goodloe*, 718 N.W.2d 413, 419–20 (Minn. 2006) (same).

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

THISSEN, Justice (concurring in part and dissenting in part).

This is a tragic case. Escalating mutual gang retribution left an innocent victim, Birdell Beeks, dead from an act of senseless violence. This case cries out for justice for Ms. Beeks and her family. But part of justice is ensuring that it is reached in a fair and constitutional manner that respects the individual liberty rights that we all cherish. In the midst of our fight for American values during World War II, we stated that the question before us "does not involve the guilt or innocence of the defendant. It concerns only his constitutional rights. The law of the land is the only yardstick which can be allowed to gauge the liberties of citizens, whatever may be their ill or just desert." *State v. Kelly*, 15 N.W.2d 554, 556 (Minn. 1944); *see generally Brown v. Mississippi*, 297 U.S. 278, 285 (1936) (stating that "the freedom of the state in establishing its policy is the freedom of a constitutional government and is limited by the requirement of due process of law").

I agree with the court's holding affirming the district court's decision that appellant Joshua Ezeka's invocation of his *Miranda* rights in June 2016 did not carry over to prevent the police from interrogating him again in January 2017. But I would rest that conclusion on our decision in *State v. Scanlon*, 719 N.W.2d 674 (Minn. 2006) (holding that a defendant who was out of custody for months between interrogations was "sufficiently 'out of custody' for his *Edwards* invocation to be nullified" without establishing a bright-line rule). I would not unnecessarily establish a bright-line 14-day expiration date for properly invoked *Miranda* rights. I disagree with the majority of the court that Ezeka's confession was voluntary. I conclude that his confession was the result of improper and

unconstitutional police coercion. Because I conclude that Ezeka's conviction should be reversed and the case remanded for a new trial, I would not reach the jury instruction issues, although it is clear that the district court should have given an accomplice corroboration instruction. Finally, I agree with the court that the district court erred by sentencing Ezeka to more than the statutory maximum sentence on the attempted-premeditated-murder conviction.

I.

Ezeka argues that his January 2017 statement to police should be suppressed because police reinitiated interrogation after he had invoked his *Miranda* rights to silence and to the advice of an attorney during his June 2016 interrogation. Consistent with the unique values of Minnesotans and the history of our state, we have held that our Minnesota Constitution provides more protection to individual liberty than the United States Constitution in precisely the context of continuing police interrogation after the invocation of *Miranda* rights. *Compare State v. Ortega*, 813 N.W.2d 86, 98 (Minn. 2012) (noting that Minnesota "case law imposes an additional obligation" that the United States Constitution does not require "on officers when a suspect makes an equivocal request for counsel"), *and State v. Risk*, 598 N.W.2d 642, 648–49 (Minn. 1999) (requiring police to "stop and clarify" an ambiguous invocation of the right to counsel before continuing with interrogation), *with Davis v. United States,* 512 U.S. 452, 461–62 (1994) (stating that an officer has "no obligation to stop questioning a suspect" when that suspect's "statement is not an unambiguous or unequivocal request for counsel"). Unless there is a good reason to do so,

we should not back away from that commitment to protecting Minnesotans' liberties in any context. And there is no good reason to do so in this case.[1]

The facts here demonstrate that Ezeka's previous invocation of his right to counsel made during his June 2016 interrogation did not carry over to prevent the January 2017 interrogation. In *Scanlon*, we held that a break in custody of several months nullified Scanlon's prior invocation of his right to counsel. 719 N.W.2d at 682–83. I agree with the district court that the rule in *Scanlon* applies equally here, where Ezeka had been out of police custody for 102 days of the 235 days between the June 2016 interrogation when he invoked his right to counsel and the January 2017 interrogation. There is no reason for our court to reach out beyond the facts of this case to adopt the federal bright-line 14-day rule of *Maryland v. Shatzer*, 559 U.S. 98 (2010).[2] *See State v. N. Star Research & Dev. Inst.*,

