STATE OF MINNESOTA

IN SUPREME COURT

A21-1585

Dakota County — Chutich, J.

State of Minnesota,

Respondent,

vs.

Filed: April 5, 2023
Office of Appellate Courts

Marcelino Santiago Lopez,

Appellant.

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

Kathryn M. Keena, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. Although the district court clearly erred when, during a bench trial, the court made a finding that is not supported by the record, the clearly erroneous finding was harmless, and a new trial is not warranted under our jurisprudence concerning the impartiality of a finder of fact.

2. The district court's failure to consider a charge of second-degree unintentional felony murder during its deliberations was harmless because the court considered the charges of first-degree murder and second-degree intentional murder and found appellant guilty of the more serious charge. But, as a matter of best practice, a district court should conduct a *Dahlin* analysis on the record during a bench trial after receiving an express request to consider a lesser-included offense by a defendant.

Affirmed.

O P I N I O N

CHUTICH, Justice.

A Dakota County grand jury indicted appellant Marcelino Santiago Lopez with several offenses, including first-degree premeditated murder and second-degree intentional murder for the shooting death of Brandon Nieves on April 2, 2020, and attempted second-degree intentional murder for the nonfatal shooting of A.N. that same day. Lopez waived his right to a jury trial and submitted his case to the district court. Before the district court began its deliberations, Lopez asked the court to consider the lesser-included offense of second-degree unintentional felony murder during deliberations. The court denied the request. In its written findings of fact, the court made a finding related to Lopez's defense, which is not supported by the record, concerning business closures at the outset of the COVID-19 pandemic. The court used this finding as part of its assessment of Lopez's credibility. Based on the record as a whole, the court found Lopez guilty of first-degree premeditated murder and attempted second-degree murder.

On direct appeal to our court, Lopez asks us to reverse his convictions and to grant him a new trial. He claims that the district court's pandemic-related finding based on facts not in the record reflects a structural error that deprived him of an impartial finder of fact. Lopez further asserts that the court's refusal to consider second-degree felony murder during deliberations was reversible error. Because the pandemic finding does not require a new trial, and the court's failure to consider the lesser-included offense of second-degree unintentional felony murder in its deliberations was harmless, we affirm.

FACTS

On April 2, 2020, appellant Marcelino Santiago Lopez drove to the home of Brandon Nieves. Nieves was out with a group of friends and family at that time. As he waited for Nieves to return, Lopez loaded a pump-action shotgun. The group, including Nieves and A.N., eventually returned to Nieves's home, and Nieves parked behind Lopez's car. As Nieves and A.N. approached Lopez's car, Lopez started to drive away. He then stopped and stepped out of the car, brandishing the shotgun. As Nieves started to speak, Lopez shot him in the head. When A.N. moved toward Lopez, Lopez fired two more shots, striking A.N. once in his chest. Lopez fled the scene in his car. A short time later, Lopez called 911 to report the shooting, and a police officer arrested him. Nieves died at the scene. A.N. survived because he received emergency, life-saving medical care.

A Dakota County grand jury later indicted Lopez on the following counts: *Count 1*: first-degree premeditated murder in violation of Minnesota Statutes section 609.185(a)(1) (2022); *Count 2*: second-degree intentional murder in violation of Minnesota Statutes section 609.19, subdivision 1(1) (2022); *Count 3*: attempted

first-degree premeditated murder in violation of Minnesota Statutes sections 609.185(a)(1) and 609.17 (2022); *Count 4*: attempted second-degree intentional murder in violation of Minnesota Statutes sections 609.19, subdivision 1(1) and 609.17; and *Count 5*: first-degree assault in violation of Minnesota Statutes section 609.221, subdivision 1 (2022). Lopez waived his right to a jury trial and submitted his case to the district court.

At the bench trial, the State presented the following evidence. In February 2020, Lopez broke up with his long-term girlfriend. About a month later, Lopez expressed interest in getting back together with his ex-girlfriend. At this point, however, she had started seeing Nieves. Lopez continued to contact his ex-girlfriend about reconciling even after she told Lopez that she did not want to get back together. She also eventually told Lopez about her new relationship with Nieves.

Upset that his ex-girlfriend did not want to reconcile, Lopez began to incessantly send text messages to her, and those messages became increasingly aggressive and threatening. For example, Lopez sent his ex-girlfriend the following threatening messages, among others:

- The reason I threatened you is cause if I can’t have you nobody can.
- Yeah please avoid me cause I think I’m really losing my mind literally and I think I’m really gonna shoot sum.
- Idc if I die or kill it’s that f*ck life.
- Dam I wish I could kill you and get away with it . . . Cause if I can’t have you no one can.
- I really might go to jail … tell you n**ga that . . . Actually don’t tell him sh*t I wanna surprise him . . . Ima kill that n**ga and if you inna car too you getting hit up as well.

