STATE OF MINNESOTA

IN SUPREME COURT

A19-0153

Ramsey County — Anderson, J.

State of Minnesota,

Respondent,

vs.

Filed: April 22, 2020
Office of Appellate Courts

Kevin Reek,

Appellant.

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, Saint Paul, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. Appellant failed to establish that his right to a fair trial before an impartial tribunal was violated when the district court stated that it might reconsider its prior evidentiary ruling if the defense presented certain witnesses.

2. Appellant failed to establish that his substantial rights were affected by an incomplete accomplice-liability jury instruction.

3. Appellant failed to establish that the prosecutor's statements during closing arguments constituted error.

4. Appellant failed to establish that the district court abused its discretion by granting the State's motion to admit evidence of appellant's past convictions for impeachment purposes, including by allowing the specific crimes to be disclosed to the jury.

5. Appellant's pro se arguments are without merit.

Affirmed.

O P I N I O N

ANDERSON, Justice.

A jury found appellant Kevin Reek guilty of first-degree murder. In this direct appeal, Reek asserts several claims. Reek argues that the district court was biased in favor of the State when the court considered revisiting its prior *Spreigl* ruling without the prompting of either party and that the effect of the court's actions was to deny Reek his right to an impartial judge. Reek next argues that an incorrect jury instruction on accomplice liability misstated the law; that the prosecutor made misstatements of the law regarding accomplice liability; and that, individually or combined, these unobjected-to errors were reversible plain error. Reek also argues that the district court abused its discretion by granting the State's motion to admit Reek's past convictions for impeachment purposes, including by allowing the specific crimes to be disclosed to the jury. Reek makes

several additional arguments in his pro se supplemental brief. For the reasons explained in this opinion, we affirm Reek's conviction for first-degree murder.

FACTS

On January 4, 2017, Myong Gossel, a 79-year-old widow who lived in Saint Paul, was found dead in her basement. The cause of death was determined to be a closed head trauma due to an assault. She also had several bruises and abrasions across various areas of her body. Her home was ransacked, her belongings were rummaged through, and her furniture was overturned. Gossel was last known to be alive on January 2, 2017, when she called a friend at 2:44 p.m. No calls placed to Gossel's home after 2:44 p.m. were answered.

A police investigation revealed the fingerprints of Richard Joles on a jewelry box, which was found beneath the wreckage of Gossel's furniture and personal property. At the time of the fingerprint discovery, Joles was in custody on unrelated charges. Police questioned Joles, who identified Perrin Cooper and Reek as involved in the robbery and homicide. Reek was arrested and initially was charged with second-degree murder. A grand jury returned an indictment charging Reek with murder in the first degree.

Before trial, the State sought to introduce *Spreigl* evidence of a prior crime committed by Reek. That prior crime evidence consisted of testimony from a co-defendant. At a pretrial hearing, the co-defendant stated that she, along with Reek, previously had tied up and physically assaulted an elderly couple. The co-defendant stated that the couple had a safe at their home, that Reek learned of the safe while performing manual labor for the couple, and that the purpose of restraining and assaulting the couple was to obtain money

or other assets from the safe. According to the State, these events were similar to the facts associated with the assault and murder of Gossel. The State also sought to impeach Reek with his prior convictions should he testify at trial. The district court made preliminary rulings on the *Spreigl* and impeachment evidence. Reek ultimately did not testify at trial.

Reek provided notice to the State that he intended to introduce alternative-perpetrator evidence through the testimony of two witnesses, R.E. and J.G., who were former inmates with Joles. The defense claimed that these witnesses would testify that, while incarcerated, Joles made statements that could cast doubt on who was present during the robbery and killing of Gossel. Ultimately, Reek did not call these two witnesses at his trial.

During Reek's trial, Cooper testified for the State that he was familiar with Gossel because Joles, a longtime acquaintance, had previously performed manual labor for Gossel. Cooper testified that Joles told him that Gossel was generous with her payments for manual labor and thus someone from whom money could be easily obtained. Cooper also testified that, just before Christmas 2016, he and Joles had travelled to Minnesota and received a $20,000 deposit from Gossel for tree trimming work to be performed in the spring. After returning to Indiana, shortly before New Year's Day, he and Joles discussed a plan to obtain more advance payments from Gossel. It was during this conversation that Reek arrived and it was decided that they would travel to Minnesota to obtain more money from Gossel. Although Reek was a prior acquaintance of Joles, Reek did not know Cooper. The three men decided to make Gossel a target for acquiring money and left Indiana for Minnesota.

While driving to Minnesota in Reek's truck, the three men smoked methamphetamine. During this trip, Reek suggested to Cooper that he gain Gossel's trust at her door so they could tie her up in the basement and no one would hear her scream. Cooper thought Reek was "acting super paranoid" and "was off his rocker." When they stopped for gas in Baldwin, Wisconsin, Cooper and Joles left Reek at the gas station and continued to Minnesota without him.

After arriving in Minnesota, Joles and Cooper went to Gossel's home. Gossel resisted their verbal demands for money and they were able to obtain only between $250 and $300. Cooper later pleaded guilty to simple robbery for these actions.

That same day, Reek, who was still in Baldwin, called and texted Cooper and Joles, demanding that they come get him. Cooper and Joles drove to Baldwin. They made up a story about getting arrested, which Reek did not believe; Reek was furious and thought that they had cut him out of the money they were supposed to get from Gossel. The group then returned to Minnesota.

