STATE OF MINNESOTA

IN SUPREME COURT

A19-0362, A22-0290

Saint Louis County — McKeig, J.

State of Minnesota,

Respondent,

vs.

Filed: May 17, 2023
Office of Appellate Courts

Noah Anthony Charles King,

Appellant .

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, Saint Paul, Minnesota; and

Kimberly J.M. Kromatka, Saint Louis County Attorney, Duluth, Minnesota, for respondent.

S Y L L A B U S

1. A recanting codefendant's prior inconsistent statement is properly admitted as substantive evidence if the statement meets the requirements of Minnesota Rule of Evidence 801(d)(1)(A).

2. When viewed in a light most favorable to the verdict, the evidence presented at trial is sufficient to prove that a victim's death was a reasonably foreseeable result of the burglary when the perpetrators were armed and the defendant participated in planning the burglary.

3. The district court does not abuse its discretion in denying postconviction relief on the grounds of ineffective assistance of counsel for failing to communicate and explain an *Alford* plea when the petitioner does not present any substantive evidence other than their own assertions that such a plea offer was made.

4. When multiple offenses are alleged in the charging instrument, Minnesota Statute section 609.035, subdivision 1 (2022), does not prohibit the district court from finding the defendant not guilty of some charges but guilty of the remaining charges.

5. A challenge to an indictment is forfeited if not raised before trial; absent a showing of good cause, the appellate court will not review the issue.

6. When viewed in a light most favorable to the verdict, the evidence presented at trial is sufficient to prove that the defendant committed first-degree felony murder under an aiding and abetting theory of criminal liability.

Affirmed.

O P I N I O N

MCKEIG, Justice.

Following a bench trial, appellant Noah Anthony Charles King was convicted of first-degree felony murder under an aiding and abetting theory of criminal liability. King filed a direct appeal that we stayed so he could pursue postconviction relief. In his

postconviction petition, King alleged a claim of ineffective assistance of trial counsel. After holding an evidentiary hearing, the district court denied King's postconviction petition. King appealed. We lifted the stay and consolidated King's appeals. In his principal brief, King challenges the admission of a recanting codefendant's prior inconsistent statement, the sufficiency of the State's evidence, and the denial of his postconviction petition alleging ineffective assistance of trial counsel. In a pro se supplemental brief, King raises three additional arguments. Because we conclude that King's arguments do not entitle him to any relief, we affirm.

FACTS

On February 14, 2017, William Grahek was fatally shot during a burglary in the basement of his home in Duluth. Grahek's brother heard the gunshots and called the police. Following an investigation, the police concluded that Noah Baker, Deandre Davenport, and King broke into Grahek's home with the intent to rob Grahek, and when Grahek resisted, he was fatally shot.

The State charged King with second-degree intentional murder under Minn. Stat. § 609.19, subd. 1 (2022), and first-degree attempted aggravated robbery under Minn. Stat. § 609.245, subd. 1 (2022), alleging aiding and abetting theories of criminal liability under Minn. Stat. § 609.05 (2022). A grand jury subsequently indicted King for first-degree felony murder while attempting to commit aggravated robbery under Minn. Stat. § 609.185(a)(3) (2022) and first-degree felony murder while committing burglary under Minn. Stat. § 609.185(a)(3), alleging aiding and abetting theories of criminal liability under

Minn. Stat. § 609.05. King moved to dismiss the indictment for lack of probable cause and the district court denied his motion.[1]

Meanwhile, Baker pleaded guilty to second-degree murder pursuant to a plea agreement.[2] As part of his plea, Baker admitted the following facts. Baker was close friends with Davenport and King. In January 2017, Davenport told Baker and King that Grahek kept drugs in his home, which was located across the alley from King's home. Based on this information, the three men decided to rob Grahek.