- Until I kill him (in response to the ex-girlfriend saying that she can see whoever she wants).

Lopez also sent Nieves the following messages, among others:

- Yup with you and her (in response to Nieves asking Lopez if there was a problem).
- You f*cked up wya.[1]
- Link p*ssy (referring to meeting up to fight).
- F*ck you b*tch.
- We done talkin.

On the afternoon of April 2, 2020, a group of people, including Lopez's ex-girlfriend, Nieves, and A.N., went for a drive. During the drive, someone in the group sent Nieves's address to Lopez and told him to "pull up" for a fistfight.

In response to the challenge, Lopez drove to the home of Nieves. After he arrived at the home, Lopez loaded six slugs into a pump-action shotgun in preparation for the confrontation with Nieves. When the group in Nieves's car returned to Nieves's home, they stepped out of the car and began to approach Lopez's car. Lopez started to drive away, but then stopped and stepped out of his car holding the fully loaded pump-action shotgun. According to Lopez's ex-girlfriend, Nieves put his hands up and started to say something like "Bro, let's just," at which point Lopez shot him in the head. Another witness testified that Lopez shot Nieves within seconds of getting out of the car, and Nieves died at the scene. After Lopez shot Nieves in the head, A.N. moved toward Lopez, and Lopez fired

[1] "[W]ya" is an acronym for "where are you at?" It is a shorthand often used in electronic messaging.

two more shots, striking A.N. once in his chest and piercing his left lung. The surgeon who operated on A.N. testified that A.N. would have died without medical intervention.

Lopez testified to the following facts at the bench trial. Lopez explained that, at the time of the shooting, he was unemployed because the restaurant he had worked at was closed because of the pandemic. He claimed that he did not remember sending the threatening messages to his ex-girlfriend and Nieves before the shooting because he was intoxicated at the time. According to Lopez, he was still in love with his ex-girlfriend and was just upset that she was dating someone else. He stated that he went to Nieves's house with the intent only to fight. Lopez felt that Nieves was challenging him as a man and that he had to fight for his ex-girlfriend. He said that he thought Nieves was a gang member and could have possibly been armed.

According to Lopez, the fear of Nieves's purported gang activity, however, was not the reason that he had the shotgun in his car. Instead, he claimed the shotgun was in the car because he and his brother had planned to go to a gun range the day before. Lopez admitted, however, that he did not load the shotgun until he was in front of Nieves's house. Lopez claimed that when he first got out of his car at Nieves's house, he was not holding the shotgun, but when he saw the group of people get out of Nieves's car, he became afraid. He returned to his car and started to drive away. Lopez conceded that he could have just left but was worried that the group would follow him and that "as a man," he needed to answer Nieves's "challenge."

Lopez then got back out of the car with the loaded shotgun. According to Lopez, he told the group to back up several times as they walked toward him. He also claimed

that Nieves reached toward his waist area, and Lopez thought that meant Nieves was reaching for a weapon, so he fired his shotgun. He testified that he was not aiming when he shot Nieves in the head. Lopez stated that after he shot Nieves, A.N. "jolted" toward him, so he shot the gun again without aiming. He claimed that he did not intend to kill either Nieves or A.N. when he shot them.

On cross-examination, Lopez acknowledged that he was searching for Nieves on the day of the shooting and even looked up the tobacco shop where Nieves worked on his phone. He also admitted that as he was approaching the group with the loaded shotgun, he had the shotgun pointed at Nieves.

The prosecutor also asked, "It's your testimony that you were going to go to a gun range during COVID?" Lopez claimed that he was. The district court asked which shooting range he was going to; Lopez responded that he could not remember the name of the range, only that it was located in Blaine. The court did not openly question the veracity of any factual assertion made by Lopez.

At the close of trial, Lopez's counsel asked the district court to consider the offense of second-degree unintentional felony murder during deliberations. The State argued, and the court agreed, that second-degree unintentional felony murder was not a lesser-included offense of first-degree premeditated murder. Defense counsel then asked the judge to consider the offense anyway. The State objected. The court, after examining the elements of second-degree unintentional felony murder, found that the offense did not fit this case and denied Lopez's request.

After deliberations, the district court issued its order, making several findings of fact related to the shooting. When discussing the order of events and after finding that Lopez got out of the car with the shotgun, the court made the following finding of fact: "[Lopez's] testimony the gun had been in the car since April 1, 2020, when he and his brother were going target shooting at a gun range in Blaine lacks credibility. April 1, 2020, was at the beginning of the pandemic, and most places were closed." This finding is the focus of Lopez's challenge.

