STATE OF MINNESOTA

IN SUPREME COURT

A18-1886

Hennepin County

Hudson, J.
Concurring, Thissen, Lillehaug, JJ.

State of Minnesota,

Respondent,

vs.

Filed: April 22, 2020
Office of Appellate Courts

James Andre Woodard,

Appellant.

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. The district court did not abuse its discretion when it denied appellant's motion to present an alternative-perpetrator defense for lack of sufficient foundation.

2. The district court committed an error that was plain by instructing the jury on the order in which to consider the charges against the appellant, but the error did not affect

appellant's substantial rights because there is no reasonable likelihood that the instruction affected the jury's verdict.

Affirmed.

O P I N I O N

HUDSON, Justice.

A Hennepin County jury found appellant James Andre Woodard guilty of first-degree murder and the district court sentenced him to life in prison without the possibility of release. Woodard appeals from the judgment of conviction and requests a new trial on two grounds. First, Woodard contends that the district court erred in denying his motion to present an alternative-perpetrator defense. Second, Woodard argues that the district court plainly erred in instructing the jury on the order in which to consider the charges against him. For the reasons addressed below, we affirm the district court.

FACTS

Thirty-two year old Divittin Hoskins was shot to death on July 28, 2017, while socializing with friends and family in the parking lot by his sister's townhome in North Minneapolis. Police officers responded to the scene of the shooting, set up a perimeter around the parking lot, and began to identify potential witnesses. Police learned that Hoskins's children and his niece witnessed the shooting. Officers went to the townhome of L.H., Hoskins's sister, to interview the children. Inside the townhome, police spoke with K.H. and D.H., two of Hoskins's children, as well as his niece. K.H. described the shooter as a fat black man with braided hair, wearing a gray hooded sweatshirt, a white t-shirt, and jeans. D.H. told the officers that the shooter was wearing a gray hooded

sweatshirt with black pants and a black hat. Hoskins's niece said the shooter was a light-skinned black man wearing a gray hooded sweatshirt and black pants.

The day after the shooting, on July 29, 2017, L.H. began asking questions in the community about the murder and heard that Woodard may have been involved. She went online to look at Woodard's Facebook profile, and found a picture of Woodard as well as a video of him. L.H. allowed the child witnesses to view the photo and the video of Woodard, and two of them identified Woodard as the man who shot and killed Divittin Hoskins. L.H. contacted one of the investigators, Sergeant Klund, to inform her of the children's statements. Sergeant Klund asked L.H. to bring the children to CornerHouse for forensic interviews, to occur on August 2, 2017.

In addition to the eyewitnesses, the investigation into the shooting led officers to a surveillance video of the parking lot where the murder occurred. The video shows the shooter hiding along the side of a detached garage next to the parking lot. As the shooter stands by the side of the garage, a man later identified as E.R. is seen socializing in the parking lot and then walking over to talk to the shooter. After speaking with the shooter for a moment, E.R. walks around from the side of the garage and through the parking lot, stopping at the far end of the lot to look around. He then turns and walks back to the side of the garage. At the same time, the shooter walks behind the garage out of view of the camera. Both men disappear from view behind the garage for a moment, before E.R. returns to the party. A few minutes after E.R. returns to the parking lot, the shooter reappears from the back of the garage. He pulls out a gun, runs up to where Hoskins stands

next to four children, and fires one shot into the back of Hoskins's head at close range. The shooter then turns around and flees.

Sergeant Klund interviewed E.R. for the first time on July 30, 2017, two days after the murder. E.R. acknowledged that he was in the parking lot at the time of the murder, but claimed that his back was turned to Hoskins and he did not see the murder and had no knowledge of the shooter's identity. Even after Sergeant Klund showed E.R. stills from the surveillance video that contradicted his story, E.R. refused to reveal the identity of the shooter. Sergeant Klund read E.R. his *Miranda* rights and continued the interview. E.R. then identified Woodard as the shooter after the police showed him a series of photographs of people who police believed were at the scene.

Based on the eyewitness identifications made by E.R. and the children, police took Woodard into custody on August 1, 2017. On August 3, 2017, E.R. was charged with the offense of first-degree murder under an aiding and abetting theory of liability and the offense of aiding an offender after the fact. E.R. later entered into a plea agreement[1] that dismissed the second-degree murder charge in exchange for his testimony against Woodard.