In February 14, 2017, in accordance with their plan, Baker and Davenport parked a white Jeep down the street from King's home and then walked to King's home where the three men changed into black clothing and armed themselves—Baker and Davenport each carried handguns, and King carried a large wrench. After the men kicked in the doors to Grahek's home, Davenport pointed his gun at Grahek and ordered him to get down, Baker also aimed his gun at Grahek, and King stood behind them. When Grahek did not drop to the floor, Davenport fatally shot him, at which point the three men ran from Grahek's house, reconvened at the white Jeep, and drove to Baker and Davenport's shared residence. On the way, they took their clothing off and put it in a trash bag. Baker's sister drove King back to his home in the white Jeep shortly after the men arrived at the Baker/Davenport residence. Baker burned their clothes the next day, and then Baker and Davenport went to

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[1] King did not claim that the prosecutor presented any false evidence or testimony to the grand jury in this motion to dismiss the indictment.

[2] The grand jury indicted Baker for two counts of first-degree felony murder under aiding and abetting theories of criminal liability.

a motel in Superior, Wisconsin, where they met up with another friend. Baker gave the gun he used in the burglary to this friend, and Davenport sold the gun he carried to someone else. Based on the above-described facts, the district court accepted Baker's guilty plea.

In October 2018, six months after Baker's guilty plea, King waived his right to a jury trial. At the ensuing bench trial, the State presented testimony from several witnesses, including the investigating police officers, the medical examiner, and Baker's sister. When the State called Baker to testify, he recanted his plea-hearing testimony, claiming he committed the murder alone. When the State offered Baker's plea transcript as a trial exhibit, defense counsel objected. The district court overruled the objection and admitted the transcript as substantive, non-hearsay evidence under Minnesota Rule of Evidence 801(d)(1)(A).

After considering the evidence presented at the bench trial, the district court made the following findings of fact. King lived directly across the alley from Grahek. Davenport learned that Grahek kept drugs and money in a safe in Grahek's basement bedroom. On February 14, 2017, King used his girlfriend's phone to contact Davenport throughout the day, both before and after Grahek's murder. Baker and Davenport approached King's house around 1:26 p.m. after they parked a white Jeep down the street from King's house. Baker and Davenport entered through the back door of King's house and then the three men left the house together through the back door.

Grahek's brother heard a loud bang from the basement followed by an unfamiliar voice yelling "get down on the ground." Within moments, Grahek's brother heard two or

three gunshots. Grahek's brother called the police at 2:00 p.m. At 1:59 p.m. the white Jeep travelled away from Grahek's house at a "high rate of speed."

A portion of the fatal bullet was salvaged from Grahek's body and sent to the Bureau of Criminal Apprehension (BCA) for testing. Police also collected spent and unfired cartridges from Grahek's basement. Officers called a canine tracking officer and his dog after they found fresh shoe prints in the snow leading away from Grahek's house.

At 2:16 p.m. Baker's sister drove the white Jeep to drop King off at the Cenex station across the street from King's house. About an hour and a half after King initially left with Baker and Davenport, he returned to his home. Before he left the house again, King asked his girlfriend to delete calls he made from her cell phone that day.

The police canine tracked a scent associated with the shoe prints at Grahek's residence to the alley, across the alley to King's fenced in yard, and from the rear of King's home to the front porch where the canine refused to leave, indicating that the scent's owner entered the front of the residence. The shoe prints from Grahek's yard matched the tread pattern of the shoe prints on the steps at King's home.

While the canine tracked the shoe prints and scent, officers saw King leave his home through the front door and walk to the Cenex. Officers briefly spoke with King at the Cenex. King then returned home and told his girlfriend to tell the police that he was home all day. When the canine finished tracking the scent from the crime scene to the front door of King's residence, officers knocked and asked King to step outside. During this second conversation with police, King had changed out of the shoes he wore to the Cenex and instead wore a pair of boots.

After the burglary and murder, Baker and Davenport went to a motel in Superior, Wisconsin, where they burned their clothing, and each handed their handguns off to other friends. Police witnessed one of these friends arrive at and leave the motel, and the police obtained a warrant for that friend's home where they located the handgun. The BCA confirmed that the spent casings recovered from Grahek's residence were fired and ejected from this handgun.

Based on its findings of fact, the district court found King guilty of second-degree intentional murder, and first-degree felony murder while committing a burglary, both under aiding and abetting theories of criminal liability. The district court found King not guilty of the remaining charges.