The district court made other key credibility findings. The court found that Lopez's testimony that he was drunk when he wrote the threatening texts and messages to Nieves and his ex-girlfriend "lack[ed] credibility." The court noted that a relevant exhibit referenced marijuana use, but only isolated references to alcohol. The court further found that, "[w]hen interviewed by the police, [Lopez] acknowledged the Facebook and text messages but said that he 'didn't mean it' and was 'sorry.' " The court rejected that testimony, explaining that "[Lopez's] claim he 'didn't mean it' rings hollow having shot two people, killing one."

In addition, the district court made the following important findings of fact: Lopez initiated the altercation; he had loaded "six (6) slugs" into his shotgun preparing for his confrontation with Nieves; neither Nieves nor A.N. ever got within arm's distance of Lopez; Lopez could have stayed in his car and kept driving yet chose to stop and get out of his car with a loaded shotgun; and Lopez was the only person at the scene who was armed.

Based on its findings of fact, the district court found Lopez guilty of first-degree premediated murder and attempted second-degree intentional murder. The court imposed a sentence of life without the possibility of release for Nieves's murder and a concurrent sentence of 173 months for the attempted second-degree intentional murder of A.N.

Lopez now appeals his convictions.

ANALYSIS

On appeal, Lopez makes two primary arguments. As part of his first argument, Lopez asserts that the district court's finding that "April 1, 2020, was at the beginning of the pandemic, and most places were closed" is clearly erroneous because it is not supported by the record. Based on that assertion, Lopez asks us to infer that the court "must have relied on [its] own 'nonpersonal knowledge' of whether gun ranges were closed on that date" or "investigated that issue independent of evidence introduced at trial to make this factual determination that benefited the state." He then argues that the inferred conduct transformed the court into a trier of fact who was no longer impartial, thereby creating a structural error under *State v. Dorsey*, 701 N.W.2d 238 (Minn. 2005), that requires a new trial. Second, Lopez contends that the court committed reversible error when it failed to consider the lesser-included offense of second-degree unintentional felony murder. We consider each argument in turn.

I.

A.

We first consider Lopez's assertion that the district court's finding that "April 1, 2020, was at the beginning of the pandemic and most places were closed" is clearly

erroneous. According to Lopez, this finding was critical because it implicated the element of premeditation.

A factual finding is clearly erroneous when it lacks evidentiary support in the record. *State v. Roberts*, 876 N.W.2d 863, 868 (Minn. 2016); *see also Zornes v. State*, 903 N.W.2d 411, 418 (Minn. 2017) (explaining that because "the trial transcript clearly shows that Zornes's sister *did* testify at trial, the postconviction court's finding is clearly erroneous"). A clearly erroneous finding, however, does not require a new trial when independent findings of fact, decisive of the case, are supported by the record. *Sollar v. Sollar*, 222 N.W. 926, 927 (Minn. 1929); *Hanka v. Pogatchnik*, 276 N.W.2d 633, 636 (Minn. 1979) (explaining that "[w]here a decisive finding of fact is supported by sufficient evidence and is adequate to sustain the conclusions of law, it is immaterial whether some other findings are not so sustained"); *see also State ex rel. Ford v. Schnell*, 933 N.W.2d 393, 407 (Minn. 2019) (concluding that an erroneous finding was harmless).

Here, the record contains no evidence supporting the district court's finding that "April 1, 2020, was at the beginning of the pandemic, and most places were closed." Instead, the evidence shows only that Lopez's workplace was closed. Consequently, the court's pandemic finding is clearly erroneous. This clearly erroneous finding does not warrant a new trial, however, because an independent finding of fact that is supported by the record is decisive on the issue of premeditation, namely the court's finding that Lopez loaded the pump-action shotgun with six slugs *after* he arrived at Nieves's home—a fact that Lopez personally admitted on direct examination. Put differently, even if Lopez credibly testified that he put the shotgun in the car the day before the shooting as part of a

plan to go to the Blaine shooting range, the act of loading the shotgun with six slugs after he arrived at Nieves's home is decisive on the issue of premeditation.

B.

Had Lopez simply argued that the pandemic finding was clearly erroneous, we could end our analysis and hold that the clearly erroneous finding was harmless. But Lopez also contends that the pandemic finding supports a reasonable inference that the district court failed to set aside its general knowledge of the pandemic *or* independently investigated the question of whether the Blaine shooting range was closed on April 1, 2020, in an effort to support the pandemic finding. Lopez argues that this inference as to the district court's conduct implicates the impartiality of the judge as a fact-finder. We disagree.