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[1] To be fair, the court's holding is not inherently inconsistent with Minnesota's commitment to greater protection for individual liberty under the Minnesota Constitution. The court is not overruling our clear precedent interpreting the Minnesota Constitution to provide broader protection to suspects during investigations than is provided under the United States Constitution. But I cannot understand why this Minnesota court, in a case where it need not reach the issue, would voluntarily cede the constitutional authority granted to it by the people of Minnesota to a panel of nine non-Minnesotans sitting in Washington D.C. *See generally Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 831, 833 (Minn. 1991) (noting Minnesota's long tradition of assuring the right to counsel beyond the protections provided by the federal constitution and holding that the Minnesota Constitution affords suspects a limited right to consult an attorney before deciding whether to submit to chemical testing for blood alcohol).

[2] I do not agree that a totality-of-the-circumstances test is impractical for assessing whether sufficient time has passed after a *Miranda* warning has been given to reinitiate an interrogation, or that the needs of the police and public safety demand an arbitrary bright-line rule that the Supreme Court of the United States seemingly plucked out of thin air. *See generally* Hannah Misner, *Maryland v. Shatzer: Stamping a Fourteen-Day Expiration Date on Miranda Rights*, 88 Denver Univ. L. Rev. 289 (2010) (critiquing the decision in *Shatzer*). Certainly no evidence was admitted in this case that crime-fighting has been

200 N.W.2d 410, 425 (Minn. 1972) ("This court does not decide important constitutional questions unless it is necessary to do so in order to dispose of the case.").

II.

Ezeka asserts that his January 2017 statement must be suppressed as the product of coercion. As our division on this issue shows, this is a difficult decision.

Dating back many decades, the Supreme Court of the United States recognized that the Due Process Clause of the United States Constitution prohibits the State from using confessions obtained under coercive circumstances such that an individual's will was overborne at the time the confession was made. *See Dickerson v. United States*, 530 U.S. 428, 433–34 (2000) (reaffirming due process prohibition on use of involuntary confessions); *Miller v. Fenton*, 474 U.S. 104, 109–10 (1985); *Brown*, 297 U.S at 286. The Supreme Court has repeatedly stated that coerced confessions implicate the "complex of values" that underlies the Due Process Clause. *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960); *see also Miller*, 474 U.S. at 109–10. Those values include avoiding false confessions, ensuring that police obey the law while enforcing the law, upholding a civilized system of justice, as well as the values of "human dignity, personal autonomy and mental freedom." *See* Joshua Dressler & Alan C. Michaels, *Understanding Criminal*

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impaired because Minnesota police are uncertain about the number of days they must wait after a break in custody before they can reinitiate an interrogation. I trust police officers to exercise the type of reasonableness that underlies the totality-of-the-circumstances test in that regard. More to the point, we cannot anticipate the precise facts of future cases. There may be a situation in the future where the reinitiation of an interrogation of an individual after 18 days out of custody crosses the line into unconstitutionally compelled self-incrimination. We should wait for that much closer case—not the more than seven times 14 days at issue here—to shunt away the unique protections of our Minnesota Constitution.

Procedure 406–07 (LexisNexis ed., 5th ed. 2010) (citing *Colorado v. Connelly*, 479 U.S. 157, 165–66 (1986); *Miller*, 474 U.S. at 109; and *Spano v. New York*, 360 U.S. 315, 320 (1959)). Many of these fundamental values are implicated in this case. Recognizing the fundamental unfairness inherent in coerced confessions, true statements as well as false statements resulting from coerced confessions must be suppressed. *See Rogers v. Richmond*, 365 U.S. 534, 544–45 (1961).