King appealed his conviction in March 2019. We granted King's motion to stay his direct appeal to allow him to pursue postconviction relief. King petitioned for postconviction relief in November 2019 claiming, in part, that he received ineffective assistance of trial counsel because his attorney did not communicate an *Alford* plea deal to him. In support of his petition, King signed an affidavit that alleged that his attorney failed to explain to him "that the State had offered to allow [him] to enter an *Alford* plea," which would have let him maintain his innocence—an offer King would have accepted. At an evidentiary hearing in September 2021, King chose not to testify and did not submit any additional evidence. The district court denied King's postconviction petition, concluding that King failed to prove his claim of ineffective assistance of trial counsel by a preponderance of the evidence because he did not present any testimony or evidence at the evidentiary hearing.

King appealed the denial of his postconviction petition; we lifted the stay of King's direct appeal and consolidated the two appeals.

ANALYSIS

In this consolidated appeal, King makes three arguments in his principal brief. First, King argues the district court improperly allowed the prosecutor to call a recanting codefendant solely for impeachment purposes. Second, King argues the State failed to present sufficient evidence to prove he aided and abetted Grahek's murder because the murder was not a reasonably foreseeable consequence of the burglary. Third, King argues the district court abused its discretion when it denied him postconviction relief because his trial counsel was ineffective by failing to explain an *Alford* plea.

In his pro se supplemental brief, King makes three additional arguments. First, he argues that because the district court found him not guilty of two of four charges, Minn. Stat. § 609.035 (2022), prevented the court from finding him guilty of the remaining charges. Second, King argues the prosecutor committed misconduct by submitting false evidence to the grand jury. Third, King argues the State failed to present sufficient evidence to convict him of first-degree felony murder. We address each argument in turn.

I.

We first consider whether the district court abused its discretion when it admitted Baker's plea transcript under Minn. R. Evid. 801(d)(1)(A). We review a district court's evidentiary determinations for an abuse of discretion. *State v. Nunn*, 561 N.W.2d 902, 906–07 (Minn. 1997). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v.*

Guzman, 892 N.W.2d 801, 810 (Minn. 2017). King has the burden to establish both that the trial court abused its discretion and that he was prejudiced by the abuse of discretion. *See Nunn*, 561 N.W.2d at 907.

King argues that the admission of Baker's plea transcript violated the rule announced in *State v. Dexter*, 269 N.W.2d 721 (Minn. 1978).[3] In support of his argument, King asserts that the State knew Baker intended to recant the statements he made during his plea hearing and that it called Baker as a trial witness solely for impeachment purposes, thereby creating a risk that the trier of fact would use the evidence for an improper purpose. According to the State, *Dexter* does not apply in situations, like here, where the witness's prior inconsistent statements are substantively admissible. The State argues that the *Dexter* rule is meant to prevent the risk of improper use of impeachment evidence as substantive evidence; that concern does not exist when the prior inconsistent statement is substantively admissible.

We agree with the State. Baker's plea agreement was properly admitted as substantive evidence of guilt under an exception to the hearsay rule; consequently, *Dexter* does not apply.

Minnesota Rule of Evidence 801(d)(1)(A) allows for a prior inconsistent statement to be admitted as substantive, non-hearsay evidence if (1) the declarant testified and is

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[3] "In *State v. Dexter*, we affirmed a district court's ruling 'barring the prosecution from impeaching one of its own witnesses with extrinsic evidence of prior inconsistent statement[s]' because the State sought 'to present, in the guise of impeachment, evidence which is not otherwise admissible.' " *State v. Morales*, 788 N.W.2d 737, 756–57 (Minn. 2010) (quoting *Dexter*, 269 N.W.2d at 721).

subject to cross examination about their prior statement, (2) the prior statement is inconsistent with the declarant's current testimony, and (3) the prior inconsistent statement was made under oath or subject to the penalty of perjury at a trial, hearing, or other proceeding. The district court correctly concluded Rule 801(d)(1)(A)'s requirements were met because (1) Baker testified at King's trial and was subject to cross examination about his prior inconsistent statement; (2) Baker's testimony at trial was inconsistent with his plea hearing testimony because during King's trial, Baker recanted King and Davenport's involvement in the burglary; and (3) Baker was under oath during his plea hearing. Accordingly, the district court properly admitted the plea hearing transcript as substantive evidence upon which the fact finder could rely in determining whether King was guilty.