We must presume that the district court "discharged [its] judicial duties properly." *State v. Munt*, 831 N.W.2d 569, 580 (Minn. 2013) (internal quotation marks omitted) (citation omitted). The nearly 570-page trial transcript contains testimony about the pandemic, which includes a discussion of the pandemic-related closure of Lopez's workplace. Even if we assume that the district court accurately remembered the trial testimony and failed to set aside its general knowledge of the pandemic, Lopez is not entitled to a new trial under our precedents concerning the impartiality of a finder of fact. We begin by summarizing our precedent on this issue and then address its application to the circumstances here.

1.

Our jurisprudence concerning the impartiality of a district court acting as the finder of fact has identified three distinct, but related concepts: (1) actual bias, which is a strong

and deep impression or opinion—in reference to the case or to either party—that prevents the court from considering the case impartially and without prejudice to the substantial rights of one of the parties; (2) emergent bias, which involves conduct that transforms an unbiased court into a partial one; and (3) perceived bias, which arises when facts or circumstances might cause the public to reasonably question the impartiality of an unbiased court. *See Rochester City Lines Co. v. City of Rochester*, 913 N.W.2d 443, 447–48 (Minn. 2018) (explaining that actual and perceived bias are separate legal concepts).

We begin by discussing the concept of actual bias. "Impartiality requires absence of 'actual bias against the defendant or interest in the outcome of his particular case.' " *State v. Mouelle*, 922 N.W.2d 706, 713 (Minn. 2019) (quoting *Munt*, 831 N.W.2d at 580). Generally considered in the context of jurors as triers of fact—but applicable when the court sits as the fact-finder as well—actual bias requires more than the "mere existence of any preconceived notion as to the guilt or innocence of an accused." *Munt*, 831 N.W.2d at 577 (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)). Instead, "[t]o prove actual bias, the challenging party must show that the [fact-finder] exhibited strong and deep impressions that would prevent [it] from lay[ing] aside [its] impression or opinion and render[ing] a verdict based on the evidence presented in court." *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015) (fourth and sixth alteration in original) (internal quotation marks omitted) (citations omitted). Such impressions or opinions might relate to race, mental illness, or previous knowledge of the specific case. *See*, *e.g.*, *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (race); *Munt*, 831 N.W.2d at 577–78 (mental illness); *Fraga*, 864 N.W.2d at 623–24 (previous knowledge).

The challenging party has the burden of proving actual bias. *Munt*, 831 N.W.2d at 577. But a showing of prejudice is not required when, despite the defendant's objection, an actually biased trier of fact sits on the case. *Fraga*, 864 N.W.2d at 625–26; *see also State v. Logan*, 535 N.W.2d 320, 324 (Minn. 1995) (agreeing that "if a biased juror is improperly allowed to sit in judgment of a criminal defendant and the issue is properly raised and preserved, the error has undermined the basic 'structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review' " (citation omitted)); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (explaining that the absence of prejudice was irrelevant when the defendant "seasonably raised the objection" to the direct pecuniary interest of the court, who was sitting as the trier of fact). We commonly refer to such errors as "structural errors." *See State v. Curtis*, 905 N.W.2d 609, 614 (Minn. 2018).

The second concept is emergent bias. This concern arises when the trier of fact is not actually biased, but during the trial, something happens that transforms it into a partial trier of fact. *See, e.g.*, *Dorsey*, 701 N.W.2d at 253. Although a trier of fact has a duty to decide the case based on the evidence presented at trial, not all violations of that duty transform an impartial trier of fact into a partial trier of fact. For example, in *Olberg v. Minneapolis Gas Co.*, 191 N.W.2d 418, 421–23 (Minn. 1971), we reversed an order granting a new trial because the juror's "*conscious observation* of the width of the headlight beams while on a journey incident to the juror's ordinary affairs" did not require a new

trial.[2] (Emphasis added.) As part of our analysis in *Olberg*, we explained that "[c]asual observations taken while a juror is going about his ordinary business can be expected in many situations" and that "[i]t would be totally unrealistic to expect a juror, while out of the jury room, to purge his consciousness of any and all reflections upon the trial at hand." *Id.* at 423. We emphasized, however, that when a trier of fact makes "a deliberate inspection of an area to ascertain damages or to prove a witness' testimony," an order granting a new trial will not be reversed. *Id.*

An example of a case in which the trier of fact conducted a deliberate investigation to assess the credibility of a witness's testimony is *Dorsey*, 701 N.W.2d at 253. In *Dorsey*, the defendant was charged with felony possession of marijuana. *Id.* at 241. To invoke a mandatory 3-year sentence, the state further alleged he was in possession of a firearm. *Id.* at 241–42.