On January 2, 2017, a neighbor's security camera showed Reek's truck driving past Gossel's home. The group—Reek, Cooper, and Joles—visited the Dollar Tree where Reek purchased latex gloves. The group returned to Gossel's neighborhood but abandoned the plan to obtain money from Gossel after concluding that they had been seen in the neighborhood. Two days later, on January 4, Gossel was found dead in her basement. A police investigation later determined that a cellular phone with which Reek was associated was located near Gossel's home at the time of the murder; that Cooper's cell phone was not near the home; and that Reek's DNA was on the front of Gossel's sweatshirt, on her

refrigerator, and on the walls of her home. Police investigators also found latex gloves in the basement. Cooper's sister, C.C., testified that Reek had called her and said, "Yeah, I killed that f'ing lady, tell them they will never get another dime from her. And tell your brother and Richard [Joles] I said that, when I see them, I will put a bullet into them."

The jury returned guilty verdicts on all counts. Reek was convicted of first-degree murder while committing or attempting to commit aggravated robbery and was also convicted of second-degree murder. Reek was sentenced to life with the possibility of release after 30 years for the first-degree murder conviction. Reek directly appeals his conviction to this court as of right.

ANALYSIS

I.

Reek's first claim is that he was denied a fair trial before an impartial tribunal, in violation of the Due Process Clause of the Fourteenth Amendment and the Minnesota Code of Judicial Conduct, because the district court judge failed to recuse himself after allegedly becoming partial to the State. Reek's claim of judicial bias is based on how the court handled the issues surrounding the admission of the *Spreigl* evidence.

At the pretrial hearing, the State argued for the admission of *Spreigl* evidence to prove identity and modus operandi of the perpetrator. The district court took the motion under advisement.[1] During trial, after the State called its last non-*Spreigl* witness, the jury

[1] After the pretrial *Spreigl* hearing, the district court stated:
> In order for me to make a determination about [the admission of *Spreigl* evidence], I need to hear more of the State's case, and so I'm going to

was excused and the parties re-argued the *Spreigl* issue. Finding that the admission of the evidence was a "close call," the court ruled that it was excluding the *Spreigl* evidence.

After the ruling, the parties and the district court discussed the testimony of the defense's two witnesses with whom Joles had conversations while they were incarcerated. Defense counsel reported that their testimony would be that Joles had made statements to them, which implicated himself and a relative of his, not Reek, in the murder of Gossel. As a result, the court stated: "If I were to allow [either of the two witnesses] to testify, I might very well have to reconsider the *Spreigl* motion by the State because then it makes identification all the more pertinent." The court also said that it would need "to give some serious thought to all of this tonight, gentlemen. You do the same, and let's -- let's just do this right, all right?" The court stated that it did not want "to try this case twice" and that it wanted "to get it right the first time." Reek's counsel replied, "Your Honor, I -- I appreciate and understand your considerations and I will take them into account as I strategize as to how I may or may not try and present this evidence, and of course I'll be discussing this issue with my client."

The next morning, Reek's counsel stated that he had made the "tactical" decision not to call Joles's former fellow inmates. In its ruling that the *Spreigl* evidence was not admissible, the district court explained the concern that it had articulated the day prior, stating that, "[w]hen the Defense indicated that it might call the two informants," doing so

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> withhold ruling on whether that *Spreigl* evidence is admissible until such time as I have a better assessment of the strength of the State's case. And so that matter remains under advisement.

"might shed a different light on" its "ruling to not allow the *Spreigl* evidence," and that its position had not changed because admitting such evidence "might very well open the door to the *Spreigl* evidence." The court repeated its prior ruling that the "State will not be allowed to [introduce *Spreigl* evidence regarding Reek's prior convictions] during its case" with the added condition that its ruling might change based on how the defense proceeded.

At no point did Reek seek disqualification of the district court. Nor did he raise the issue of an abuse of discretion or impartiality. None of the *Spreigl* discussions occurred in the presence of the jury.

Reek argues that, based on these facts, he was denied a fair trial before an impartial tribunal as required under the Due Process Clause. Reek contends that, because the district court revisited a prior ruling on *Spreigl* evidence without prompting by the State, it was no longer impartial. We conclude that because Reek cannot establish either that the court's discourse with the parties raised an appearance of judicial partiality against him or that actual bias existed, there was no error.

A judge must not preside over any criminal proceeding if the judge is disqualified from doing so under the Code of Judicial Conduct. Minn. R. Crim. P. 26.03, subd. 14(3). "Whether a judge has violated the Code . . . is a question of law, which we review de novo." *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005) (citation omitted). Under the Code, a judge must disqualify himself from "any proceeding in which the judge's impartiality might reasonably be questioned." Minn. R. Jud. Conduct 2.11(A). Impartiality requires absence of " 'actual bias against the defendant or interest in the outcome of his particular

case.' " *State v. Munt*, 831 N.W.2d 569, 580 (Minn. 2013) (quoting *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998)).

"A judge must maintain the integrity of the adversary system at all stages of the proceedings." *State v. Schlienz*, 774 N.W.2d 361, 367 (Minn. 2009). To do so, "a judge must . . . 'refrain from remarks which might injure either of the parties to the litigation' " and " 'should not act as counsel for a party by raising objections which the party should make.' " *Id.* (quoting *Hansen v. St. Paul City Ry. Co.*, 43 N.W.2d 260, 264 (Minn. 1950)).