A different situation is presented when the prior statement is hearsay and inadmissible as substantive evidence. Such evidence may still be admitted to attack a witness's credibility. Minn. R. Evid. 607. One way to attack credibility is through a prior inconsistent statement. Minnesota Rule of Evidence 613 provides the circumstances in which extrinsic evidence of prior inconsistent statements can be admitted. The requirements of Rule 613 are not as rigorous as the requirements of Rule 801(d)(1)(A). Under Rule 613, extrinsic evidence of a prior inconsistent statement is admissible if the witness is given a chance to explain or deny the inconsistent statement, and the opposing party is given a chance to interrogate the witness about the prior inconsistent statement. Minn. R. Evid. 613(b). We have also clarified in case law that to impeach a witness under Rule 613, there must be a foundation established that shows the statements are inconsistent

or that the declarant does not recollect the prior statement. *State v. Martin*, 614 N.W.2d 214, 224 (Minn. 2000).

The rule articulated in *Dexter*—and later in *State v. Ortlepp*, 363 N.W.2d 39, 42–43 (Minn. 1985)—applies when evidence of an inconsistent statement is admitted to impeach a witness's' credibility. In *Dexter*, the State conceded that the statements at issue were not admissible as substantive evidence under Rule 801(d)(1)(A). *Dexter*, 269 N.W.2d at 721. Nevertheless, the State argued that the district court erred when it barred the State from impeaching its own witness with extrinsic evidence of prior inconsistent statements that the witness made to her friends in a casual setting. *Id.* We disagreed, explaining that the less rigorous requirements of Rule 607 create a possibility that impeachment evidence could be misused as substantive evidence. *Id.*

In *Ortlepp*, we cautioned about the danger of a prosecutor impeaching their own witness with a prior inconsistent statement when the statement is not admissible as substantive evidence because such impeachment creates "a large risk that the jury, even if properly instructed, will consider the prior statement as substantive evidence." 363 N.W.2d at 43. But we made clear that when a prior inconsistent statement is admissible as substantive evidence under Rule 801(d)(1)(A), the "defendant has no legitimate cause to complain" and no *Dexter* problem exists. *Id*. Consequently, the district

court did not abuse its discretion by admitting the prior inconsistent statements in the April 2018 transcript of Baker's plea hearing.[4]

II.

Second, we consider King's argument that the State presented insufficient evidence to prove that Grahek's murder was a reasonably foreseeable consequence of the burglary. The State argues that given the facts here, King could have reasonably foreseen Grahek's death because he participated in the armed burglary of a dwelling.

"When reviewing whether evidence is sufficient to support a conviction, we view the evidence in the light most favorable to the verdict and assume that the factfinder

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[4] In his reply brief, King argues that "[t]he *Dexter* problem at King's trial warrants a new trial," and then proceeds to argue that the prosecutor improperly called Baker as a witness to offer perjured testimony. The State moved to strike the reply brief in its entirety, arguing that it raises a new legal argument. To the extent that the reply brief can be construed as raising a new argument of prosecutorial use of false testimony under a standard adopted by the federal courts, this argument was impermissibly raised for the first time in the reply brief and is not properly before the court. *See Emerson v. School Bd. of Independent School Dist. 199*, 809 N.W.2d 679, 687 (Minn. 2012); *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009).

We nonetheless deny the State's motion to the extent the reply brief raises this charge of prosecutorial misconduct in the context of "[t]he *Dexter* problem at King's trial." The *Dexter* issue was squarely raised in King's principal brief. The charge of prosecutorial misconduct under *Dexter*, however, was addressed and rejected in our subsequent decision in *Ortlepp*. As we explained, in that case "[t]he prosecutor *knew* that [the witness's] testimony was not going to be helpful and yet he called him for the purpose of getting his prior statement before the jury under the guise of impeachment. In fact, the prosecutor referred to the content of [the witness's] statement in his opening remarks . . . ." 363 N.W.2d at 43 (emphasis added). We framed the central question in *Ortlepp* as "whether [the witness's] statement was admissible substantively." *Id.* Because "[i]f it was, the *Dexter* problem is not present and defendant has no legitimate cause to complain." *Id.* So too is the case here. We have held that Baker's plea hearing testimony was admissible substantively, so there is no *Dexter* issue to the extent the prosecutor knew that Baker was going to recant his trial testimony.