The defendant claimed that the gun—which was found wedged between the cushions of the defendant's couch—did not belong to him. *Id.* at 242. To support his argument, the defendant called a witness to testify that the couch originally belonged to her

[2] A trier of fact's exposure to information that was not presented at trial does not automatically require a new trial. *See State v. Beier*, 263 N.W.2d 622, 626 (Minn. 1978) (explaining that a defendant must show that the information not only made its way into the jury room, but infected the verdict); *State v. Cox*, 322 N.W.2d 555, 559 (Minn. 1982) (explaining that "[t]he relevant factors to be considered by this court, in an independent evaluation of the verdict, are the nature and source of the prejudicial matter, the number of jurors exposed to the influence, the weight of evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice"); *State v. Jackson*, 977 N.W.2d 169, 173 (Minn. 2022) (explaining that the district court denied the defendant's motion for a new trial because the information that was not presented at trial was not unduly prejudicial but merely a recitation of the law of self-defense).

boyfriend L.P. and that she had previously seen her boyfriend stuff weapons into the couch. *Id.* According to the witness, she took the couch from the boyfriend's home after he died in 1999, and she eventually sold it to the defendant's wife. *Id.*

During the witness's testimony, the district court, who was sitting as the trier of fact, interjected and "openly questioned" the veracity of a factual assertion made by the witness.[3] *Id.* at 249. The court informed the parties that she knew of someone named L.P., who she believed died more recently than 1999, and therefore she believed the witness's "statements about the date of [her boyfriend's] death were likely false." *Id.* at 250.

After the witness completed her testimony, the district court notified the parties that it had its law clerk check court records to confirm that the person she knew of and the boyfriend of the witness were the same person and that the person died much later than the witness claimed. *Id.* at 244. Relying on this information, the court disclosed the real date of death to the parties and later discredited the witness's testimony when finding that the defendant had possessed the gun. *Id.* at 244–45.

On appeal, the defendant in *Dorsey* argued that Minn. R. Crim. P. 26.03, subd. 13(3) (providing that "[n]o judge shall preside over a trial or other proceeding if that judge is disqualified under the Code of Judicial Conduct") barred the court from presiding over his

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[3] In Minnesota, jurors are instructed to keep an open mind until they have seen and heard all of the evidence. *State v. Costello*, 646 N.W.2d 204, 210 (Minn. 2002) (citing 10 Minn. Dist. Judges Ass'n, *Minnesota Practice—Jury Instruction Guides*, *Criminal,* CRIMJIG 1.02 (4th ed. 1999)); *see also* 10 Minn. Dist. Judges Ass'n, *Minnesota Practice—Jury Instruction Guides*, *Criminal,* CRIMJIG 1.02 (6th ed. 2015).

trial;[4] Canon 3D(1)(a) of the Minnesota Code of Judicial Conduct, in turn, requires judges to disqualify themselves if they have "personal knowledge of disputed evidentiary facts concerning the proceeding." *Dorsey*, 701 N.W.2d at 245. In the alternative, the defendant argued that the court committed three acts during the trial that transformed it into a partial trier of fact. *Id.* at 249.

We concluded that Canon 3D(1)(a) did not bar the district court in *Dorsey* from presiding over the defendant's trial. *Id.* at 247. As part of our analysis, we determined that the phrase "personal knowledge" in the canon did not include "the vast realm of *general* knowledge that a judge acquires in her day-to-day life as a judge and citizen." *Id.* (emphasis added). After reviewing the record, we concluded that the court in *Dorsey* acquired her knowledge of L.P.'s approximate death "in the course of her general judicial capacity or as a result of her day-to-day life as a citizen taking an interest in local news," and therefore the court was not barred from presiding over the defendant's trial. *Id.* We did emphasize, however, that "the judge was obligated to set aside her knowledge of [L.P.'s] approximate date of death and—with a neutral and objective disposition—decide the case solely on the merits of the evidence presented by the parties." *Id.* at 249 (citing *Spinner v. McDermott*, 251 N.W. 908, 908 (Minn. 1933)).

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[4] Minnesota Rule of Criminal Procedure 26.03, subdivision 13(3), as referenced in *Dorsey*, has been renumbered Minnesota Rule of Criminal Procedure 26.03, subdivision 14(3). The language of the rule has also slightly changed since *Dorsey* and now reads: "A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct." Minn. R. Crim. P. 26.03, subd. 14(3).

Having concluded that Canon 3D(1)(a) did not bar the district court in *Dorsey* from presiding over the defendant's trial, we next considered whether the court's trial *conduct* violated the defendant's right to an impartial finder of fact and created a structural error. In particular, we examined the court's conduct when the court: "(1) openly questioned the veracity of a factual assertion made by Dorsey's key witness; (2) independently investigated the fact; and (3) revealed the results of [its] investigation in open court." *Dorsey*, 701 N.W.2d at 249.