In addition to constitutional concern for fundamental fairness, coerced confessions also run afoul of the Fifth and Sixth Amendments which protect individual liberty from the overwhelming power of the State in criminal prosecutions. *See* U.S. Const. amends. V, VI. In *Miranda v. Arizona*, the Supreme Court recognized that "custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals" and held that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations. 384 U.S. 436, 455, 478 (1966); *see Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (stating that the Fifth Amendment privilege against compelled self-incrimination is binding on the States). The Supreme Court has determined that custodial interrogations are presumptively coercive. *Miranda*, 384 U.S. at 455; s*ee also Oregon v. Elstad*, 470 U.S. 298, 304–07 (1985) (interpreting *Miranda* to state that custodial interrogations are presumptively coercive).

In assessing whether Ezeka's statement was coerced—whether his will was overborne—we examine whether Ezeka was "deprived of his ability to make an unconstrained and wholly autonomous decision to speak." *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991). We assess whether such deprivation occurred by considering all

the circumstances surrounding the interrogation and confession. *Id.* The State has the burden of proving the voluntariness of the confession by a preponderance of the evidence. *State v. Nelson*, 886 N.W.2d 505, 509 (Minn. 2016).

I start with the findings of the district court which are entitled to due deference unless clearly erroneous. *State v. Anderson*, 396 N.W.2d 564, 565 (Minn. 1986). The district court, having reviewed the interrogations and hearing the testimony of the two officers and Ezeka, issued a lengthy and detailed order with several important findings that are supported by the record. But I conclude that the district court clearly erred when it determined as follows: "[One investigator] mentioned several times that he was going to read [Ezeka] his *Miranda* rights, but it was [Ezeka] who kept asking questions which delayed the reading of *Miranda*." For the reasons stated by Justice Anderson, the district court's finding is flatly contradicted by the record. In fact, on more than one occasion, the second police investigator distracted the first investigator from reading Ezeka his *Miranda* rights.[3] The court makes no effort to seriously engage with the central fact that a detective, who previously and indisputably ignored Ezeka's constitutional rights, made a conscious and deliberate decision to repeatedly delay the *Miranda* warning in an inherently coercive environment.

[3] I also find the district court's conclusion that the investigators were "cordial and encouraging during the interview" to be an overstatement. But I am not convinced the finding matters much. Our constitution does not require that police be cordial and encouraging. Based on my review of the record, the demeanor of the investigators was also not unusually harsh or threatening, which should be the relevant inquiry.

Ezeka makes three arguments that his will was overborne, thereby making his statement involuntary. First, he argues that the police promised that he would receive a more lenient sentence if he admitted that he fired the shots at the car, including the shot that killed Birdell Beeks. We have acknowledged that express or implied promises of special treatment in exchange for a confession may render the confession involuntary. *See Nelson*, 886 N.W.2d at 505; *State v. Biron*, 123 N.W.2d 392, 397–99 (Minn. 1963). But we have also been clear in numerous cases that we will not find the confession involuntary when it was not reasonable in the circumstances for a suspect to understand the police statement as a promise of special treatment in exchange for a confession. *See Nelson*, 886 N.W.2d at 509–10; *State v. Cox*, 884 N.W.2d 400, 410 (Minn. 2016) (observing that officers made no promise that if the suspect confessed, "they would attempt to obtain favorable treatment for him from the prosecutors"); *State v. Farnsworth*, 738 N.W.2d 364, 374–75 (Minn. 2007) (concluding that there was no promise of treatment made in lieu of prosecution); *In re Welfare of M.D.S.*, 345 N.W.2d 723, 732 (Minn. 1984) (holding that the statements of police provided no objective basis for a juvenile to believe that if she cooperated with the investigation and confessed, she would be given immunity); *State v. Merrill*, 274 N.W.2d 99, 107–08 (Minn. 1978) (concluding that police made no actual or implied promise by informing the suspect that, although they had evidence supporting a murder charge, others in a similar situation had been charged with manslaughter), *abrogated on other grounds by State v. Dahlin*, 695 N.W.2d 588 (Minn. 2005); *see generally State v. Williams*, 535 N.W.2d 277, 287 (Minn. 1995) (stating that the purpose of the rule suppressing involuntary confessions is to deter coercive police conduct).