Police continued to investigate the Hoskins murder into September 2017. Sergeant Klund spoke with G.P., an acquaintance of Woodard and a friend of the Hoskins family, on September 20, 2017. G.P. told Sergeant Klund that he was at the home of a man named T.R. two days before the murder, where he witnessed T.R. give Woodard a handgun.

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[1] As part of the plea agreement, E.R. pleaded guilty to the offense of aiding an offender after the fact and received a downward durational sentencing departure.

Pre-trial motions and preparation continued through the end of 2017 and the spring of 2018. Woodard filed a motion to introduce alternative-perpetrator evidence on July 5, 2018. The accompanying memorandum identified T.R. as the alleged alternative perpetrator. Woodard's proffer identified several potential pieces of evidence as foundation for the motion, including: (1) a photo of T.R. that showed that he is a light-skinned black man of similar build to the shooter; (2) at the time of the Hoskins murder, T.R. lived two-and-a-half blocks from the location of the shooting; (3) T.R. might have had a motive to kill Hoskins based on T.R.'s friendship with a man referred to as Fernando because it was rumored that Hoskins's brother was involved in a shooting of Fernando; (4) a witness saw T.R. give Woodard a gun two days before the murder; and (5) T.R. was suddenly absent from Minneapolis after the Hoskins murder. The district court denied Woodard's motion to present an alternative-perpetrator defense on the grounds that Woodard had not presented evidence that inherently connected T.R. to the murder of Hoskins.

After the State and Woodard presented their cases to the jury, the court instructed it on the elements of first-degree murder and the lesser-included offense of second-degree murder. The court also instructed the jury that it should "only consider murder in the second degree if there's a not guilty finding on murder in the first degree." The jury returned a verdict of guilty on the first-degree murder charge. The district court sentenced Woodard to life in prison without the possibility of release.

ANALYSIS

I.

We first address the district court's ruling on Woodard's motion to present alternative-perpetrator evidence. We review a district court's denial of a motion to present alternative-perpetrator evidence for an abuse of discretion. *Huff v. State*, 698 N.W.2d 430, 435 (Minn. 2005).

A defendant's constitutional right to a fair opportunity to defend against criminal charges "includes the right to present evidence that a third party (an 'alternative perpetrator') committed the crime for which the defendant was charged." *Troxel v. State*, 875 N.W.2d 302, 307 (Minn. 2016). This right, however, "is not absolute." *State v. Jenkins*, 782 N.W.2d 211, 224 (Minn. 2010). A defendant's motion to present alternative-perpetrator evidence is still subject to the foundation and admissibility requirements outlined in *State v. Hawkins*, 260 N.W.2d 150, 159 (Minn. 1977).

We said in *Hawkins* that district courts should follow a two-step process to determine whether to admit alternative-perpetrator evidence upon a defendant's motion. 260 N.W.2d at 159. First, the district court considers whether the defendant laid the proper foundation to admit alternative-perpetrator evidence by analyzing whether the proffered evidence has "an inherent tendency" to connect the alleged alternative perpetrator with the "actual commission of the crime." *Id.* (citation omitted) (internal quotation marks omitted). "This requirement avoids the use of bare suspicion and safeguards the third person from indiscriminate use of past differences with the deceased." *Id.* In considering whether the defendant has established the required foundation, a court must focus on "the evidence, not

the assertions, contained in the proffer." *State v. Nissalke*, 801 N.W.2d 82, 102 (Minn. 2011) (citation omitted) (internal quotation marks omitted).

We have previously held that "[e]vidence of motive alone does not have the inherent tendency to connect a third party to the commission of the crime." *Troxel*, 875 N.W.2d at 309 (quoting *State v. Larson*, 787 N.W.2d 592, 598 (Minn. 2010)). Similarly, "[m]ere presence at the scene of the crime does not, by itself, create an inherent tendency to connect a person alleged to be the alternative perpetrator to the commission of the charged crime." *State v. Atkinson*, 774 N.W.2d 584, 590 (Minn. 2009). On the other hand, we have held that the foundational requirement was satisfied when the alternative perpetrator made a statement that "was, in essence, an admission . . . that he was involved in [the victim's] murder." *State v. Vance*, 714 N.W.2d 428, 439 (Minn. 2006).

If the defense does not lay the proper *Hawkins* foundation, the court need not move to the second step of the process outlined in *Hawkins*. *See State v. Palubicki*, 700 N.W.2d 476, 485 (Minn. 2005) ("If the defendant fails to lay a proper foundation, the alternative-perpetrator evidence is not admissible and the trial court need not consider any of the alternative perpetrator evidence further."). But if the defense does lay sufficient foundation, the court must move to the second step and consider the admissibility of the alternative-perpetrator evidence. *Jenkins*, 782 N.W.2d at 224.