In determining that the court's conduct amounted to structural error, we emphasized that the independent investigation violated the court's obligation as the finder of fact to refrain from seeking evidence outside that presented by the parties during trial. *Id.* at 250. We concluded that the act of seeking information outside the record effectively transformed the court into an investigator for the prosecution, thereby "eliminat[ing] any vestige of impartiality." *Id.* Consequently, we adopted a "bright-line rule that judges may not engage in independent investigations of facts in evidence."[5] *Id.* at 251.

In considering the court's disclosure of the results of its investigation, which "served to directly impeach the veracity of a defense witness's testimony," we concluded that the court had essentially "assume[d] the role of the advocate" by presenting information to the parties that was prejudicial to the defendant. *Id.* at 251–52 (internal quotation marks

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[5] In adopting this bright-line rule, we rejected the dissent's position that a confirmatory search of an immutable fact should not require a new trial. We explained that "adopting the dissent's position opens a judicial Pandora's box regarding if, when, and how a judge sitting as the finder of fact may conduct independent investigations." *Dorsey*, 701 N.W.2d at 251.

omitted) (citation omitted). Critically, the court's knowledge of the boyfriend's approximate date of death was alone not enough to reverse. *Id.* at 253. Instead, it was the *conduct* that the court later engaged in that created the structural error. *Id.*

The third and final concept regarding impartiality is perceived bias. This concept arises in cases that involve facts or circumstances that might cause the public to reasonably question the impartiality of an *unbiased* court. *See, e.g.*, *Powell v. Anderson*, 660 N.W.2d 107, 121 (Minn. 2003). Under the Minnesota Code of Judicial Conduct Rule 2.11(A), "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Having "personal knowledge of facts that are in dispute in the proceeding" is one example of when a court's impartiality may be reasonably questioned. Minn. R. Jud. Conduct 2.11(A)(1).

Notably, we have never held that perceived bias requires automatic reversal. Instead, we adopted a three-factor test for addressing perceived bias in *Powell*, 660 N.W.2d at 121. Under the *Powell* test, a court considers: (1) the risk of injustice to the parties in the particular case, (2) the risk that denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process. *Id.* Applying this risk analysis test, we balance the legitimate objectives of providing parties with a fair trial and promoting confidence in the judicial system "against the potential burdens placed on the judicial system and the parties by reopening a final judgment." *Id.*

2.

Having clarified our impartiality jurisprudence, we now consider whether Lopez would be entitled to a new trial if we assume that the district court accurately remembered

the trial testimony and failed to set aside the court's general knowledge of the pandemic. We review the constitutional question of whether a district court deprived a defendant of his right to a fair trial and an impartial fact-finder de novo. *Dorsey*, 701 N.W.2d at 249.

Lopez does not accuse the district court of actual bias nor does anything in the record suggest actual bias. We therefore turn to the issue of emergent bias.[6]

Lopez contends that the facts in his case are materially indistinguishable from the facts in *Dorsey*. We disagree. Unlike the judge in *Dorsey*, the district court here did not "openly question" the veracity of Lopez's factual assertions during his testimony. In addition, the record does not support a reasonable inference that the court conducted an independent investigation of whether the Blaine shooting range was open on April 1, 2020. Instead, the record suggests that the court simply relied on its observations—made during its ordinary affairs—of the general effect of the pandemic on businesses. Obviously, if the record demonstrated that the court actively researched the issue of whether the Blaine gun range was open, this case would be very different.[7]

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[6] The State contends that we need not consider the emergent bias issue because the executive pandemic orders requiring closure of certain businesses and requiring Minnesotans to stay home are legislative facts subject to judicial notice. *See* Minn. R. Jud. Conduct 2.9(C) (stating that judges "shall consider only the evidence presented and any facts that may properly be judicially noticed"). We disagree. Even if the district court could have taken judicial notice of the existence of the orders, its finding did more than note *the existence* of the orders. It found that most businesses were *actually complying* with the orders—this conclusion is not supported by the record or amenable to conclusion via judicial notice.

[7] Lopez contends that he is entitled to a new trial even if the district court did not conduct an independent investigation. To bolster his argument, he notes that in *Dorsey* we cited to the Illinois Supreme Court's decision in *People v. Wallenberg*,

Although the judge's conduct does not satisfy the *Dorsey* test for structural error, her impartiality might be reasonably questioned under Rule 2.11(A)(1) of the Minnesota Rules of Judicial Conduct because the court's reliance on its general knowledge about the pandemic arguably favored the State.[8] To address these concerns, we must apply the *Powell* risk-analysis test.