disbelieved any testimony conflicting with that verdict." *State v. Fardan*, 773 N.W.2d 303, 321 (Minn. 2009) (citation omitted) (internal quotation marks omitted). We will not disturb the verdict if a factfinder "could reasonably conclude, given the presumption of innocence and the requirement of proof beyond a reasonable doubt, that the defendant [is] guilty of the charged offense." *Id.* "We review criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions." *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998).

Though the sufficiency-of-the evidence standard is very deferential to the verdict, the due process clause still requires that each element of the charged crime be proven beyond a reasonable doubt. *State v. Merrill*, 428 N.W.2d 361, 366 (Minn. 1988). In Minnesota, a person commits first-degree felony murder if they intentionally "cause[] the death of a human being . . . while committing or attempting to commit burglary." Minn. Stat. § 609.185(a)(3). A person can be held criminally liable for a murder committed by another if (1) "the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime" and the murder was "committed in pursuance of the intended crime," and (2) the murder was "reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." Minn. Stat. § 609.05, subds. 1–2; *see also Merrill*, 428 N.W.2d at 366–67.

According to King, the State failed to prove that Grahek's death was reasonably foreseeable as a probable consequence of committing or attempting to commit the burglary. We have "previously recognized that the burglary of a dwelling always carries with it the possibility of violence." *Merrill*, 428 N.W.2d at 366–69 (citation omitted) (internal

quotation marks omitted) (holding there was sufficient evidence to support a felony-murder conviction where there was no direct evidence of who stabbed the victim, but the defendant knocked the victim out of his wheelchair, stole the victim's property with a codefendant, removed all identifying evidence from the victim's home, and fled the state because burglarizing a dwelling always carries a possibility of violence); *accord State v. Nunn*, 297 N.W.2d 752, 753–54 (Minn. 1980) (holding that a victim's death was a reasonably foreseeable consequence of a burglary given that burglary of a dwelling and assault of the dwelling's resident "obviously involved special danger to human life," and that burglary "always carries with it the possibility of violence and therefore some special risks to human life").

When viewed in a light most favorable to the verdict, the evidence presented at trial establishes the following facts. King, Baker, and Davenport developed a plan to break into Grahek's home with the intent to steal Grahek's drugs and money. King was armed with a large wrench and knew that Baker and Davenport were armed with handguns. King actively participated in the burglary by kicking in Grahek's door and holding a large wrench while standing with Baker and Davenport as they brandished their handguns.

Burglaries always carry with them a heightened risk to human life, *see Nunn*, 297 N.W.2d at 754, which is undoubtedly enhanced when the perpetrators knowingly carry dangerous weapons. Under the facts here, it is a reasonable inference that the codefendants were prepared to use force to accomplish the burglary. *See State v. Jackson*, 726 N.W.2d 454, 460–61 (Minn. 2007) (holding that there was sufficient evidence that a victim's murder was reasonably foreseeable when two codefendants entered a store armed with a

high-powered assault rifle, two codefendants sought out their third codefendant because of his dangerous reputation, and the appellant knew the plan involved using force). Having viewed the evidence presented at trial in a light most favorable to the verdict, we conclude the state has proven beyond a reasonable doubt that Grahek's death was a reasonably foreseeable consequence of committing the burglary.

III.

