**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-1776**

State of Minnesota,
Respondent,

vs.

Jesse Silvestrini,
Appellant.

**Filed February 3, 2009**
**Affirmed**
**Collins, Judge**[*]

St. Louis County District Court
File No. K6-04-301247

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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John Stuart, State Public Defender, Lydia Villalva Lijó, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## U N P U B L I S H E D  O P I N I O N

**COLLINS,** Judge

Appellant challenges his convictions of first-degree assault; three counts of first-degree burglary; two counts of attempted first-degree murder; attempted first-degree aggravated robbery; second-degree assault; and ineligible person in possession of a firearm, which stem from a violent home invasion occurring in the early morning hours of November 25, 2004. Appellant argues that the district court (1) erred by denying his motion to suppress statements made to police; (2) violated his constitutional right to present a defense by excluding exculpatory hearsay testimony and denying him the right to challenge DNA evidence; and (3) violated his right to a fair trial by repeatedly interjecting itself sua sponte into the trial. Appellant also contends that his attempted-murder conviction was not supported by sufficient evidence. Because the district court did not err in its application of the law and because the evidence is sufficient to sustain the convictions, we affirm.

## D E C I S I O N

*Statements to Police*

At trial, the jury heard the tape-recorded statements that appellant Jesse Silvestrini made to police after being arrested. Silvestrini argues that the district court erred by admitting these statements because they were the fruits of his illegal arrest.

Under the exclusionary rule, evidence seized in violation of the constitution generally must be suppressed. *State v. Jackson*, 742 N.W.2d 163, 178 (Minn. 2007). Whether the exclusionary rule prohibits the admission of evidence in a particular case is a

question of law, which we review de novo. *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). When reviewing a pretrial order denying a motion to suppress evidence, we may independently review the facts and determine whether as a matter of law the district court erred by not suppressing the evidence. *Id.*

Initially, we are asked to determine whether Silvestrini waived the argument he now makes on appeal. The state contends that in his motion to suppress before the district court, Silvestrini argued only that "Trooper [Mark] Shepard unlawfully arrested [him] without probable cause by ordering [him] to get on his knees and place his hands behind his head"; not, as he argues in this court, that the police transformed a *Terry*-type stop into an unlawful detention by transporting him to the crime scene. Issues raised for the first time on appeal typically will not be considered by the reviewing court. *In re Welfare of K.T.*, 327 N.W.2d 13, 16-17 (Minn. 1982); *State v. Propotnik*, 355 N.W.2d 195, 199 (Minn. App. 1984), *review denied* (Minn. Dec. 20, 1984). We may chose to hear such issues, however, if, in our discretion, we decide that such review is required in the interests of justice and doing so would not result in an unfair surprise to a party. *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989).

In a suppression motion, the moving party must provide opposing counsel with written notice of the grounds on which the party seeks suppression of the evidence. *See* Minn. R. Crim. P. 10.03 (requiring motions to include "all defenses, objections, issues, and requests"). "[A] pretrial motion to suppress should specify, with as much particularity as is reasonable under the circumstances, the grounds advanced for suppression in order to give the state as much advance notice as possible as to the

contentions it must be prepared to meet at the hearing." *State v. Needham*, 488 N.W.2d 294, 296 (Minn. 1992) (citing 1 W. LaFave & J. Israel, *Criminal Procedure* § 10.1(b) (1984)).

In his motion, Silvestrini requested of the district court, in part: "To suppress any and all evidence seized and/or taken from [Silvestrini] subsequent to his arrest . . . because said arrest was done without probable cause contrary to the Defendant's Federal and State constitutional rights." At the outset of the omnibus hearing the state attempted to clarify the issues being raised, as follows:

> [T]he first issue is probable cause for the charges. *The second issue, in a nutshell, is the stop of the defendant.* The third is a subsequent arrest of the defendant. And the fourth is statements given by the defendant to law enforcement. And we'd be prepared to proceed with testimony as to those issues.

(Emphasis added.) The state apparently understood that the suppression issue implicated the entirety of the stop. Moreover, even if the state did not so concede, based on our careful review of the record we are satisfied that Silvestrini's challenge encompassed the entirety of the stop and he did not forfeit this issue for appeal.