First, under *Powell*, we assess the risk of injustice to Lopez. The court's reliance on its general knowledge about the pandemic created, at best, a minimal risk of injustice because overwhelming evidence supports Lopez's guilt. Lopez admitted that he loaded the shotgun at Nieves's house. He chose not to drive away from the intended confrontation

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181 N.E.2d 143, 145 (Ill. 1962). In *Wallenberg*, the judge at a criminal bench trial did not actively investigate a specific fact. *Id.* Instead, the judge happened to be familiar with the stretch of road at issue and used this extra-record knowledge to discredit the defendant's alibi. *Id.* The Illinois Supreme Court overturned the defendant's conviction, even though no evidence suggested that the judge conducted any independent research on the issue. *Id.*

Our citation to *Wallenberg* in *Dorsey* is dicta, so we are not bound by its analysis. But even if we adopted the analysis in *Wallenberg*, Lopez would not be entitled to any relief. The extra-record knowledge in *Wallenberg* was something only a limited group of people could know, and it provided the sole basis for discrediting the defendant's alibi defense. Unlike the extra-record knowledge in *Wallenberg*, the extra-record knowledge here did not provide the sole basis for the district court's assessment of Lopez's credibility. Moreover, an independent finding of fact is decisive on the key issue of premeditation, namely the court's finding that Lopez loaded the pump-action shotgun with six slugs *after* he arrived at Nieves's home—a fact that Lopez personally admitted on direct examination. Consequently, we leave the issue of whether the analysis in *Wallenberg* should be adopted in Minnesota for another day.

[8] We have used the term "impartiality" in two senses. In one meaning, we expect all fact-finders (whether judge or jury) to be impartial by not relying on anything besides what is admitted in a trial record when making fact-finding decisions. *See, e.g.*, *State v. Jackson,* 977 N.W.2d 169, 171–72 (Minn. 2022), *cert. denied*, 143 U.S. 500 (2022). In the other distinct sense, we expect district courts to be impartial by not advocating or weighing in for one side or the other. *See, e.g.*, *Dorsey*, 701 N.W.2d at 251–52.

even though he had the opportunity to do so. Lopez conceded that he pointed the shotgun at Nieves leading up to the shooting. He sent dozens of threatening messages to Nieves and his ex-girlfriend before the shooting, including messages that explicitly threatened to kill Nieves. And, finally, he shot Nieves in the head with a shotgun from close range. That the court relied on its general knowledge of the pandemic to discredit one piece of his testimony[9] created little risk of injustice to Lopez at trial.

Second, we must consider what the risk of injustice is to other defendants like Lopez. April 2020 was a highly unprecedented time in the state and across the world. *See State v. Paige*, 977 N.W.2d 829, 834 (Minn. 2022) (describing the pandemic as a "public health emergency of international concern" (internal quotation marks omitted) (citation omitted)). The state of the pandemic has also dramatically changed over the past 3 years. It is unlikely that a finder of fact will find itself in a situation similar to the facts of this shooting that occurred at the very beginning of the pandemic. The risk of injustice from judges relying on their knowledge regarding the COVID-19 pandemic is, at best, minimal for future defendants. *See Snell v. Walz*, 985 N.W.2d 277, 287 (Minn. 2023) (determining that the same circumstances of the 2020 pandemic were unlikely to recur).

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[9] In fact, the district court discredited Lopez's testimony in other ways that were completely proper. For example, it discredited Lopez's claim that Lopez could not remember sending all the threatening texts and messages to Nieves and his ex-girlfriend because he was drunk. The court also discredited, based on his later actions in shooting Nieves and A.N., Lopez's testimony that he did not mean the threats of violence. Because the court made other credibility determinations in its findings of facts based on the record, the risk of injustice to Lopez here is even less.

Finally, we must consider how the district court's conduct impacts public confidence in the judicial system. To be sure, as a general matter, the public likely would view a judge relying on a fact that does not appear in the trial record as unfair to the defendant, especially if that reliance is key to a finding of the defendant's guilt. In *People v. Wallenberg*, 181 N.E.2d 143, 145 (Ill. 1962), for example, the district court relied upon personal knowledge to reject the defendant's entire theory of defense. By contrast, the judge's general knowledge of the pandemic was only one part of the judge's assessment of Lopez's credibility. In addition, the judge made an independent finding of fact that is decisive on the issue of premeditation, namely its finding that Lopez loaded the pump-action shotgun with six slugs *after* he arrived at Nieves's home—a fact that Lopez personally admitted on direct examination.

Given the overwhelming evidence of Lopez's guilt apart from any credibility determinations—that he explicitly threatened many times to kill Nieves, he searched for Nieves the day of the shooting, he loaded the shotgun after arriving at Nieves's house, he trained the shotgun on Nieves after stepping out of the car, and he fired the shotgun at Nieves at close range—it is unlikely that the judge's finding that "most places were closed" during the beginning of the pandemic will undermine public trust in our courts. Overall, even though the court's failure to set aside its general knowledge of the pandemic might lead some to reasonably question its impartiality under Rule 2.11, a *Powell* analysis shows that reversal is unwarranted.