Under the second *Hawkins* step, a court considers whether the evidence in question is admissible under the "ordinary rules of evidence." *Jenkins*, 782 N.W.2d at 224; *see also State v. Jones*, 678 N.W.2d 1, 17 (Minn. 2004) (explaining that the district court should evaluate reverse-*Spreigl* evidence of "prior crimes, wrongs, or bad acts" by an alternative

perpetrator under the heightened clear and convincing admissibility standard, but noting that not all alternative-perpetrator evidence is reverse-*Spreigl* evidence). If so, "evidence of the motive of a third person to commit the crime, threats by the third person, or other miscellaneous facts which would tend to prove the third person committed the act" may be presented to the jury. *Hawkins*, 260 N.W.2d at 159 (footnotes omitted) (citations omitted).

Woodard argues that the district court abused its discretion by ruling that his proffer did not satisfy the first, foundational step of the *Hawkins* process. As foundation for his alternative-perpetrator motion, Woodard offered the following: (1) T.R. and the shooter were both thin, light-skinned black men; (2) at the time of the murder, T.R. lived approximately two-and-a-half blocks from the parking lot where Hoskins was shot; (3) T.R. may have had a motive to kill Hoskins because T.R. had a close relationship with the victim of a prior shooting and Hoskins's brother was allegedly connected to the incident; (4) a witness saw T.R. give a gun to Woodard two days before the murder; (5) T.R. was not seen at his home after the Hoskins murder.

As explained above, "our task is to determine whether the evidence, not the assertions, contained in the proffer" establish an inherent connection between the alleged alternative perpetrator and the commission of the crime. *Jenkins*, 782 N.W.2d at 228; *see also Nissalke*, 801 N.W.2d at 102 ("Nissalke's bare assertions as to what could have happened are not evidence and do not have an 'inherent tendency' to connect B.F. or E.L. to the crime."). In this case, it was not an abuse of discretion for the district court to conclude that Woodard failed to satisfy the first step of the process outlined in *Hawkins* because the evidence, as opposed to the assertions, contained in Woodard's proffer failed

to establish an inherent connection between the alleged alternative perpetrator and the commission of the crime.

Woodard's evidence of T.R.'s physical appearance establishes that T.R. bears similarities to the description of the shooter, but the description of the shooter is lacking in specificity (a thin, light-skinned black man) such that any number of people would match the description. And while Woodard asserted that T.R. could have committed the murder because he lived near the scene, Woodard did not present any evidence showing that T.R. was at home or otherwise near the parking lot on the day of the murder. *See, e.g.*, *State v. Larson*, 787 N.W.2d 592, 598 (Minn. 2010) (holding that the district court did not abuse its discretion in denying the defendant's motion to present an alternative-perpetrator defense where the defendant did not proffer evidence showing the alleged alternative perpetrator was "at or near the murder scene" or "had the opportunity" to murder the victim).

Woodard's argument about motive is similarly speculative. The defense argued that T.R. had a motive to kill Hoskins based on T.R.'s relationship with Fernando and T.R.'s presence at the prior shooting, but defense counsel did not proffer any evidence of T.R.'s desire to seek revenge against Hoskins. *See Troxel*, 875 N.W.2d at 309 (finding a third party's "purported motive" unconvincing in the absence of "any overt indication of violence, threats, anger, jealousy, or frustration").

The witness statement that T.R. gave Woodard a gun in the days before the crime could suggest involvement on T.R.'s part, but it does not link T.R. to the actual commission of the murder because it puts the potential murder weapon in Woodard's hand, rather than

in T.R.'s hand. *See Palubicki*, 700 N.W.2d at 486–87 (concluding that evidence of potential accomplice liability did not have an inherent tendency to connect an alleged alternative perpetrator to the actual murder).

The defense's use of a witness statement concerning T.R.'s whereabouts in the period following the murder also relies on an assertion in an effort to link T.R. to the actual commission of the crime. Specifically, defense counsel cited the witness's statement that he had not seen T.R. since the shooting, as well as a "rumor" that the murderer had fled the state. We rejected a similar argument in *State v. Jenkins*. In that case, the appellant argued that the district court abused its discretion in denying a motion to present alternative-perpetrator evidence for lack of foundation based in part on a claim that the alleged alternative perpetrator "fled" the state following the crime. *Jenkins*, 782 N.W.2d at 228. Not only did the evidence fail to show that the third party fled, rather than leaving for a legitimate reason, we also noted that the third party's whereabouts after the fact did not link the third party to the actual commission of the crime. *Id.* The same is true here, except that there is no evidence that T.R. actually left the state after the crime, only a witness's statement that he had not seen T.R. since two days before the murder and a rumor that the murderer had fled after the shooting.