Because the issue is properly before us, we must first determine whether police exceeded the scope of a valid *Terry* stop.[1] The district court, in denying Silvestrini's motion to suppress on this ground, stated:

> It is apparent [that] Trooper Shepard did *not* have a reasonable basis for specifically suspecting the Defendant was involved in the assault that occurred in the neighborhood

[1] *Terry v. Ohio*, 392 U.S. 1, 20-22, 88 S. Ct. 1868, 1879-80 (1968).

> when he stopped him on Greyhound Boulevard; nevertheless, Trooper Shepard was justified in 'freezing the situation[,]' . . . and briefly detaining the Defendant to ascertain whether or not he was involved in the incident.

(Emphasis added.)

The Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution protect against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. But, an officer who has a reasonable, articulable suspicion of criminal activity may conduct a limited investigatory stop. *See State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 20-22, 88 S. Ct. 1868, 1879-80 (1968)); *see also State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996) ("A brief investigatory stop requires only reasonable suspicion of criminal activity, rather than probable cause."). Although there is a "fine line" between arrests and more limited seizures, like that in a *Terry* stop, "it is not always apparent at what precise moment an arrest occurs." *State v. O'Neill*, 299 Minn. 60, 68, 216 N.W.2d 822, 827 (1974). For example, caselaw holds that an arrest occurs when the police "restrain a suspect's liberty of movement," *State v. Lohnes*, 344 N.W.2d 605, 610 (Minn. 1984), while an investigatory stop lasts "as long as reasonably necessary to effectuate the purpose of the stop," *State v. Blacksten*, 507 N.W.2d 842, 846 (Minn. 1993).[2]

[2] *Compare State v. Flowers*, 734 N.W.2d 239, 255-58 (Minn. 2007) (holding that police impermissibly expanded scope of valid *Terry* stop when, after stopping suspect for driving without rear license-plate light, they ordered him out of vehicle at gunpoint, forced him to walk toward squad car, and lie flat on ground on his stomach with his arms and legs spread, handcuffed him, confined him to backseat of squad car, and searched his vehicle at least three times); *Askerooth*, 681 N.W.2d at 365-67 (holding that confining suspect in squad car for minor traffic stop was an unnecessary escalation of valid stop);

Here, Trooper Shepard became suspicious when he observed Silvestrini walking alone, late at night, not in a residential area, and near the crime scene. Shepard became more suspicious when, even from 15 or 20 feet away, he could see a large bump over Silvestrini's eye and abrasions that appeared to be fresh because they "glistened" in the spotlight at night. Shepard, concerned for his safety, ordered Silvestrini to get down on his knees and place his hands behind his head. As Shepard approached Silvestrini, he noticed that the big bump on Silvestrini's head looked like he had been struck with something and the area was red and pussy. When asked, however, Silvestrini had told Shepard that the injury happened earlier when he was playing around with his dog. Based on his experience, Shepard doubted this story and believed the injury was fresh.

During the next approximately ten minutes, Trooper Shepard handcuffed and frisked Silvestrini, contacted the Hibbing police department, placed Silvestrini in the back of his squad car, and transported Silvestrini to the crime scene to determine whether one of the two victims would identify him.

On these facts, it is clear that the purpose of the initial stop and confrontation was to determine what role, if any, Silvestrini played in the reported home invasion. As such, transporting Silvestrini to the crime scene for a brief show-up was done for the legitimate

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*Blacksten*, 507 N.W.2d at 847 (concluding that continuing to hold suspect while seeking search warrant was "not a reasonable pre-arrest investigatory stop"), *with State v. Walsh*, 495 N.W.2d 602, 605 (Minn. 1993) (observing that briefly handcuffing suspect while sorting out crime scene does not necessarily transform an investigatory detention into an arrest); *State v. Herem*, 384 N.W.2d 880, 883 (Minn. 1986) (concluding that suspect was not in custody when required to sit briefly in back of police car); *State v. Nading*, 320 N.W.2d 82, 83 (Minn. 1982) (concluding there was no arrest when suspect ordered to lie on the ground); *O'Neill*, 299 Minn. at 69, 216 N.W.2d at 828 (same, suspects held at gun-point).