In sum, even if the court failed to set aside its general knowledge of the pandemic, Lopez is not entitled to a new trial under any of our impartiality tests.

II.

We next consider whether the district court abused its discretion by declining to consider the lesser-included offense of second-degree unintentional felony murder when it considered the offenses of first-degree premeditated murder and second-degree intentional murder at Lopez's trial. A court's refusal to consider a lesser-included offense at trial is reviewed for abuse of discretion. *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005).

"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. Vangrevenhof*, 941 N.W.2d 730, 736 (Minn. 2020) (internal quotation marks omitted) (citation omitted). Whether a charge is a lesser-included offense is a question of law, which we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

To support his claim that the district court abused its discretion, Lopez makes two arguments. First, he asserts that the court made an error of law when it concluded that second-degree unintentional felony murder is not a lesser-included offense. Second, he contends that when the evidence presented at trial is viewed in a light most favorable to him, the evidence provided the court a rational basis to acquit him of the charged offenses and find him guilty of second-degree unintentional felony murder.

A.

We agree that the district court committed an error of law when it concluded that second-degree unintentional felony murder was not a lesser-included offense. In *State v. Leinweber*, 228 N.W.2d 120, 125 (Minn. 1975), we said, "[e]very lesser degree of murder is intended by the statute to be characterized as an 'included offense.' " Consequently,

second-degree unintentional felony murder was a lesser-included offense in this case. To the extent that the court denied Lopez's express request to consider second-degree unintentional felony murder during its deliberation based on this error of law, the court abused its discretion. But this determination does not end our analysis because a failure to consider a lesser-included offense is subject to a harmless error analysis. *Dahlin*, 695 N.W.2d at 598–99 (explaining that a failure to give a lesser-included instruction warrants reversal only when that failure prejudices the defendant).

We have consistently held that when a finder of fact has the option between first-degree murder and second-degree intentional murder and finds the defendant guilty of the *more serious offense*, a defendant is not prejudiced when the fact-finder fails to consider a different, lesser-included homicide offense. *State v. Chavez-Nelson*, 882 N.W.2d 579, 591–92 (Minn. 2016) (citing *Cooper v. State*, 745 N.W.2d 188, 194 (Minn. 2008)).

Here, the district court was presented with the option to convict Lopez of the lesser-included offense of second-degree intentional murder yet still chose to convict him of the more serious offense of first-degree premeditated murder. Consequently, the failure of the court to consider second-degree unintentional felony murder did not affect the outcome of the proceeding because Lopez would *still* have been found guilty of the greatest offense and sentenced to life without the possibility of release. Accordingly, we hold that the court's failure to consider the lesser-included offense of second-degree unintentional felony murder was harmless.

B.

Our harmless error analysis applies with equal force to Lopez's second argument, namely that the evidence provided the trier of fact a rational basis to acquit him of the charged offenses and find him guilty of second-degree unintentional felony murder.

Although no harmful error occurred here, we observe that, as a matter of best practice, a district court should conduct a *Dahlin* analysis on the record during a bench trial after receiving an express request by a defendant for instruction on a lesser-included offense. In the context of a jury trial, we have held that a district court must provide the jury an instruction on a lesser-included offense when "1) the lesser offense is included in the charged offense; 2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and 3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *Dahlin*, 695 N.W.2d at 598. When making a lesser-included offense determination, the court must "review the record in the light most favorable to the party requesting the instruction." *Id.* This is what we term a "*Dahlin* analysis." We see no reason why a district court should not conduct this same analysis in a bench trial.

Here, the district court found that the elements of second-degree unintentional felony murder did not fit this case. Based on this limited record, we cannot say with any confidence that the district court conducted a *Dahlin* analysis. Under the specific facts here, we need not determine what would be required for us to have confidence that a district court conducted a *Dahlin* analysis in a future bench trial. Instead, we simply note that, as a matter of best practice, a district court should conduct a *Dahlin* analysis on the record

during a bench trial after receiving an express request by a defendant for consideration of a lesser-included offense.[10]

CONCLUSION

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

Affirmed.

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[10] Our observation is consistent with existing case law. *See State v. Slaughter*, 691 N.W.2d 70, 78 (Minn. 2005) (holding that a court may sua sponte consider a lesser-included offense at a bench trial even over the defendant's objection); *see also State v. Palmer*, 803 N.W.2d 727, 740 (Minn. 2011) (holding that the court's failure to sua sponte consider a lesser-included offense at a bench trial was not reversible error).