The police never promised—explicitly or implicitly—that Ezeka would receive more leniency from prosecutors if he cooperated and confessed. Rather, he was told truthful information about the potential consequences he faced. *See Pilcher*, 472 N.W.2d at 334 (stating that it is not improper for police to inform a suspect of possible charges and evidence in the case). Accordingly, I agree with the court: I cannot conclude that Ezeka was coerced by false promises.

Second, Ezeka argues that the investigators' suggestions that a confession would mean people would stop shooting up his family's house, reducing the risk to his parents and family, was coercive. Police statements that raise the specter that a confession may reduce a threat of physical violence to a suspect or his family could, in certain circumstances, be sufficiently powerful to cause an innocent suspect to falsely admit to conduct. And it remains a factor even here for purposes of the totality-of-the-circumstances test. But based on my review of the record, Ezeka did not confess to ensure his family's safety. Indeed, Ezeka contested the investigators' reasoning during the interrogation. Consequently, I agree with the court on this point. I cannot conclude in these circumstances that Ezeka's confession was coerced by suggestions that a confession would keep his family safe.

Third, Ezeka asserts that coercion was demonstrated by a constellation of police conduct that overbore Ezeka's will. The same investigators who interrogated Ezeka in January 2017 blatantly ignored a plain request to remain silent and speak to a lawyer during

the June 2016 interrogation;[4] following the June 2016 interrogation, Ezeka was held in police custody for 23 days; immediately prior to the January 2017 interrogation, Ezeka was apprehended after six officers with guns drawn entered his girlfriend's bedroom where he and his girlfriend were together; the police failed to immediately give Ezeka a *Miranda* warning at the beginning of the January 2017 interrogation; and multiple times during the January 2017 interrogation one investigator refused to allow the other investigator to read Ezeka his *Miranda* rights, including at least one instance where the investigator expressly waived off the *Miranda* rights. Notably, the district court expressly found that one investigator "appeared anxious to keep [Ezeka] from saying anything substantive about the case until the *Miranda* warning had been read." But the warning kept being delayed. That is simply impermissible conduct.

Based on those experiences, Ezeka argues, he had no reason to believe that the investigators would honor a future request to speak with a lawyer or a refusal to talk to police. Stated another way, Ezeka argues that he perceived the promise that the investigators would allow him to remain silent to be meaningless because, based on his

[4] As discussed above, I concur in the court's decision that the passage of several months nullified the June 2016 *Miranda* warning such that the investigators did not violate the federal and Minnesota constitutions by initiating a second interrogation of Ezeka in January 2017. That conclusion does not mean, however, that we cannot consider the investigators' June 2016 conduct when they ignored Ezeka's invocation of his right to remain silent and to speak to counsel as part of our totality-of-the-circumstances inquiry into whether Ezeka's January 2017 statements were the product of an unconstrained and wholly autonomous decision to speak. Indeed, his treatment by the police in June 2016 and January 2017 in the investigation of the Beeks murder is Ezeka's most relevant and important experience for purposes of assessing whether his confession was voluntary or coerced.

relevant and immediate experience, the investigators simply would not honor that right and would continue to interrogate him until he confessed. If true, that is unquestionably a coercive interrogation; indeed, it is the definition of one.

I conclude that the State did not carry its burden of proving that, under the circumstances just described, Ezeka was not deprived of his ability to make an *unconstrained* and *wholly autonomous* decision to speak. *See Pilcher*, 472 N.W.2d at 333. The State does not now contest that the investigators ignored a clear and unequivocal invocation of Ezeka's *Miranda* rights in June 2016 or that he was held in jail for 23 days after that interrogation. The detectives indisputably and intentionally delayed giving Ezeka a *Miranda* warning in January 2017 for over 13 minutes of interrogation even though (as the State agrees) Ezeka was in custody. And a review of the interrogation transcript and video shows that one investigator specifically overrode the efforts of the other investigator to give the *Miranda* advisory.