"The mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge's impartiality." *Id.* at 366 (citation omitted) (internal quotation marks omitted). In deciding whether a disqualification is required, the relevant question is "whether a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." *In re Jacobs*, 802 N.W.2d 748, 753 (Minn. 2011). To evaluate whether a "reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality," we take the perspective of "an objective, unbiased layperson." *State v. Mouelle*, 922 N.W.2d 706, 713 (Minn. 2019) (quoting *Jacobs*, 802 N.W.2d at 753).

Reek's principal argument is neither that the district court abused its discretion by reconsidering its *Spreigl* ruling in light of new information, nor that it did so without prompting by the State.[2] Rather, Reek's argument is that in reconsidering its decision, the

[2] Although Reek essentially argues that a district court is not allowed to consider the defendant's case when making a *Spreigl* decision, this argument is unsupported by our case law. *See, e.g.*, *State v. Reed*, 737 N.W.2d 572, 589 (Minn. 2007) ("We are aware of no

court no longer was impartial because it made the State aware that if it objected or made a motion to the court, the court might reconsider its decision on the *Spreigl* motion. Put another way, Reek's argument is that the court alerted the prosecution to raise, once again, the *Spreigl* issue if Reek pushed forward with his plan to call Joles's former fellow inmates.

To support this argument, Reek relies principally on our decision in *Schlienz*.[3] We are not persuaded that this case is similar to *Schlienz*. In *Schlienz*, the district court had an ex parte communication with the prosecutor regarding a potential defense motion to withdraw a guilty plea. 774 N.W.2d at 363–64. During this communication, the court reported the results of its independent research into the relevant law and suggested specific arguments the prosecutor should be prepared to make in court. *Id.* at 364. We concluded that the district court's conduct "reasonably call[ed] into question the [district court's] ability to be impartial." *Id.* at 369.

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case law, rule, or standard of conduct that would prohibit a district court from hearing a defendant's case-in-chief before ruling on the admissibility of a prior conviction for *Spreigl* purposes or to rebut the defendant's assertion of good character."). Further, none of the *Spreigl* factors precludes a district court from considering the defendant's case when ruling on the admissibility of *Spreigl* evidence, and we have allowed *Spreigl* evidence in rebuttal, which takes into consideration, and necessarily occurs after, the defendant's case. *See, e.g.*, *State v. Fader*, 358 N.W.2d 42, 45–46 (Minn. 1984) (holding that evidence admitted in rebuttal was admissible as *Spreigl* evidence).

[3] Reek also quotes the proposition that trial judges " 'should not act as counsel for a party by raising objections which the party should make.' " *Schlienz*, 774 N.W.2d at 367 (quoting *Hansen*, 43 N.W.2d at 264). In *Hansen*, the judge frequently interjected during defense counsel's witness examination, in the presence of the jury, with statements such as "Isn't that an absurd question?" or interjecting that answers to questions should be "so obvious." 43 N.W.2d at 262–63. We held that those types of "caustic clashes" in front of the jury rose to a level of partiality that required a new trial. *Id.* at 264. Here, the district court's comments were neither caustic nor made before the jury.

Here, the form of the district court's communications with Reek and the State are dissimilar to the ex parte communication in *Schlienz*. All relevant communications here were on the record, in the presence of counsel for both parties, and outside the presence of the jury.

The substance of the court's communications with the parties is also distinguishable from *Schlienz*. In *Schlienz*, the court informed the prosecutor of specific arguments that might persuade the court to reach a certain outcome, which we characterized as a "roadmap for responding to the . . . motion." *Id.* at 369. Here, by contrast, after the district court ruled on the *Spreigl* motion and was advised of the likely testimony of Joles's former fellow inmates, which would call into question the identity of the perpetrator, the court informed the defense that such a strategy could cause the court to reconsider its *Spreigl* ruling. The court suggested that both parties "give some serious thought to all of this" so that the court could "do this right." The court was not suggesting that the State make a motion. Instead, the court was providing the parties notice that the new information may cause it to reconsider its earlier ruling. The court, concerned with providing a fair trial, did not "want to try this case twice" and wanted to "get it right the first time." The court did not suggest that the State make a motion; rather, it sought to avoid error and ensure a fair trial for Reek.

Rather than *Schlienz*, our decision in *State v. Burrell*, 743 N.W.2d 596 (Minn. 2008), is more analogous. In *Burrell*, the district court cautioned the State regarding the risks of pursuing a for-the-benefit-of-a-gang offense in light of certain "evidentiary hurdles." *Id.* at 600. The State unsuccessfully argued on appeal that removal was required because the district court had prejudged the merits of the case. *Id.* at 602–03 (holding that the district

court remained impartial and removal was not warranted). Unlike *Schlienz*, where we found that the district court appeared partial because it provided a "roadmap" for one party, 774 N.W.2d at 369, in *Burrell*, we concluded that the district court remained impartial because the court's comments were "a valid observation based on the history of the case and the State's own comments, not a prejudgment on the merits of the underlying charges," 743 N.W.2d at 603; *see also Schlienz*, 774 N.W.2d at 368 (distinguishing *Burrell*). The district court's comments to defense counsel in the presence of the State were akin to instructions to "consider the risks" of Reek's trial strategy, rather than a "roadmap" communicated ex parte on how to respond to a dispositive motion.