For these reasons, the district court did not abuse its discretion in holding that Woodard's proffered evidence in support of his motion to present alternative-perpetrator evidence did not satisfy the *Hawkins* foundational requirement. Excluding the speculation regarding T.R.'s whereabouts on the day of the crime, and setting aside the bare assertions regarding T.R.'s motive and his alleged flight from the state, the evidence proffered by

Woodard, even when considered cumulatively, did not have the inherent tendency to connect T.R. to the actual commission of the murder of Hoskins.[2]

II.

We next address whether the district court erred when instructing the jury on the order in which to consider the charges against Woodard. We review the district court's instructions for plain error because Woodard did not object to the instructions at trial. *See* Minn. R. Crim. P. 31.02 ("Plain error affecting a substantial right can be considered by the court . . . on appeal even if it was not brought to the trial court's attention."). Under the plain-error standard, Woodard must demonstrate (1) that the district court's instructions were in error; (2) that the error is plain; and (3) that the error affected his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If he satisfies this burden, we must then determine whether we "should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.*

We held in *State v. Prtine* that a district court must not suggest the order in which the jury should consider the charges against a defendant. 784 N.W.2d 303, 316 (Minn. 2010). The district court in *Prtine* told "the jury that it should proceed 'down the

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[2] Woodard also argues that the district court placed too much weight on whether the proffer established T.R.'s presence at the scene of the crime. We disagree. Although the district court discussed at length Woodard's failure to place T.R. at the scene, it did not rest its ruling solely on the question of presence at the scene.

To be clear, under the first step of the process outlined in *Hawkins*, direct evidence of an alternative perpetrator's presence at the scene of the crime is not a *necessary* component of foundation. There may be cases where overwhelming circumstantial evidence of motive, opportunity, and method of murder has an inherent tendency to connect an alternative perpetrator to the scene of the crime even in the absence of direct evidence of presence at or near the scene. This, however, is not one of those cases.

line' until it arrived at a guilty verdict." *Id.* at 317. We noted that "[c]onsideration of both the greater-[]and lesser-included crimes is important because it may cause the jury to evaluate the evidence differently with regard to an essential element." *Id.* at 316.

Here, the district court told the jury to "only consider murder in the second degree if there's a not guilty finding on murder in the first degree." In doing so, the district court committed an error that is plain. We are therefore left with the question of whether the instruction affected Woodard's substantial rights.

An erroneous jury instruction affects a defendant's substantial rights if " 'there is a reasonable likelihood that giving the instruction in question had a *significant* effect on the jury verdict.' " *State v. Johnson*, 915 N.W.2d 740, 746 (Minn. 2018) (quoting *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006)). A jury instruction that erroneously directs the jury to consider the more serious charge first does not have a significant effect on the verdict if no rational jury would have acquitted the defendant of the more serious charge based on the evidence at trial. *See Prtine*, 784 N.W.2d at 317 (holding that a defendant was not prejudiced by a district court's jury instruction where there was "uncontroverted evidence" of the predicate felony and intent to kill supporting the first-degree murder guilty verdict); *Griller*, 583 N.W.2d at 741–42 (summarizing the evidence and concluding that it was unlikely that the jury would accept the defendant's defense-of-dwelling defense); *State v. Dimmick*, 586 N.W.2d 127, 130 (Minn. 1998) ("On the facts presented by this case, we can find no rational basis for the jury to have concluded that Dimmick did not intend to kill Tigner.").

Woodard was charged with first-degree premeditated murder and second-degree intentional murder. The critical difference between the jury instructions for these charges is the element of premeditation. *See State v. Goodloe*, 718 N.W.2d 413, 423 (Minn. 2006) ("The element of premeditation differentiates first-degree premeditated murder from second-degree intentional murder.").