Our coercion inquiry is a totality-of-the-circumstances analysis, which, by its nature, requires a case-by-case approach. But over time, our coercion jurisprudence has evolved into a formula—the often repeated *Jungbauer* list of factors.[5] *See, e.g.*, *Pilcher*, 472 N.W.2d at 333. We must remain vigilant that the analysis does not devolve into the

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[5] The coercion inquiry includes consideration of such factors as

> the age, maturity, intelligence, education, and experience of the defendant and the ability of the defendant to comprehend; the lack or adequacy of warnings; the length and legality of the detention; the nature of the interrogation; whether the defendant was deprived of physical needs; and whether the defendant was denied access to friends.

State v. Jungbauer, 348 N.W.2d 344, 346 (Minn. 1984) (citing *State v. Linder*, 268 N.W.2d 734, 735–36 (Minn. 1978)).

checking off of boxes on a list, regardless of whether any particular factor says anything about the specific case under consideration, or whether other factors may be relevant to the inquiry in a particular case. And I agree that some of the physical aspects of this interrogation were not unreasonable. There were no physical threats or intimidation tactics.

The court relies on the asserted brevity of the delay—13 minutes—between the time the January 2017 interrogation started and when Ezeka received the *Miranda* warning. Certainly, in other cases, we have found a confession voluntary after a slightly longer delay between the initiation of the interrogation and the *Miranda* warning. *See State v. Scott*, 584 N.W.2d 412, 418 (Minn. 1998) (referring to an unwarned 15-minute period of interrogation). But there is no magic constitutional time period that makes an interrogation voluntary or coerced. What matters is what happened before and during those 13 minutes. In this case, during those 13 minutes, the investigators—the same investigators who had completely ignored Ezeka's right to remain silent and to counsel just months before—refused multiple times to provide a *Miranda* warning, ignoring the underlying constitutional promises that an individual will not be forced by the State to testify against himself. In that broader context of his prior experiences, Ezeka likely would feel isolated and hopeless; a fact the investigator played upon by delaying and waving off efforts to inform Ezeka of his constitutional rights.

The investigators easily could have read Ezeka his *Miranda* rights at the start of the custodial interrogation. Had the officers done so, the course and experience of the interrogation would have been different. The State offers no explanation as to why the detectives failed to immediately give the warning. Notably, in our long series of cases

dealing with questions of coercion and the voluntariness of a confession, there are very few examples of a custodial interrogation where the police did not provide a *Miranda* warning before the interrogation. Indeed, in several cases, we noted that the suspect was advised *multiple* times of his *Miranda* rights during an interrogation.

The court also vaguely relies on Ezeka's experience with law enforcement in determining that his confession was voluntary. Experience with law enforcement and having a criminal history may be relevant to assessing whether a statement was voluntary. The court asserts that Ezeka's history "suggests that he was familiar with the collateral consequences of a felony conviction [that he could go to prison], and his demeanor in the interrogation suggests that he was aware of the investigators' adversarial role." And to the extent that Ezeka claims that he believed he would get a more lenient sentence by cooperating, I agree that those considerations may be relevant with the proper proof.

But that is not the source of the coercion about which I am concerned. Ezeka's experience with law enforcement generally is not relevant to demonstrate that his experience with these investigators in June 2016 and January 2017 rendered his confession unconstrained and wholly autonomous. The State presented—and the district court found—no evidence, either specific to Ezeka or based on broader social science research, to demonstrate that Ezeka was more likely to withstand coercive police techniques because of his history with law enforcement than another suspect without the same history.[6] There

[6] We should take great care when we use an individual's general experience with law enforcement or a criminal history to assess whether a confession was voluntary. The practical effect of an assumption that individuals with experience in the criminal justice system are more likely *as a group* to be able to stand up to coercive police conduct is to

is nothing in the record that tells us anything about his experiences one way or the other, particularly with regard to interrogations following arrests. For all we know from the record, it is equally possible that Ezeka's assertion of his constitutional rights, including the right to remain silent, may have been ignored previously as well.