Third, we consider whether the district court abused its discretion by denying King's postconviction petition, which claimed that King received ineffective assistance of counsel related to his plea bargain. "The person seeking postconviction relief bears the burden of establishing by a preponderance of the evidence that his claims merit relief." *Crow v. State*, 923 N.W.2d 2, 10 (Minn. 2019). We review the denial of a postconviction petition for an abuse of discretion. *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018). "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record, or exercises its discretion in an arbitrary or capricious manner." *Crow*, 923 N.W.2d at 9 (citation omitted) (internal quotation marks omitted). We review a district court's factual determinations for clear error. *Scherf v. State*, 788 N.W.2d 504, 507 (Minn. 2010). We review a district court's legal conclusions de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

Under the two-prong test set forth in *Strickland* to demonstrate ineffective assistance of counsel, King had to show (1) that his attorney's representation " 'fell below an objective standard of reasonableness,' " and that (2) " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different.' " *Martin*, 695 N.W.2d at 587 (quoting *Strickland*, 466 U.S. 668, 694 (1984)), *abrogated on other grounds by Arredondo v. State*, 754 N.W.2d 566 (Minn. 2008). "A court may address the two prongs of the test in any order and may dispose of the claim on one prong without analyzing the other." *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006). The reasonableness of an attorney's performance is judged by an objective standard based on "the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (citation omitted) (internal quotation marks omitted). "There is a strong presumption that counsel's performance was reasonable." *Martin*, 695 N.W.2d at 587.

In his postconviction petition and supporting affidavit, King claimed his trial counsel failed to meet the objectively reasonable *Strickland* standard by failing to communicate a formal plea offer that included an *Alford* plea.[5] King's postconviction petition alleged that his attorney "did not explain" that King could accept the State's plea offer "while still maintaining his innocence" and failed to explain "what an *Alford* plea was." In an effort to corroborate his allegation, King attached a document that is purportedly an email from the State to King's attorney setting forth a plea offer from the State that would have capped his sentence at 360 months.[6] The purported email does not

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[5] An *Alford* plea is a guilty plea by a defendant who maintains their innocence but pleads guilty because they conclude that the evidence the State is likely to offer at trial is sufficient to convict. *Matakis v. State*, 862 N.W.2d 33, 35 n.2. (Minn. 2015); *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977).

[6] This purported email is a document with three paragraphs that is not signed and does not contain any indicia that it came from the State. The email states that the best the State

mention an *Alford* plea. Nevertheless, in his supporting affidavit, King alleges that not everything in the plea agreement was in the email and that his attorney told him he could enter an *Alford* plea but did not explain what an *Alford* plea entails.

In accordance with Minn. Stat. § 590.04, subd. 3 (2022), the district court granted King an evidentiary hearing at which he bore the burden of establishing the facts he alleged in his petition and supporting affidavit "by a fair preponderance of the evidence." But at the evidentiary hearing, King chose not to testify about the facts alleged in his affidavit and did not submit any other evidence. The State subpoenaed King's trial counsel but did not call him to testify because King offered no evidence. The district court therefore denied King's postconviction petition because he chose not to testify about the facts alleged in his affidavit and he failed to present any other evidence of an *Alford* plea.

King argues the district court abused its discretion when it denied his postconviction petition. He asserts that the postconviction statute does not require testimonial evidence and the State failed to contradict or rebut King's affidavit. The State argues that because King failed to show that he was offered an *Alford* plea, he cannot show that his trial counsel's actions fell below the objectively reasonable standard by failing to discuss an *Alford* plea offer with King.

Even if King's self-serving affidavit could be deemed an adequate substitute for live testimony—which unlike an affidavit is subject to cross examination and provides

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would offer King was to cap his sentence at "360 months." The email challenged King's claim of innocence, explaining that the State did not have to prove that King shot Grahek; rather, it just needed to prove that King was there and participated in the burglary. The email does not mention an *Alford* plea, or indicate the State offered King an *Alford* plea.

important nonverbal information relevant to assessing credibility—it fails to satisfy the preponderance of the evidence standard. Notably, the purported email does not mention, reference, or indicate in any way that the State offered King an *Alford* plea. King thus "offer[ed] no evidence aside from his own assertions that such a deal was ever offered." *See Crow*, 923 N.W.2d at 14. As we previously held, "[a] postconviction court properly rejects ineffective assistance claims when based solely on conclusory, argumentative assertions without factual support." *Id.* at 14–15 (citation omitted) (internal quotation marks omitted). And "[i]n the absence of any substantive evidence to support . . . claims about the plea deal, the postconviction court d[oes] not abuse its discretion by rejecting [an] ineffective assistance of counsel claim." *Id.* at 15 (citation omitted) (internal quotation marks omitted). Accordingly, the district court did not abuse its discretion by denying King's postconviction petition.