Although the district court stated that the anticipated testimony of Joles's former fellow inmates might affect the analysis of the probative value of the *Spreigl* evidence, it did not suggest that the State should make such an objection. Nor did it suggest that the defendant not call these witnesses. Rather, the court sought to preserve Reek's right to a fair trial by allowing him to make an informed tactical decision regarding whether to offer certain testimony. *Cf. State v. Brant*, 345 N.W.2d 248, 249 (Minn. 1984) ("Defendant was not prejudiced by the timing of the court's decision, since the decision made it possible for him to make an informed decision as to whether or not to testify."). In light of this caution, Reek's counsel made a tactical decision, stating:

> Based on discussions we had, I believe it was on the record yesterday afternoon about *Spreigl*, about the potential testimony of [Joles's former fellow inmates] and how they could potentially raise the issue of identification in this case, and the Court indicated there may be concerns that *Spreigl* may have more value if identification were questioned via those two witnesses, as a tactical matter I've decided that their value as witnesses was not very good and so I instructed your clerk and included Mr. Hatch on that

> conversation to release them on their writs back to the Department of Corrections and I will not be calling them.

The actions of a district court in making known to both parties that potential testimony could affect a previous "close call" *Spreigl* evidentiary ruling is not the same as making a motion or objection for one party, nor is it acting as counsel for a party. Rather, the district court's actions helped ensure a fair trial and protected the defendant's right to make tactical trial decisions.

In short, an objective, unbiased lay person, with full knowledge of the facts and circumstances, would not question the district court's impartiality here. Instead, the record shows that, after the State's case-in-chief, the district court considered the impact of *Spreigl* evidence and balanced the probative value against the prejudicial harm in light of all of the information before it. Reek has failed to establish that the Code of Judicial Conduct required the district court to recuse itself. Because Reek failed to show even the appearance of partiality by the court, we hold that Reek's right to a fair trial before an impartial tribunal was not violated.

II.

Reek's second claim asserts that he is entitled to a new trial because the jury was not instructed on the correct elements of accomplice liability and the prosecutor committed misconduct in his closing arguments regarding the law of accomplice liability. Reek argues that these errors individually or collectively affected his substantial rights and we should therefore reverse his conviction and remand to the district court for a new trial. We conclude that, although the jury instructions given here were plainly erroneous, Reek failed

to carry his heavy burden of establishing that there was a reasonable likelihood that the error had a significant effect on the verdict. We also conclude that the prosecutor's statements, when viewed as whole, did not constitute misconduct.

A.

Reek argues, and we agree, that the jury instructions failed to accurately state the law regarding accomplice liability. We review unobjected-to jury instructions for plain error. *State v. Laine*, 715 N.W.2d 425, 432 (Minn. 2006). Under the plain-error doctrine, an appellant must show that there was (1) an error; (2) that is plain; and (3) that the error affected his substantial rights. *State v. Radke*, 821 N.W.2d 316, 327 (Minn. 2012). "To establish that the erroneous accomplice liability jury instruction affected his substantial rights, [the appellant] has the heavy burden of proving that there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict." *State v. Kelley*, 855 N.W.2d 269, 283 (Minn. 2014) (citation omitted) (internal quotation marks omitted). When the appellant satisfies the first three prongs of the plain-error doctrine, "we may correct the error only if it 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.' " *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)).

The accomplice liability jury instruction provided at Reek's trial was outdated and plainly erroneous. *See State v. Huber*, 877 N.W.2d 519, 525 (Minn. 2016); *Kelley*, 855 N.W.2d at 275. The instruction given to the jury stated: "Liability for the crimes of another. The defendant is guilty of a crime committed by another person when the defendant has intentionally aided the other person in committing it or has intentionally advised, hired,

counseled, conspired with, or otherwise procured the other person to commit it." We held in *State v. Milton* that this jury instruction was erroneous because accomplice-liability instructions "must explain to the jury that in order to find a defendant guilty as an accomplice, the jury must find beyond a reasonable doubt that the defendant knew his alleged accomplice was going to commit a crime and the defendant intended his presence or actions to further the commission of that crime." 821 N.W.2d 789, 808 (Minn. 2012) (citing *State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007)). The instruction given at Reek's trial did not do so.

Because the jury instruction constituted an error that was plain, our focus is on the third prong of the test: whether the defendant's substantial rights were affected. *Id.* at 808–09. To determine whether the failure to explain the meaning of intentionally aiding another affected Reek's substantial rights, we may consider, among other factors, whether the defense focused on accomplice liability. *See Kelley*, 855 N.W.2d at 283–84 (concluding that there was no reasonable likelihood that the failure to explain the meaning of "intentionally aiding another" had a significant effect on the verdict because, during trial, the defense focused on a mistaken eyewitness identification rather than accomplice liability).

The concern in accomplice-liability cases, which led us to conclude that a jury instruction such as that used in Reek's case was incomplete and thus in error, is not presented here. In *Milton*, the issue was whether a person who was undeniably present with the person that committed a crime had the intention to aid and abet the person committing the crime. 821 N.W.2d at 809. In particular, the issue was whether Milton

knew that his alleged accomplice was going to rob the victim and whether Milton intended his presence to further the commission of that crime. *Id.* at 805.