Finally, the fact that the detectives ultimately advised Ezeka of his *Miranda* rights and Ezeka acknowledged those rights does not automatically cleanse the interrogation of coercion. We recognized as much in *State v. Bailey*, 677 N.W.2d 380, 391–92 (Minn. 2004) (suppressing statements made after a *Miranda* warning where the suspect was subjected to coercive police interrogation before the *Miranda* warning was given).[7]

The recitation of *Miranda* rights is a constitutionally founded prophylactic against the inherently coercive nature of custodial interrogations. A valid *Miranda* warning, accompanied by a voluntary, knowing, and intelligent waiver of the suspect's Fifth and Sixth Amendment rights, eliminates the *presumption* that a confession given during a

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further embed in our criminal justice system the class and racial disparities that already exist. Because people of color and poor people are more likely to have experience with the criminal justice system, a rule of law that systemically—rather than based on individual case-by-case assessments—provides less protection for their constitutional rights will inevitably perpetuate those disparities and reduce trust in the fairness of our courts. *See, e.g.*, Susan M. Behuniak, *How Race, Gender, and Class Assumptions Enter the Supreme Court*, 10 Race, Gender & Class 1, 79–82 (2003) (describing how judicial assumptions about the "real" world serve as starting points from which to engage in legal reasoning are not always based on empirical data, but may be derived from culture or individual subconscious values and may also reflect "an expression of power, hierarchy, and perhaps even oppression").

[7] This case differs from *Scott*, 584 N.W.2d at 418–19, where the totality of the circumstances and police conduct did not evince a coercive environment that overcame the suspect's exercise of free will.

custodial interrogation was coercive. But the giving of a *Miranda* warning does not convert an otherwise coerced confession into a voluntary confession. "[I]t would be absurd to think that mere recitation of the litany suffices to satisfy [the constitutional prohibition on coerced confessions] in every conceivable circumstance." *Missouri v. Siebert*, 542 U.S. 600, 611 (2004).

Siebert is instructive. In *Siebert*, a police officer held off on giving a *Miranda* warning until he had extracted a confession from the suspect. *Id.* at 604–06. The officer subsequently gave the suspect a *Miranda* warning after which the suspect confessed again. *Id.* at 605–06. The *Siebert* Court held that the second confession was inadmissible. *Id.* at 617. In so holding, the *Siebert* Court reasoned that a *Miranda* warning is effective only when it gives the suspect a "real choice" about giving a statement. *Id.* at 609, 612.

In this case, the totality of the investigators' conduct—wholly ignoring a demand for assistance of counsel and to remain silent in June 2016, followed by weeks in jail, an arrest at gunpoint by six armed officers in his girlfriend's bedroom, and the same investigators' repeated failure and refusal to allow the *Miranda* rights to be administered during the January 2017 custodial interrogation—rendered the entire interrogation coercive. And because of the specific conduct of the investigators who interrogated him in June 2016 and January 2017, Ezeka likely did not believe that his constitutional rights would be honored. The conduct of the investigators suggests that they would interrogate Ezeka until he confessed, and the State did not carry its burden and introduce evidence sufficient to overcome that conclusion. In short, Ezeka's experience taught him that he did not have a real choice about making a statement. Accordingly, the investigators' belated

reading of the *Miranda* warning to guarantee his rights was meaningless and cannot cleanse the already existing coercive conditions into an unconstrained and wholly autonomous decision to speak.

In summary, I conclude that Ezeka's inculpatory statement was not the product of an unconstrained and wholly autonomous decision to speak. The statement should have been excluded at trial. And for the reasons stated by Justice Anderson, I cannot conclude that the guilty verdict in this case was surely unattributable to the constitutionally impermissible admission of the statement. Therefore, I would reverse and remand for a new trial.