limited purpose of quickly determining whether Silvestrini took part in the crime, and was not an arrest. *Cf. United States v. King*, 148 F.3d 968, 970 (8th Cir. 1998) ("Police officers need not limit themselves to station house line-ups when an opportunity for a quick, on-the-scene identification arises. Such identifications are essential to free innocent suspects and to inform the police if further investigation is necessary."); *Johnson v. Dugger*, 817 F.3d 726, 729 (11th Cir. 1987) (stating that "immediate confrontations allow identification before the suspect has altered his appearance and while the witness' memory is fresh, and permit the quick release of innocent persons"). Thus, we conclude that police did not impermissibly expand a valid *Terry* stop when Silvestrini was handcuffed and brought to the crime scene for a show-up.

The victim was unable to identify Silvestrini, but the police nonetheless transported him from the crime scene to the police station after the show-up. The state concedes that Silvestrini was under arrest at this point. We now turn to whether there was then probable cause to arrest Silvestrini.

Probable cause to arrest a person exists when, based on an officer's observations, inferences, and experience, the officer reasonably believes that the person has committed a crime, *State v. Olson*, 436 N.W.2d 92, 94 (Minn. 1989), and "under the totality of facts and circumstances, a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed," *State v. Prax*, 686 N.W.2d 45, 48 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Dec. 14, 2004); *see also Illinois v. Gates*, 462 U.S. 213, 230–31, 103 S. Ct. 2317, 2328 (1983) (stating that the "totality-of-the-circumstances approach is far more consistent with our prior treatment of

probable cause than is any demand that specific 'tests' be satisfied"); *State v. Perkins*, 582 N.W.2d 876, 878 (Minn. 1998) (holding that courts "tak[e] into account the totality of the circumstances to determine whether police have probable cause"). Probable cause requires something more than mere suspicion but something less than the evidence necessary for conviction. *Prax*, 686 N.W.2d at 48. "A person cannot be arrested and searched merely because he is found in suspicious circumstances." *State v. Clark*, 312 Minn. 44, 49, 250 N.W.2d 199, 202 (1977). An arresting officer's probable-cause finding may be based on the "collective knowledge" of the entire police force when the officer "act[s] in good faith *on the basis of* such information" and the underlying assumption is ultimately proved correct. *State v. Conaway*, 319 N.W.2d 35, 40 (Minn. 1982) (quotation omitted) (emphasis added).

The district court, in finding that probable cause to arrest Silvestrini existed when he was transported from the crime scene, stated:

> After consulting with officers at the scene . . . officers knew [1] [Silvestrini] had been stopped walking four blocks away from the scene of the crime, [2] he was alone and the only person seen walking in the area, [3] the male victim had had two teeth knocked out and was bleeding heavily from the mouth, [4] the victim had stated that [Silvestrini] could have been involved because the victim had given information to the police that had lead to [Silvestrini's] arrest in another matter, [5] that one of the assailants had fallen over a coffee table, [6] he had a cut that two officers thought looked as though it had been recently sustained, [7] and [Silvestrini] had a red mark on his shoe and sock that one officer thought could have been blood. This collective information gives rise to ample probable cause to arrest [Silvestrini].

One of the facts supporting the district court's finding of probable cause is that the more seriously injured victim told police that because he "snitched" on Silvestrini several years earlier, Silvestrini may have had an axe to grind. However, the victim made this statement while being interviewed at the hospital at 3:48 a.m., which was well after Silvestrini had been taken from the crime scene to the police station. Therefore, the district court's reliance on this fact was clearly erroneous.

Thus, the facts supporting the district court's finding of probable cause are limited to (1) Silvestrini walking alone, late at night, near the crime scene; (2) one of the victims having two teeth knocked out; (3) one of the assailants having fallen over a coffee table; (4) Silvestrini having a suspicious abrasion on his head; and (5) Silvestrini having a red spot on one of his shoes. The district court, however, overlooked two critical facts. First, when initially confronted, Silvestrini was wearing blue jeans and a yellow sweater and not dressed in camouflage, as the victim described. Second, at the show-up, the only victim who was present was unable to identify Silvestrini.