This concern is not present here. At trial, Reek's argument was not that he was present yet uninvolved and lacking the required knowledge and intention to aid someone else in beating, robbing, and ultimately killing Gossel. Rather, Reek's argument was that he was not present at all during those acts. In contrast, the State's case was that Reek was present at the murder and he either (1) beat and killed Gossel himself, (2) beat and killed Gossel with Joles's aid; or (3) Joles beat and killed Gossel with Reek's aid. Thus, unlike in *Milton*, this case does not turn on whether Reek was present but did not have the requisite intent to aid or abet Joles. Instead, this case is like *Kelley*, in which the defense focused on a mistaken eyewitness identification.

Moreover, the State produced overwhelming evidence that Reek participated in the murder, either as the principal or as an accomplice. The evidence showed that Reek was angry after being left at the gas station in Wisconsin. Reek's anger was established in part by the text messages that he sent expressing his belief that Cooper and Joles cheated him after leaving him in Wisconsin. It was also established through C.C.'s testimony that Reek was angry after finding a receipt, which he believed reflected money that Cooper and Joles obtained while he was still in Wisconsin. The State's evidence of Reek's participation in the murder also included: (1) cell phone data linking Reek to the house near the time of death, along with the lack of cell phone evidence linking other potential criminals to the scene; (2) Reek's DNA found on Gossel's sweatshirt, wall, and refrigerator; (3) C.C.'s testimony that Reek called her while she was driving and told her: "I killed that f'ing lady,

tell them they will never get another dime from her"; (4) a receipt at the crime scene with Reek's palm print in two places, which corroborated the testimony by C.C.; (5) evidence that Reek bought rubber gloves the day Gossel was murdered; and (6) rubber gloves found near Gossel's body.

Reek would be prejudiced by the erroneous jury instruction only if the jury rejected all of the State's evidence that Reek was present and committed the crime, either alone or with another, and there was a theory advanced by the defense that Reek was present but did not have an intent to aid or abet. In light of the State's substantial evidence and the lack of any defense arguments at trial to the contrary, a reasonable jury could not conclude that, if Reek was present, he was an unknowing bystander or lacked the required intent to aid Joles in the robbery.

The following evidence presented establishes Reek's guilt: (1) he thought he had been cheated by his friends and still wanted to obtain the money for which he drove to Minnesota; (2) his DNA and the rubber gloves that he purchased established that he had been inside Gossel's home; (3) the location data of his cell phone established that he was near Gossel's home around the time of the murder; and (4) according to his confession to C.C., he committed the act. All of this evidence proves that Reek acted as the principal or as an accomplice to the murder of Gossel. Because Reek failed to establish that there was a reasonable likelihood that the incorrect jury instructions affected his substantial rights, we conclude that his challenge to the jury instructions does not warrant a new trial.

B.

Reek also claims that the prosecutor made statements during his closing argument that incorrectly stated the law regarding liability for aiding and abetting another in the commission of a crime. "When a defendant alleges unobjected-to prosecutorial misconduct, we apply a modified plain-error standard that requires the defendant to show an error was made that was plain." *State v. Waiters*, 929 N.W.2d 895, 901 (Minn. 2019) (citation omitted) (internal quotation marks omitted). An error is plain if it is "clear or obvious." *Id.* (citation omitted) (internal quotation marks omitted). When the defendant satisfies this burden, the burden shifts to the State to establish that the unobjected-to misconduct did not affect the defendant's substantial rights. *Id.* To satisfy this burden, the State must show "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (citation omitted) (internal quotation marks omitted). When applying this test, "we view the prosecutor's statements as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence to determine whether reversible error has occurred." *Waiters*, 929 N.W.2d at 901 (citation omitted) (internal quotation marks omitted).

The issue is, when taken as a whole, whether the prosecutor erred during his closing argument when he stated: "Also remember that what Reek is being charged with here is aiding and abetting an intentional murder. So even if you conclude that Richard Joles was there or he participated in the beating, Kevin Reek was there, the defendant was there and he is responsible for what happened."

The statement "Kevin Reek was there . . . and he is responsible for what happened" could be a misstatement of the law if taken to mean that Reek is responsible based on his mere presence, regardless of whether he intended to aid or abet the person who committed the murder as a principal. A person's mere presence at the scene of a crime is insufficient to prove liability "because inaction, knowledge, or passive acquiescence does not rise to the level of criminal culpability." *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995); *see also Mahkuk*, 736 N.W.2d at 682 (stating that "to prove that [the defendant] aided and abetted the shooting and killing of the two victims, the state was required to prove more than [the defendant's] intentional presence at the scene of the crime").

But, when viewed as a whole, the prosecutor's statements do not constitute error. Immediately before making the potential misstatement of law, the prosecutor stated: "So even if you conclude that Richard Joles was there or he participated in the beating . . . ." This phrase modifies the alleged misstatement by the prosecutor that on its own might suggest that the prosecutor was arguing that Reek committed a crime by simply being present at the crime scene. Further, viewed in light of the surrounding statements, the final phrase, "[Reek] is responsible for what happened," clarifies that even if Joles had helped Reek beat the victim, Reek was still guilty of murder, not that Reek was guilty if he was present but not aiding in the crime.