Unlike most cases where "intent and premeditation are not easily susceptible to direct proof," *State v. Dahlin*, 695 N.W.2d 588, 601 (Minn. 2005), the surveillance video of the parking lot shows a shooter lying in wait for Hoskins. The footage of the shooter hiding behind the garage before running up to shoot Hoskins in the back of the head at close range clearly establishes premeditation. *See, e.g.*, *State v. Gray*, 456 N.W.2d 251, 259 (Minn. 1990) ("The jury could reasonably have found this to be an execution-type killing, which is a clear example of premeditated murder."). Moreover, Woodard's defense was not that the shooter acted without premeditation, but instead that he was not the shooter. Based on this record, no rational jury could have found Woodard not guilty of first-degree premeditated murder but guilty of second-degree intentional murder. Because there is no reasonable likelihood that the instruction affected the jury's verdict, we conclude that Woodard failed to satisfy his burden on the third requirement of the plain-error standard.

CONCLUSION

For the foregoing reasons, we affirm the judgment of conviction.

Affirmed.

C O N C U R R E N C E

THISSEN, Justice (concurring).

Based on our precedent, I concur in the well-reasoned decision we reach today. The court applies our law fairly and sensibly.

I write separately to raise concerns with our alternative-perpetrator-evidence jurisprudence. Our jurisprudence is overcomplicated, requiring district courts to apply a vague threshold test before alternative-perpetrator evidence is introduced. I am not convinced that anyone knows exactly how to determine what constellation of acts has an "inherent tendency" to connect a person to a crime. We certainly have provided no precise contours of the "inherent tendency" principle since we first articulated it—in dicta—over 40 years ago. *See State v. Hawkins*, 260 N.W.2d 150, 159 (Minn. 1977).

Our current alternative-perpetrator rule treats people accused of a crime differently than those attempting to prove the accusation. The threshold inquiry prevents an accused person from introducing relevant (if circumstantial) evidence that another person committed the crime. For instance, in the absence of threshold evidence placing the alternative perpetrator at the scene of a crime, we have held that even substantial circumstantial evidence that another person committed the crime is insufficient to place an alternative-perpetrator theory before the jury. *See, e.g.*, *State v. Flores*, 595 N.W.2d 860, 868–69 (Minn. 1999) (affirming exclusion of evidence that the victim owed the alternative perpetrator money, that alternative perpetrator had threatened a person who had failed to pay debts, that the alternative perpetrator's business card was at the crime scene, and that the alternative perpetrator was at the victim's house on the day of the crime, because no

evidence placed the alternative perpetrator at the crime scene at the time of the murder); *State v. Williams*, 593 N.W.2d 227, 232–34 (Minn. 1999) (affirming exclusion of evidence that alternative perpetrator had threatened a friend of the victim's, had an order for protection issued against him by one of the victims, had been in court for vandalizing the victim's house just days before the murder, and had been seen peering in the window of the victim's home before the murder, because no evidence placed the alternative perpetrator at the crime scene). At the same time, we have also said that alternative-perpetrator evidence may be excluded even with proof that a person *was* present when the crime was committed. *See State v. Atkinson*, 774 N.W.2d 584, 591–92 (Minn. 2009).

We do not impose so high a burden on the State. Not only can the prosecution introduce evidence that the accused committed a crime, but it also can seek to convict a person and send him to prison for the rest of his life based solely on circumstantial evidence of motive and opportunity. To convict, the State need not offer any proof that the accused was at the crime scene. *See, e.g.*, *State v. DeRosier*, 695 N.W.2d 97, 108 (Minn. 2005) (affirming a first-degree murder conviction based on evidence that the defendant had a motive to commit the murder, had access to a murder weapon, and had a key to the victim's residence, despite the fact that there was no evidence connecting the defendant to the scene at the time of the crime). This asymmetry seems particularly unfair because the accused rarely has the resources—and very rarely resources that can match those of the State—required to adequately investigate and prove that someone else committed the crime.

It is illogical—and simply unfair—to impose these differing burdens of proof on the State and the defense. That is especially true in a system where an accused is meant to be

presumed innocent. Wigmore identified precisely this problem when criticizing alternative perpetrator rules like ours:

> The question that arises, from the point of view of the rules of evidence, is whether, in evidencing the doing of an act by a third person as a fact of disproof, any unusual requirements should be made concerning the strength of the evidence before it can be admitted. Thus, to prove *A* guilty of murder, evidence of his threats (i.e., a design) to commit it are always admissible; now, if the fact to be proved is that *B* committed the murder (as inconsistent with *A*'s guilt), why should not *B*'s threats be admitted, without further restriction, as *A*'s are? It is true that evidence of *B*'s threats alone would not go far toward proving *B*'s commission; but it is not a question of absolute proof, nor even of strong probability, but only of raising a reasonable doubt about *A*'s commission, and for this purpose the slightest likelihood of *B*'s commission may suffice or at least assist. The evidence of *B*'s threats, to be sure, may, in a given instance, be too slight to be worth considering, but it seems unsound as a general rule to hold that mere threats, or mere evidentiary facts of any one sort, are to be rejected if unaccompanied by additional facts pointing toward *B* as the doer.