Therefore, on the entire record, not just the facts relied on by the district court, we determine that probable cause for arrest did not exist at the time Silvestrini was taken to the police station. Because Silvestrini was arrested without probable cause, the district court's denial of Silvestrini's motion to suppress the two statements he gave to police following his initial arrest was clearly erroneous.

Because the district court's failure to suppress Silvestrini's first two statements to police was erroneous, we must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512

N.W.2d 99, 102 n.2 (Minn. 1994); *see also* Minn. R. Crim. P. 31.01 ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Post*, 512 N.W.2d at 102 n.2. "A conviction can stand only if the error committed was harmless beyond a reasonable doubt." *State v. King*, 622 N.W.2d 800, 809 (Minn. 2001). In completing a harmless-error analysis, the inquiry is not whether the jury could have convicted the defendant without the testimony, but rather, what affect the testimony had on the jury's verdict, "and more specifically, whether the jury's verdict is 'surely unattributable to the testimony.'" *Id*. at 811 (quoting *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997)); *see also State v. Burrell*, 697 N.W.2d 579, 597 (Minn. 2005) (stating that an error is harmless beyond a reasonable doubt if it was "surely attributable" to the error (quotation omitted)).

The jury was erroneously allowed to hear two tape-recorded statements that Silvestrini made to police after being unlawfully arrested. Silvestrini's first statement focused generally on his background and knowledge of the area, as well as his whereabouts and companions on November 24, 2004. The second statement focused on Silvestrini's whereabouts and his companions on November 24—essentially illustrating the inconsistencies between his first and second statement to police, and eliciting information regarding the home invasion, including the identity of the participants, the use of weapons and disguises during the commission of the crime, and potential motives. But the jury was presented a substantial amount of direct and circumstantial evidence tying Silvestrini to the crime. The jury saw surveillance video showing Silvestrini and

two others purchasing masks and other items at Wal-Mart the night of the crime. The jury also heard from investigators who found masks and hats in the area where Silvestrini was picked up—one of which contained Silvestrini's DNA. In addition, both victims testified about the night of the attack and their previous encounters with Silvestrini. After viewing the statements improperly admitted into evidence, tempered by the abundance of other evidence presented before the jury, we conclude that had Silvestrini's first two statements to the police been suppressed, there is no reasonable possibility that the verdict would have been favorable to Silvestrini. Therefore, we are satisfied that the district court's error was harmless beyond a reasonable doubt.

Silvestrini also contends that the two statements he made to police after he was released and re-arrested pursuant to a valid arrest warrant were tainted and should have been excluded.

The exclusionary rule extends to both the direct and indirect products of unlawful searches; under the fruit-of-the-poisonous-tree doctrine, evidence is inadmissible if it has been acquired by the exploitation of unlawfully acquired evidence. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963). When determining whether evidence is the "fruit" of an unlawful search and must be suppressed, we examine "whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Knapp v. Comm'r of Pub. Safety*, 610 N.W.2d 625, 628 (Minn. 2000) (quotation omitted). The examination requires an analysis of several factors, including "the purpose and flagrancy of the misconduct, the presence of

intervening circumstances, whether it is likely that the evidence would have been obtained in the absence of the illegality and the temporal proximity of the illegality and the evidence alleged to be the fruit of the illegality." *Id.* (quotation omitted); *see also State v. Weekes*, 312 Minn. 1, 8, 250 N.W.2d 590, 594 (1977) (analyzing seven factors to consider in determining admissibility of confessions obtained following an illegal arrest). By contrast, evidence is admissible if it has been come at by means sufficiently distinguishable from the illegality to be purged of the primary taint. *Knapp*, 610 N.W.2d at 628.

Silvestrini was released from custody and was rearrested nearly 13 hours later. In the meantime, a police search of the area in which Silvestrini was first seen uncovered "a [camouflage] mask, and hats, and also a sweatshirt, sweatpants, and some tape," and police obtained a cash-register receipt and surveillance video that indicated that at 1:43 a.m. on November 25, two hats, two face masks, disposable gloves, cord, duct tape, and a candy bar were purchased by Silvestrini and his co-defendants, Travis Madich and Justin Redwine, at the local Wal-Mart. None of this evidence was gathered because of, or was related to, the statements Silvestrini made during his initial detention.