Viewing the prosecutor's statements in light of the entire closing argument, the State's case and closing argument did not turn on whether Joles was at the scene of the murder. Rather, it focused on placing Reek at the scene and establishing his motive for killing Gossel. The State argued that, regardless of whether Reek was at Gossel's home

alone, was there and was aided and abetted by Joles, or was there and was aiding and abetting Joles, in each scenario, the jury could find Reek guilty. During his closing argument, shortly before the statement at issue, the prosecutor also stated: "But after it got dark, Mr. Reek, either alone, but I think the evidence shows you with Richard Joles, they go back to the house. And they carry out what they had planned on doing." Just prior to that statement, the prosecutor argued that the plan was: "[Reek] wants to go back to that house. He wants someone to go in ahead of them, get the door open and then he will come from behind. That's his plan to go and rob and smack her around if she doesn't tell him where the money is."

The prosecutor further argued during his closing argument for principal liability by stating: "Kevin Reek entered her home, brut[al]ly beat her and left her to die on the basement floor[,]" and that "Ms. Gossel would have screamed and [Reek] would have put his hands around her neck and squeezed so hard to stop her from screaming . . . that he would have broken the hyoid bone in her neck . . . that would have caused hemorrhaging." Thus, when viewed as a whole, the prosecutor's closing argument demonstrates that the State argued that Reek was guilty because he had the requisite intent to commit the crime either as a principal or as an accomplice, not that he was guilty merely because he was present in Gossel's home. Because Reek has failed to establish that the prosecutor's

statements constituted error, we conclude that Reek is not entitled to a new trial on this ground.[4]

III.

Reek next claims that the district court abused its discretion by granting the State's motion to impeach Reek with his prior felony convictions, including by allowing the identified convictions to be revealed to the jury. The prior crimes at issue were aggravated burglary, simple robbery, aggravated robbery, and two counts of aggravated assault. Reek argues that the effect of the ruling to allow the State to impeach him with these past crimes was that he chose to not testify at his trial. "We will not reverse a district court's ruling on the impeachment of a witness by prior conviction absent a clear abuse of discretion." *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011) (citation omitted) (internal quotation marks omitted). "On appeal, the defendant has the burden of proving both that the trial court abused its discretion in admitting the evidence and that the defendant was thereby prejudiced." *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997).

[4] Reek also contends that the prosecutor's alleged errant statement of the law was not cured by the jury instructions because an erroneous version of the instructions was used. We agree that the jury instruction was incorrect and take this opportunity to encourage district courts to ensure that the jury is fully and correctly instructed on accomplice liability. But because we find that the prosecutor's statements did not constitute error, the burden does not shift to the State to prove that the defendant was not prejudiced by the error. Further, because we found that the prosecutor's statements did not constitute error, there is no cumulative error, as argued by Reek, to be analyzed as, in the end, the only plain error was the incomplete jury instruction.

A.

Evidence of a defendant's prior conviction is admissible for impeachment when the crime is punishable by more than one year in prison and the probative value outweighs the prejudicial effect. Minn. R. Evid. 609(a). District courts exercise discretion under this evidentiary rule, and in doing so must consider the factors established in *State v. Jones*, which are: "(1) the impeachment value of the prior crime; (2) the date of the conviction and the defendant's subsequent history; (3) the similarity of the past crime with the charged crime . . . ; (4) the importance of [the] defendant's testimony; and, (5) the centrality of the credibility issue." 271 N.W.2d 534, 538 (Minn. 1978).

1. Impeachment Value

The impeachment of a witness with his or her prior crimes assists the jury to see the "whole person" and therefore to better judge the truth of the witness's testimony. *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979). Reek argues that, because his prior crimes were not crimes of dishonesty, the impeachment value of his prior crimes is low and that courts should be hesitant to admit violent crimes for impeachment. Although Reek cites to *State v. Gassler* for this proposition, *Gassler* simply states that "violent crimes lack the impeachment value of *crimen falsi* [(crimes of falsehood)]." 505 N.W.2d 62, 66–67 (Minn. 1993). This is true of all crimes, violent or nonviolent, not involving dishonesty. We have

not held that violent, nondishonest crimes have less impeachment value than nonviolent, nondishonest crimes, and Reek cites no decisions to support this distinction.[5]

2. Date and Subsequent History

Rule 609(b) of the Minnesota Rules of Evidence generally prohibits criminal convictions to be introduced for impeachment purposes if more than 10 years have elapsed since the date of conviction or release from confinement. Reek does not argue that his prior convictions are less relevant due to the passage of time as the convictions at issue here occurred within the 10-year time limit prescribed in Rule 609(b).

3. Similarity

"[I]f the prior conviction is similar to the charged crime, there is a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively." *Gassler*, 505 N.W.2d at 67 (citations omitted). Reek argues that the five prior convictions the State sought to admit for impeachment purposes are similar to the underlying felony for which he was being tried. The five prior convictions arose from a single incident and were for aggravated burglary, simple robbery, aggravated robbery, and two counts of aggravated assault. Although the prior convictions bear similarity in identity, that similarity alone is not dispositive in demonstrating that the district court abused its discretion. *See, e.g.*, *State v. Frank*, 364 N.W.2d 398, 399 (Minn. 1985) (holding that allowing impeachment with prior rape convictions in a rape trial was not an abuse of the

[5] That does not mean, however, that a district court exercising its discretion is prohibited from considering the violent nature of the crime underlying a prior conviction while weighing the probative value of the prior conviction against the risk of unfair prejudice.

district court's discretion); *State v. Lloyd*, 345 N.W.2d 240, 247 (Minn. 1984) (upholding a decision to admit a second-degree murder conviction for impeachment in trial for first-degree murder had defendant testified).