IV.

Fourth, we consider whether the district court violated Minn. Stat. § 609.035 when it found King not guilty of some of the charged counts and guilty of the remaining charged counts. King argues that the moment that the district court found him not guilty of first-degree murder while committing an aggravated robbery and attempted first-degree aggravated robbery, Minn. Stat. § 609.035 prevented the district court from finding him guilty of the remaining charges alleged in the complaint because all the charges arose from that same behavioral incident. We disagree.

Minnesota Statutes section 609.035 provides:

> if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All the offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts.

Minn. Stat. § 609.035, subd. 1. King's reliance on the phrase "a conviction or acquittal of any one of them is a bar to prosecution for any other of them" is misplaced. We have explained that section 609.035 means "a person may be punished for only one of the offenses that results from acts committed during a single behavioral incident and that did not involve multiple victims." *State v. Branch*, 942 N.W.2d 711, 713 (Minn. 2020).

The State charged King with second-degree intentional murder under Minn. Stat. § 609.19, subd. 1 and first-degree attempted aggravated robbery under Minn. Stat. § 609.245, subd. 1, and a grand jury indicted King for first-degree felony murder while attempting to commit aggravated robbery under Minn. Stat. § 609.185(a)(3) and first-degree felony murder while committing burglary under Minn. Stat. § 609.185(a)(3). Section 609.035 prevents King from being convicted and sentenced for both first-degree felony murder while attempting to commit aggravated robbery and first-degree felony murder while committing burglary because those charges arose from the same behavioral incident. Here, the district court only found King guilty of second-degree intentional murder, and first-degree felony murder while committing a burglary, both under aiding and abetting theories of criminal liability. Consequently, the convictions and sentences comply with section 609.035.

To the degree that King intended to argue that he cannot be convicted of some of the charged offenses while others are dismissed, we also disagree. We have previously clarified "that a defendant who is found guilty of one count of a two count indictment or complaint is not entitled to a new trial or a dismissal simply because the jury found him not guilty of the other count . . . ." *State v. Juelfs*, 270 N.W.2d 873, 873–74 (Minn. 1978). Here, the indictment alleged multiple counts arising from the same incident. All of these counts were prosecuted and tried at the same time, and the district court found King guilty of some counts and not guilty of others. Accordingly, the district court complied with both section 609.035 and *Juelfs* when it found King not guilty of some of the counts charged in the indictment and guilty of the remaining charges.

V.

Fifth, we turn to King's argument that the prosecutor knowingly offered false evidence to the grand jury, thereby invalidating the indictment. We conclude that King has forfeited the claim.

Under the Minnesota Rules of Criminal Procedure, any motions challenging the validity of an indictment and seeking dismissal must be made before trial by a motion to dismiss or grant other appropriate relief. Minn. R. Crim. P. 17.06, subd. 2(1), 10.01, subd. 2. Such a motion "must include all defenses, objections, issues, and requests then available. Failure to include any of them in the motion constitutes waiver." Minn. R. Crim. P. 10.01, subd. 2; *see also State v. Whittaker*, 568 N.W.2d 440, 448 (Minn. 1997) ("Failure to include in a motion all defenses, objections, issues, and requests then available constitutes a waiver

thereof, unless the court for good cause shown grants relief from the waiver."). "The court can grant relief from the waiver for good cause." Minn. R. Crim. P. 10.01, subd. 2.[7]

King moved to dismiss the indictment in February 2018, arguing the indictment failed to establish probable cause, but the motion did not include any accusation that the prosecutor submitted false evidence to the grand jury. Concluding that the indictment established probable cause, the district court denied King's motion.

Because the motion King filed in the district court did not include any accusation that the prosecutor submitted false evidence to the grand jury and King does not allege that the falsity of this evidence is newly discovered, he has forfeited appellate review of the issue. Moreover, King has not provided us any good cause argument. We therefore decline to consider King's objections to the indictment. *See State v. Pippitt*, 645 N.W.2d 87, 96 (Minn. 2002) (holding that when a defendant forfeits their objections to an indictment by failing to include them in the requisite motion and fails to demonstrate good cause to grant relief from their forfeiture, "we need not consider [the] objections to the indictment").