Moreover, the record does not indicate that Silvestrini's first arrest, albeit lacking probable cause, was flagrant police misconduct. The method and duration of the prior interrogations were not extraordinary, and Silvestrini was given a *Miranda* warning prior to each interrogation. Therefore, even though we conclude that the district court improperly admitted Silvestrini's first two statements into evidence, the two statements made to police subsequent to Silvestrini's warranted arrest were not tainted. As such, the

district court did not err by admitting Silvestrini's later two statements to police into evidence.

In his pro se supplemental brief, Silvestrini argues that even if the district court did not err by allowing his statements into evidence because they were fruits of an illegal arrest, the district court nonetheless erred because his statements were involuntarily. The district court, in denying Silvestini's motion to suppress evidence, stated:

> The Prosecution has established that [Silvestrini]'s statements were voluntarily made, that he was adequately informed of his rights, and he willingly waived his rights. [Silvestrini] was 26 years old when he gave his statements, and he has had experience with the criminal justice system on at least two prior occasions. Although he claimed to be under the influence of drugs, and his [urine analysis] did indicate a preliminary positive for THC and methamphetamines, there is no evidence to indicate that those drugs affected [Silvestrini]'s ability to understand the police's questions or his agreement to answer them.

Whether a defendant's statement was voluntary presents a question of law, which we review de novo. *State v. Ritt*, 599 N.W.2d 802, 808 (Minn. 1999). But the district court's factual findings regarding the circumstances that surround an interrogation will be upheld unless they are clearly erroneous. *State v. Williams*, 535 N.W.2d 277, 286 (Minn. 1995). A defendant who is convicted of a crime based on an involuntary statement is deprived of due process. *State v. Camacho*, 561 N.W.2d 160, 169 (Minn. 1997). The state has the burden of proving by a preponderance of the evidence that the defendant's statement was made voluntarily. *State v. Andrews*, 388 N.W.2d 723, 730 (Minn. 1986).

A statement is involuntary if, after examining all relevant factors, police interrogations were so coercive, manipulative, or overpowering, that the defendant was

unable to "make an unconstrained and wholly autonomous decision to speak as he did." *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991). Examination of the relevant factors is a subjective, factual inquiry into all circumstances surrounding a confession. *State v. Moorman*, 505 N.W.2d 593, 600 (Minn. 1993). Relevant factors a district court can consider are the defendant's age; maturity; intelligence; education; experience, including experience within the criminal justice system; and the nature and length of the interrogation. *Id.* In addition, intoxication is another factor to be considered. *State v. Kulseth*, 333 N.W.2d 635, 637 (Minn. 1983).

Silvestrini was first questioned for approximately one and one-quarter hours, nearly three hours after he was taken to the police station. Before any questioning, Silvestrini was given a *Miranda* warning, acknowledged the understanding of his rights, and agreed to proceed with the questioning without the police officer threatening him or promising him anything in return. The officer testified that although Silvestrini tested positive for marijuana and methamphetamine, his breath did not smell of alcohol, he did not appear to be under the influence, he did not have any difficulty responding to the officer's questions, and he remained rational throughout the interrogation.

About two hours later, Silvestrini was again given a *Miranda* warning, said that he understood his rights, and agreed to another interview. The police officer testified that during that interview Silvestrini had no difficulty understanding his questions, had no trouble responding in a rational manner, and did not appear to be under the influence of any substance.

After Silvestrini had been released and was re-arrested later that same day, he was questioned by another police officer. The officer testified that he gave Silvestrini a *Miranda* warning; Silvestrini again indicated that he understood his rights; he agreed to be interviewed; and he responded in a rational manner, did not have difficulty following or responding to questions, and did not smell of alcohol. The officer also testified that Silvestrini showed no signs of paranoia or schizophrenia, which are common side effects of methamphetamine use.