The crimes here were all from the same date, which lessens the likelihood that the jury would have found Reek to be a career criminal. In addition, it is likely that had Reek testified and the convictions been introduced for impeachment purposes, the jury would have received a limiting instruction, which the jury is assumed to follow. *See, e.g.*, *Brouillette*, 286 N.W.2d at 708 ("Such an instruction[, cautioning the jury to consider the prior conviction only as it relates to defendant's credibility,] adequately protects defendant against the possibility that the jury would convict him on the basis of his character rather than his guilt.").

4. Importance of Reek's Testimony

Reek did not testify at trial. Had he taken the stand, whether he testified that he was not at the crime scene or that he was there but not as an accomplice, his testimony would at least theoretically have been central to the jury's decision. Thus, Reek's testimony would have been important under this factor, which would weigh against allowing the use of impeachment evidence. But Reek made no offer of proof as to what his testimony would have been. *See, e.g.*, *Gassler*, 505 N.W.2d at 67 (in analyzing this factor, noting that no offer of proof was made regarding the appellant's testimony). We are limited to the record and do not speculate as to what testimony Reek might have offered and whether it was important to his case. While Reek's testimony might have been important, his lack of proffer as to what he would have testified to limits our ability to assess its importance.

5. Credibility of Reek's Testimony

Had Reek testified, his credibility would have been central to any testimony refuting the State's theory that he acted either as a principal or as an accomplice to the murder. Reek's credibility also would have been central had he offered testimony refuting the testimony of C.C. regarding his admission of guilt. *See, e.g.*, *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) (analyzing the *Jones* credibility factor when testimony to refute another witness is at issue). Although the district court did not know whether Reek would testify, this factor weighs in favor of allowing the convictions to be admitted for impeachment.

Based on an analysis of the factors articulated in *Jones*, we hold that the district court did not abuse its discretion by allowing the admission of Reek's prior convictions for impeachment purposes. District courts have wide discretion in determining the admissibility of evidence, and there is no reason for us to overturn, or even question, the district court's ruling here. We therefore reject Reek's claim that the district court committed reversible error by granting the State's motion to allow Reek to be impeached with his prior crimes.

B.

The next impeachment issue raised by Reek is that the district court abused its discretion by denying Reek's request that the specific offenses on which he was convicted be withheld even if the convictions were admitted for purposes of impeachment. Put another way, Reek argued to the district court that the jury should not be told about the specific offenses on which he was convicted; rather, he asserted that the jury should simply

be told that he was convicted of unspecified felonies without any further detail. "[T]he decision about what details, if any, to disclose about the conviction at the time of impeachment is a decision that remains within the sound discretion of the district court." *Hill*, 801 N.W.2d at 652.

Reek concedes that the district court had discretion to determine which details can be revealed about his prior convictions. Reek argues that a court must independently weigh the probative value and prejudicial effect of the details revealed about convictions after ruling on whether the convictions themselves are admissible for impeachment purposes. During a pretrial hearing, when arguing to the district court about the admissibility of his past convictions, Reek's counsel requested, in the alternative, that the "[c]ourt limit [the details of the convictions] to that Mr. Reek has been convicted of two felony convictions for which he is on parole." The State then argued for admission including the specific convictions and proceeded through the *Jones* factors.

The court ruled from the bench, explaining that it agreed with the State's analysis of the *Jones* factors. The court noted that it would continue to consider how much information to allow and would discuss it again at trial. After the close of the State's case-in-chief, the district court finalized the held-over impeachment ruling by reaffirming its pretrial ruling. The court did not repeat the reasoning it stated when it made its preliminary decision, but Reek does not cite to any case law that requires a court to do so. Decisions on what details can be disclosed to impeach a witness are within a court's discretion. The court stated that it agreed with the State's *Jones* analysis; and when it finalized its ruling,

the only change from the pretrial ruling was that the district court narrowed the scope of any impeachment in the defense's favor.

There might well be circumstances justifying a limit on the information received by the jury about specific convictions, but we hold that the district court here did not abuse its discretion by granting the State's motion to impeach Reek with his prior convictions of specific crimes because it considered whether that evidence was unfairly prejudicial as part of its original balancing.

IV.

Reek also filed a pro se supplemental brief in which he advances several legal issues. Many of these issues rely on documents outside the record.[6] We decline to reach the merits of these claims because we do not base our decisions on matters outside the record. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003). Reek can, if he chooses to do so, attempt to develop and present such claims in a postconviction petition.

A.