VI.

Finally, King's pro se supplemental brief presents a different sufficiency of the evidence challenge than that raised in his principal brief and addressed in Part II of this opinion, this time to whether the State presented sufficient evidence to prove beyond a

[7] Our decisions have since clarified the distinction that a right "may be forfeited . . . by the failure to make timely assertion of the right," *State v. Beaulieu*, 859 N.W.2d 275, 278 (Minn. 2015) (citation omitted) (internal quotation marks omitted), while "[w]aiver is the voluntary relinquishment of a known right," *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). Accordingly, the references to "waiver" in Rule 10.01 and *Whittaker* can fairly be characterized as more precisely being references to forfeiture.

reasonable doubt that King committed first-degree felony murder under an aiding and abetting theory of criminal liability. King argues that the State failed to prove beyond a reasonable doubt that he was involved in Grahek's murder. According to King, the evidence presented to the court was "false" and therefore insufficient. Specifically, King claims that the statements Baker made during his guilty plea are false, and that Baker's trial testimony is true. The State argues that King's sufficiency arguments are meritless, and given the deferential standard of review, there is no reason for this court to overturn his conviction.

King's argument rests on the credibility of Baker's trial testimony, but "[w]e accord great deference to the trial court's determination" on credibility because credibility and "the weight to be given" to a witness's testimony are determinations for the factfinder. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (citation omitted) (internal quotation marks omitted). Given that we defer to the district court's credibility determination and disregard any testimony conflicting with the verdict, King's arguments about Baker's testimony fail. *See Merrill*, 428 N.W.2d at 366 (holding that in a challenge to the sufficiency of the evidence, "[a]ny conflicting evidence must . . . be resolved in the state's favor").

King alleges that other evidence is false, but to prove the evidence is false, King merely points to what he believes are discrepancies in the evidence submitted to the district court. For example, King focuses on perceived discrepancies in his footwear the day of the crime, claiming that it is impossible that he could have worn the shoes that created the shoe prints in Grahek's yard based on King's stated timeline, the video evidence, and the

footwear he wore to the police station. Essentially, King is asking us to reweigh the evidence presented to the district court. But we must "view the evidence in the light most favorable to the verdict" when reviewing whether the evidence is sufficient to support a conviction and defer to the credibility determinations made by the factfinder. *Fardan*, 773 N.W.2d at 321 (citation omitted) (internal quotation marks omitted); *Dickerson*, 481 N.W.2d at 843. Furthermore, we "assume that the factfinder disbelieved any testimony conflicting with [the] verdict." *See Fardan*, 773 N.W.2d at 321 (citation omitted) (internal quotation marks omitted).

When viewed in the light most favorable to the verdict, the evidence presented at trial proves beyond a reasonable doubt that King committed first-degree felony murder under an aiding and abetting theory of criminal liability. Baker testified about King's involvement in the burglary and Grahek's subsequent murder. The district court found that the statements that Baker made during his guilty plea, which implicated King and Baker, were more credible than his trial testimony, which only implicated himself. We defer to that credibility determination. *See Dickerson*, 481 N.W.2d at 843. Furthermore, the statements made by Baker during his guilty plea are supported by other record evidence including, but not limited to, King's girlfriend's testimony that the codefendants met at King's home just before the crime and all left together; the white Jeep sped away from the scene of the crime, but returned within the half hour and dropped King off at the Cenex across from his home; King told his girlfriend to delete calls he made to Davenport from her phone and to lie to police about King's whereabouts that day; King's wrench was recovered in the white Jeep and matched the description of the wrench Baker claimed King

carried during the burglary; the police canine positively indicated that a person involved in Grahek's death could be tracked to King's residence—specifically to King's front door; and King is the only codefendant who entered and exited his home through the front door on the day of the burglary and murder.

Thus, when the evidence presented at trial is viewed in the light most favorable to the verdict, it establishes beyond a reasonable doubt that King committed first-degree felony murder under an aiding and abetting theory of criminal liability.

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.