Contrary to Silvestrini's assertions, the evidence does not indicate that he was too intoxicated or impaired to render his statements involuntary. In addition, Silvestrini had prior experience with the criminal justice system, was given a *Miranda* warning prior to each interrogation, was not interrogated for lengthy periods of time, and was neither lied to nor tricked into speaking with police. Moreover, none of Silvestrini's statements were made after unusually long or contentious interrogations. Viewed in the totality of the circumstances, the district court did not err by finding that Silvestrini's statements were voluntary.

*Right to Present a Defense*

On the second day of trial, Silvestrini's counsel proposed to offer evidence indicating that co-defendants Madich and Redwine made self-inculpatory statements to other inmates at the St. Louis county jail that exculpated Silvestrini. According to the statements, while incarcerated, Redwine told one inmate that Silvestrini was let out of the car before the attack because he was "too high," and Madich told another inmate a similar story. Silvestrini sought to have both inmates testify about these conversations, arguing

that, although hearsay, the testimony was admissible under the statements-against-penal-interest exception, Minn. R. Evid. 804(b)(8). The state objected, and the district court ruled that the testimony lacked the indicia of trustworthiness required for admissibility under that exception. On appeal, Silvestrini contends that the district court erred by prohibiting him from calling the two jailhouse informants.

An appellate court will not reverse an evidentiary ruling absent a clear abuse of discretion, and the appellant has the burden to show that he was prejudiced by such an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Under this standard, "[r]eversal is warranted only when the error substantially influences the jury's decision." *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997). That is, appellate courts will reverse when there is a reasonable possibility that, had the erroneously excluded evidence been admitted and its damaging potential fully realized, the verdict might have been more favorable to the defendant. *Post*, 512 N.W.2d at 102. Although we generally afford district courts broad discretion on evidentiary rulings, this discretion is limited by a criminal defendant's right to fundamental fairness, including a "meaningful opportunity to present a complete defense." *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (quotation omitted).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay is inadmissible unless an exception applies. Minn. R. Evid. 802. Statements made by an unavailable declarant may be admissible if, at the time the statement was made, the statement would likely subject the declarant to criminal liability.

Minn. R. Evid. 804(b)(3). But "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.* Moreover, even if exculpatory statements are sufficiently trustworthy, under the statements-against-penal-interest exception, the term "statement" is narrowly construed and includes "only those statements that directly inculpate the declarant and not . . . a larger narrative that merely contains some inculpating statements." *State v. Tovar*, 605 N.W.2d 717, 723 (Minn. 2000); *See also State v. Ford*, 539 N.W.2d 214, 227 (Minn. 1995) ("Rule 804(b)(3) only allows the admission of the self-inculpatory aspects of a statement, but not other parts of the larger statement.").

Because the two self-inculpatory hearsay statements expressly contradict other evidence in the record, the record lacks corroborating circumstances that clearly indicate the trustworthiness of the hearsay statements. For example, Redwine's out-of-court statement was that (1) they needed to purchase *one mask* from Wal-Mart, but the surveillance video showed Madich, Redwine, and Silvestrini purchasing *two masks*; (2) they used a *9 mm* handgun, but the crime-scene evidence and Silvestrini's statement indicated that a *.45 caliber* handgun was used; (3) the gun used *had no firing pin*, but the two unspent bullets found at the home had *firing pin markings*; and (4) they tried to mace *a specific victim*, but the *other victim* testified that she was the intended target. Similarly, Madich's statement indicated that he, Redwine, and Silvestrini, purchased the ski masks from *K-Mart*, but the receipt, UPC code, and surveillance video showed the purchase was made at *Wal-Mart*. Also, other information contained in the out-of-court statements was

uncorroborated. For example, Redwine stated that Silvestrini was "too high" to join them, and Madich stated that Silvestrini "chickened out" and got out of the car, but there is no evidence in the record supporting either assertion.

On our review of the record, we do not see that the district court abused its discretion by excluding the out-of-court statements. Moreover, Silvestrini has failed to establish that he was actually prejudiced by the exclusion so any abuse of discretion was harmless error.