In his pro se brief, Reek also raises issues with the DNA evidence. Reek alleges that the State relied on contaminated results to put Reek at the scene of the crime. He also alleges that the State's evidence lacked reliability for two reasons. First, Reek argues that

[6] These arguments rely on Facebook messages, transcripts of jail phone calls, and police reports that were provided in the addendum to Reek's pro se brief but are not a part of the record. The arguments raised, but that we do not reach, include whether the prosecutor committed misconduct by suborning perjury when calling Cooper, C.C., and D.N. to testify. They also include Reek's *Brady* violation claim, which we cannot reach. The historical fact of if, and if so when, the jail phone calls were provided to Reek is unclear from the record.

the Minnesota Bureau of Criminal Apprehension (BCA) forensic scientist was not certified. On direct examination, the State's BCA forensic scientist testified that he was not personally certified, but that certification was not required to perform his tasks. Reek offers nothing to contradict that testimony.

Second, Reek asserts that the DNA was contaminated, in particular because in the initial testing of the crime scene DNA samples, the BCA's reagent blank, which is used as a control sample that should not contain DNA, failed as DNA was detected in it. The record does not support the argument that the State relied on contaminated DNA test results. The BCA forensic scientist testified about the failed DNA test based on the contaminated reagent blank and the potential sources of contamination of the reagent blank, as well as the standard operating procedures followed by the BCA after a contaminated test result is discovered. He also explained that the contamination issue was resolved, and he reported on the successful, uncontaminated results of subsequent tests. The BCA forensic scientist testified that these subsequent results showed a match between DNA on evidence gathered at Gossel's home and a sample of Reek's DNA. Reek offers nothing to refute this testimony.

"We will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority." *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008) (citations omitted); *see also State v. Myhre*, 875 N.W.2d 799, 806 (Minn. 2016) (stating that an issue is forfeited when it is not adequately argued or explained); *Louden v. Louden*, 22 N.W.2d 164, 166 (Minn. 1946) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief . . . will not be considered

on appeal unless prejudicial error is obvious on mere inspection."). The argument that Reek is making or the legal basis of Reek's objection to the DNA test results is not clear. The State did not rely on the contaminated DNA test, but rather introduced a subsequent uncontaminated test. Thus, it is not obvious based on "mere inspection" that there was prejudicial error, and we deem Reek to have forfeited his claims regarding the State's reliance on the contaminated DNA results.

Second, to the extent that Reek argues that the DNA results were unreliable, this claim is also not supported by the record. Reek and his counsel did not challenge the admissibility of the evidence during either the pretrial hearing or at trial, nor did they object to the testimony by the State's witness regarding the results. Reek's attorney cross-examined the BCA forensic scientist on the issue of the DNA test results. Reek offered testimony from his own expert, who provided his opinion on the BCA's results and a potential for DNA contamination. The jury was able to hear the testimony of the State's DNA witness and Reek's DNA witness, evaluate any differences between them, and weigh their relative credibility. Our precedent does not permit us to re-weigh the evidence and sit, in essence, as a 13th juror. *State v. Robinson*, 536 N.W.2d 1, 2 (Minn. 1995). As stated earlier, we will not consider pro se claims on appeal that are not supported by arguments or legal authority. The basis for Reek's objection to the reliability of the DNA evidence is unclear, and thus we deem Reek to have forfeited his claims regarding reliability of the DNA results.

B.

Reek also raises several claims of ineffective assistance of counsel, including the failure to investigate, the failure to call important witnesses, and the failure to cross-examine a witness. In particular, Reek argues that his trial counsel failed to investigate: (1) B.R. as a potential alternative perpetrator; (2) the content of the recorded jail phone conversations as exculpatory evidence and inculpatory of a third-party; and (3) statements by additional witnesses, including M.B., M.K, D.M., R.Z., and M.M. Reek argues that had his trial counsel investigated the phone recordings and locations, he would have been able to more effectively cross-examine witnesses A.B. and D.M. Reek also argues that his trial counsel failed to call several important witnesses, specifically (1) E.G.; (2) D.M.; (3) M.M.; (4) M.B.; (5) M.K.; (6) R.Z.; (7) P.S.; and (8) B.R.

To succeed on a claim of ineffective assistance of counsel, a defendant must affirmatively prove that his counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability that the results of the proceeding would have been different. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). There is a strong presumption that a counsel's performance falls within a wide range of reasonable assistance and even if there were errors in the counsel's performance, the defendant must still show that he was prejudiced as a result. *Id.* at 789–90.

To the extent that these claims rely on facts outside the record, including Facebook messages, jail calls, BCA reports, and police reports, we are not able to determine whether the decisions of counsel were tactical, concurred in by Reek, or made for some other reason.

All of Reek's claims regarding a failure to investigate rely on at least some facts that are not found in the record. Because additional facts are needed to review these claims, they are more properly suited for a postconviction proceeding. *State v. Barnes*, 713 N.W.2d 325, 335 (Minn. 2006) (citing *Black v. State*, 560 N.W.2d 83, 85 n.1 (Minn. 1997)).[7] Likewise, Reek's claims regarding his counsel's alleged failure to effectively cross-examine some witnesses relies on facts not found in the record. Accordingly, although we are unable to decide Reek's claims of ineffective assistance of counsel, nothing in our opinion prevents Reek from developing and presenting such claims in a postconviction petition.

CONCLUSION

For the forgoing reasons, we affirm Reek's conviction for first-degree murder.

Affirmed.

[7] A claim of ineffective assistance of counsel should be raised on direct appeal unless the claim "requires examination of evidence outside the trial record or additional fact-finding by the postconviction court . . . ." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).