1A John Henry Wigmore, *Evidence in Trials at Common Law* § 139, at 1724 (Tillers rev. ed. 1983) (citation omitted).

Finally, our two-step alternative-perpetrator analysis runs hard up against—if not beyond—constitutional limits. The United States Constitution "guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citation omitted) (internal quotation marks omitted); *see also State v. Jones*, 678 N.W.2d 1, 15–16 (Minn. 2004) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)). Consequently, an evidentiary rule that infringes on the right to present a complete defense cannot be arbitrary or disproportionate to the purposes the rule is designed to serve. *Holmes v. South Carolina*, 547 U.S. 319, 324–25 (2006).

In *Holmes*, the United States Supreme Court struck down as unconstitutional a South Carolina evidentiary rule that allowed South Carolina courts to consider the strength of the prosecution's evidence in assessing whether a defendant's evidence of third-party guilt was admissible. *Id.* at 323–34, 331. The purported purpose of the rule was to focus criminal trials on "central issues by excluding evidence that ha[d] only a very weak logical connection" to those issues. *Id.* at 330. The Supreme Court ruled that consideration of the strength of the State's case did not rationally serve that underlying purpose. *Id.* The Supreme Court also noted that the rule asymmetrically applied to exclude only evidence offered by the accused person, but not to similar evidence offered by the State. *Id.* at 330−31; *see also United States v. Scheffer*, 523 U.S. 303, 316 n.12 (1998) (noting that the evidence rule struck down in *Washington v. Texas*, 388 U.S. 14 (1967), as a violation of the constitutional right to present a defense, was problematic because it burdened only the defense and not the prosecution). Likewise, Minnesota's alternative-perpetrator jurisprudence, especially as it has evolved over the decades, treats the admissibility of similar evidence differently depending on whether it is offered by the State or by the accused.

I also doubt if requiring defendants to jump through a preliminary "inherent tendency" hoop helps courts exclude irrelevant evidence or evidence whose probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead, any more effectively than application of a more straightforward and common analysis under Minnesota Rules of Evidence 401 and 403. *See generally* David McCord, *"But Perry Mason Made it Look So Easy!": The Admissibility of Evidence Offered by a Criminal*

Defendant to Suggest that Someone Else is Guilty, 63 Tenn. L. Rev. 917 (1996) (providing a broad overview of alternative-perpetrator evidence and the issues with the "direct connection doctrine" in evidence law). On the other hand, analyzing alternative-perpetrator evidence under Rules 401 and 403 has the advantage of being simpler for courts and parties and fairer to the accused.

In an appropriate case, I would encourage our court to consider jettisoning the 4-decades-old *Hawkins* test and replace it with the traditional analysis under Rules 401 and 403 that courts apply as a matter of everyday routine. Indeed, since our decision in *Hawkins*, several courts have adopted, and several commentators have proposed, just such a rule for alternative-perpetrator evidence. *See, e.g.*, *State v. Gibson*, 44 P.3d 1001, 1003−04 (Ariz. 2002) (rejecting the "inherent tendency test" and holding that Arizona Rules of Evidence 401 and 403 "set forth the proper test" for alternative-perpetrator evidence); *State v. Kerchusky*, 67 P.3d 1283, 1286–87 (Idaho Ct. App. 2003) (applying Idaho Rule of Evidence 403), *abrogated on other grounds by State v. Galvan*, 326 P.3d 1029, 1033 n.5 (Idaho Ct. App. 2014); *People v. Primo*, 753 N.E.2d 164, 167–68 (N.Y. 2001) (rejecting "clear link" test of earlier cases in favor of the "general balancing analysis that governs the admissibility of all evidence"); John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 Am. Crim. L. Rev. 1069 (2007) (discussing a group of state courts that have adopted the "401/403" approach); Robert Hayes, *Enough is Enough: The Law Court's Decision to Functionally Raise the "Reasonable Connection" Relevancy Standard in* State v. Mitchell, 63 Me. L. Rev. 531 (2011).

Accordingly, I respectfully concur.

LILLEHAUG, Justice (concurring).

I join in the concurrence of Justice Thissen.