Silvestrini also argues pro se that the district court erred by not permitting him to challenge the DNA evidence. But following our review of the record, it remains unclear what Silvestrini is challenging. A comprehensive contested omnibus hearing was held prior to trial, and issues related to DNA evidence were not raised. In addition, there was a lengthy discussion before jury selection in which the district court addressed pending motions and procedural issues for the trial, and DNA evidence was not addressed. Finally, Silvestrini's counsel did not object to any question asked of the Minnesota Bureau of Criminal Apprehension's (BCA) DNA expert witness, and had the full opportunity for cross-examination. On the record before us, Silvestrini's argument is without merit.

*Improper Conduct*

Silvestrini points us to five exchanges with the district court, asserting that the district court demeaned his trial counsel. First, outside the presence of the jury, the district court told Silvestrini's counsel that it likely would overrule a *Crawford* objection

if made.[3] Second, during the direct examination of the emergency-room physician, the prosecutor asked: "What did [the victim] describe to you had happened?" Responding to an objection, the district court stated: "Well, I think it falls within the hearsay exception under statements for purpose of medical diagnosis or treatment. Also the existing mental, emotional or physical condition. Also it's probably not hearsay if what he said is consistent with his prior testimony." Third, during the direct examination of a victim's neighbor, the prosecutor asked: "What did [the victim] tell you?" Silvestrini's counsel objected, and the district court stated:

> Well, I will overrule the objection. I think it would be [an] excited utterance under hearsay exceptions and in Rule 803. Also—probably also under existing—then existing mental, emotional, or physical condition would fit under that exception. Also, most likely it's going to be a consistent statement with [the victim]'s prior testimony which would make it nonhearsay. So you can answer the question.

Fourth, during the direct examination of a police officer, the prosecutor asked: "What did [the other victim] tell you?" Following the objection, the trial judge stated: "That's—I'll overrule the objection as an excited utterance. Also as probably nonhearsay if it's consistent with the prior—her prior testimony." And finally, during the same officer's direct examination, the following exchange occurred:

> [THE PROSECUTOR:] I direct your attention now to the top of page two of your report.
>
> [THE WITNESS:] Yeah. I can see in there that says he described the male.

[3] *See generally Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365-66 (2004) (holding that Confrontation Clause generally prohibits district court from admitting testimonial hearsay).

> [DEFENSE COUNSEL:] Your Honor, I guess I'll object as hearsay.
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> . . . .
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> [THE PROSECUTOR:] Your Honor, I believe it's being used not necessarily to prove the truth of the matter asserted, but to establish why further follow-up investigation was being conducted.
>
> [THE COURT]: All right. Well, I will allow it into evidence for the reason that it's being used to give [the witness] cause to do further investigation, not for the truth of anything stated by Trooper Shepard to [the witness]. You can answer then.

On those bases, Silvestrini contends that because the district court improperly demeaned his counsel and interjected itself into the trial, he is entitled to a new trial.

A criminal defendant has a constitutional right to a fair trial. *See* U.S. Const. amend. XIV (Due Process Clause); Minn. Const. art. I, § 7 (same). The right to a fair trial includes the right to an impartial judge and trial. *Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006). A judge's conduct must be "fair to both sides," and a judge should "refrain from remarks which might injure either of the parties to the litigation." *Hansen v. St. Paul City Ry.*, 231 Minn. 354, 360, 43 N.W.2d 260, 264 (1950). However, "[i]t is not improper for the [district] court to comment in the presence of the jury on its reason for admitting or excluding evidence provided such comments are not prejudicial to the defendant and the court instructs the jury that it is the exclusive judge of fact." *State v. Alexander*, 290 Minn. 5, 12, 185 N.W.2d 887, 892 (1971). Moreover, the district court has discretion in conducting the trials before it, and simply making clarifying comments or explaining rulings does not necessarily "disparage defense counsel and thereby

undermine [counsel's] credibility with the jury." *State v. Erickson*, 610 N.W.2d 335, 341 (Minn. 2000).

We presume "that a judge has discharged his or her judicial duties properly," *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006), so a defendant must assert allegations of impropriety sufficient to overcome this presumption, *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). We review de novo the constitutional question of whether a defendant has been deprived of the right to a fair trial before an impartial judge. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005).

What Silvestrini cites as disparagements are merely explanations by the district court of its rulings on certain objections. Moreover, the district court not only explicitly instructed the jury that deciding questions of fact was their "exclusive responsibility," but also stated, "I have not by these instructions, nor by any ruling or expression during the trial, intended to indicate my opinion regarding the facts or outcome of the case. If I have said or done anything that would seem to indicate such an opinion, you are to disregard it." The evidence in the record is insufficient to overcome the presumption that the district court discharged its duties properly.

Additionally, Silvestrini argues that the district court "abandoned its neutral role by interjecting itself into the presentation of evidence." Silvestrini cites three examples. First, after Silvestrini's counsel noted that some of the photographs taken by Wal-Mart's surveillance cameras appeared to be mislabeled, while referring to the photographs the district court stated:

> Well, may I just say something? I think the entrance and exit is the same thing. You go in and go out the same way. On the top, that's the corridor between the registers and the other stores at Wal-Mart, like the bank, and the bathroom, and the optical, and all that stuff. The top part really isn't an exit. That's just a corridor, okay? Do you understand that, Mr. Belfry?

Second, after Silvestrini's counsel objected to a leading question asked during Stone's direct examination, the district court, clarifying the question, stated: "First of all, this is in regard to, what, November 25, 2004?" Third, in response to the state suggesting that a question be rephrased, the court stated: "Well, I think the question is clear enough, which is I think basically, are you sure that the blanket was not over your head when they were spraying the pepper spray. Do you understand the question?"

None of these amount to anything more than clarification and are insufficient to overcome the presumption that the district court discharged its duties properly.

*Sufficiency of Evidence*

Finally, Silvestrini contends that there is insufficient evidence to support his attempted-murder conviction. When considering a claim of insufficiency of the evidence, we review the record to determine if the evidence, viewed in the light most favorable to the conviction, permitted the fact-finder to find the defendant guilty. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). But we cannot retry the facts. *State v. Sheldon*, 391 N.W.2d 537, 539 (Minn. App. 1986). We assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when the resolution of the matter depends on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980)

(holding that this court must assume that fact-finder credited testimony of state's witnesses and discredited any conflicting testimony). We will not overturn a verdict if the jury, acting with due regard for the presumption of innocence and the necessity for proof beyond a reasonable doubt, reasonably could conclude that the defendant was proven guilty of the offenses charged. *State v. Bernhardt*, 684 N.W.2d 465, 466-67 (Minn. 2004).

Silvestrini was convicted of attempted first-degree murder, a violation of Minn. Stat. §§ 609.185, subd. (a)(1), (3), .17 (2006). A person is guilty of first-degree murder if he

> (1) cause[d] the death of a human being with premeditation and with intent to effect the death of the person or of another; [or] . . . (3) cause[d] the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit burglary . . . .

Minn. Stat. § 609.185, subd. (a)(1), (3). And a person is guilty of an attempted crime if he acted with the intent to commit a crime and take a substantial step towards the commission of that crime. Minn. Stat. § 609.17, subd. 1.

Viewed under the totality of the circumstances, the facts established by the state are inconsistent with any rational hypothesis except that of guilt. At trial, one of the victims testified that after being beaten, he tried to stand up, and he heard a click of a gun—a sound he believed was that of a gun not working. The victim stated that he was then hit in the face, felt a gun pointed at his head, and heard the gun click again.

The jury also heard Trooper Shepard's testimony that he saw Silvestrini walking alone, late at night, near the crime scene, with a fresh wound on his head. A police

officer testified about finding a mask, hats, sweatpants, a sweatshirt, and some tape near the place where Silvestrini was initially detained. The jury saw surveillance video from the Wal-Mart store which showed Silvestrini purchasing a mask, hats, sweatpants, a sweatshirt, and duct tape. Finally, the jury heard from the BCA expert witness who testified that one of the masks that was found by the police, bore Silvestrini's DNA.

Viewed in the light most favorable to the conviction, the record contains ample evidence for the jury to find Silvestrini guilty of attempted first-degree murder.

**Affirmed.**