STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1140

State of Minnesota,
Respondent,

vs.

Marcus Deon Champs,
Appellant.

Filed February 23, 2010
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-07-119816

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges his conviction of second-degree murder, claiming that (1) Minnesota's automatic-certification statute is unconstitutional; (2) the district court abused its discretion by granting the state's challenges for cause to two prospective jurors; (3) the district court clearly erred by determining that appellant failed to make a prima facie showing of racial discrimination in his *Batson* challenge; (4) the district court abused its discretion by not instructing the jury that one of the state's witnesses was an accomplice; (5) he was denied a fair trial as a result of prosecutorial misconduct; and (6) the postconviction court abused its discretion by denying his petition for postconviction relief without an evidentiary hearing. We affirm.

FACTS

A.B., an alleged member of the 30's Bloods gang, suffered a fatal gunshot wound to the head on February 22, 2005. On November 8, 2007, a grand jury indicted appellant Marcus Deon Champs, a member of a rival gang, with several counts of first- and second-degree murder based on his alleged role in A.B.'s murder. Champs was 17-years old at the time of the offense. Because Champs was alleged to have committed murder in the first degree after becoming 16 years of age, the district court had original and exclusive jurisdiction over the proceedings. Minn. Stat. §§ 260B.007, subd. 6(b), .101, subd. 2 (2004). The case was tried to a jury, which found Champs guilty of second-degree murder and not guilty of first-degree murder. The district court sentenced Champs to serve 325 months in prison.

Champs filed a notice of appeal and then brought a motion to stay the appeal and remand for postconviction proceedings. We stayed the appeal pending completion of Champs's postconviction proceedings. After the district court denied Champs's petition for postconviction relief, we dissolved the stay and ordered that Champs's appeal may include issues raised and decided in the postconviction proceedings.

D E C I S I O N

Champs raises the following issues on appeal: (1) whether Minnesota's automatic-certification statute is unconstitutional; (2) whether the district court abused its discretion by granting the state's challenge for cause to two prospective jurors; (3) whether the district court clearly erred by determining that Champs failed to make a prima facie showing of racial discrimination in his *Batson* challenge; (4) whether the district court abused its discretion by not instructing the jury that a witness was an accomplice; (5) whether Champs was denied a fair trial as a result of prosecutorial misconduct; and (6) whether the postconviction court abused its discretion by denying Champs's petition for postconviction relief without an evidentiary hearing. We address each claim in turn.

I.

Champs argues that the automatic-certification[1] statute violates the equal-protection and due-process clauses of the United States and Minnesota constitutions.

[1] Subject to certain exceptions, the juvenile court has original and exclusive jurisdiction in proceedings concerning any child who is alleged to be delinquent. Minn. Stat. § 260B.101, subd. 1 (2004). The juvenile court lacks jurisdiction over proceedings concerning a child who is excluded from the statutory definition of a delinquent child. *Id.*, subd. 2. Minn. Stat. § 260B.007, subd. 6(b) excludes from the definition of delinquent child a "child alleged to have committed murder in the first degree after

Champs concedes that he did not raise these constitutional arguments in the district court. Because these arguments were not argued to and considered by the district court, they are waived on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

II.

"In determining whether to dismiss a potential juror for cause, the [district] court must decide whether the juror 'can set aside his or her impression or opinion and render an impartial verdict.'" *State v. Anderson*, 603 N.W.2d 354, 356 (Minn. App. 1999) (quoting *State v. Drieman*, 457 N.W.2d 703, 708 (Minn. 1990)), *review denied* (Minn. Mar. 14, 2000). "On review, this court will not lightly substitute its own judgment for that of the [district court] because the [district court] is in the best position to evaluate the testimony and demeanor of potential jurors." *Id.* The district court's resolution of the question of whether a prospective juror's protestation of impartiality is credible is entitled to special deference because it is essentially a determination of credibility and of demeanor. *State v. Logan*, 535 N.W.2d 320, 323 (Minn. 1995).

Under the Minnesota Rules of Criminal Procedure, a prospective juror may be challenged for cause if, among other reasons, "[t]he juror's state of mind–in reference to the case or to either party–satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the challenging party." Minn. R. Crim. P. 26.02, subd. 5(1)1. A veniremember who has a bias is "generally subject to rehabilitation, and may sit on the jury if he or she agrees to set aside any preconceived

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becoming 16 years of age." This statute is commonly referred to as "automatic waiver, automatic certification or legislative waiver." *State v. Behl*, 564 N.W.2d 560, 563 (Minn. 1997).

notions and make a decision based on the evidence and the court's instructions." *State v. Brown*, 732 N.W.2d 625, 629 n.2 (Minn. 2007). While the district court may question a prospective juror in an attempt at rehabilitation, it is under no obligation to do so. *See State v. Manley*, 664 N.W.2d 275, 285 (Minn. 2003) (citing 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 21.3(c) at 729-30 (1984)) ("While the judge in the exercise of his discretion might have questioned the juror to see if she could be . . . rehabilitated before excusing her, he was under no obligation to do so.").

Champs argues that the district court erred by dismissing veniremember J.G.N. for cause. During voir dire, J.G.N. stated, "I'm bound to say that I have some racist tendencies," and informed the district court that "we've had a lot of crime committed against my immediate family by blacks,[2] including a daughter that was kidnapped and raped and held, raped repeatedly over eight hours by several of them." J.G.N. also stated, "But, I mean, you should know that many times I've been called a racist, and I guess I'm not going to completely deny it. I have some tendencies. I know the dictionary definition of racism and I know the dictionary definition of the other terms for bias and things, and I guess I would fit into that category." J.G.N. also indicated, in his jury-questionnaire responses, that he felt individuals of a particular race were more likely to be involved in criminal acts. Despite appearances to the contrary, J.G.N. stated that he thought he could be objective. But he was equivocal, stating, "[Putting aside biases and prejudices is] the ideal, whether it happens, I don't know . . . Bound to be some that you are going to bring with you . . . [L]ike everyone else, I suppose it's possible." Despite

[2] Champs is African American.

J.G.N.'s statements that he could be objective, the district court granted the state's motion to dismiss J.G.N. for cause over Champs's objection. The district court's implicit determination that J.G.N.'s protestation of impartiality was not credible is entitled to special deference, and its decision to dismiss J.G.N. for cause was sound.

Champs also contends that the district court erred by dismissing veniremember M.M.D. for cause. During voir dire, M.M.D. stated that she had non-refundable plane tickets for a vacation that would begin on Thursday, March 20. The jury was anticipated to begin its deliberations on either Friday, March 14 or Monday, March 17. M.M.D. stated that it was her first vacation in eight years and that she looked forward to it. M.M.D. also said that she did not need to plan for the trip and would not yield her ground during jury deliberations simply to complete deliberations in time for her vacation. But she admitted that she would be disappointed if she had to miss her trip and would lose money if that happened. The state moved to dismiss M.M.D. for cause, and the district court granted the motion over Champs's objection.

"If an otherwise fair and neutral juror is distracted by some extraneous concern, the integrity of the jury as a unified body focused solely on the trial is diminished." *State v. Yeboah*, 691 N.W.2d 87, 91 (Minn. App. 2005), *review denied* (Minn. Apr. 19, 2005). M.M.D. stated that she would not be distracted and would hold her ground in jury deliberations. Given its decision to dismiss M.M.D. for cause, the district court apparently doubted M.M.D.'s claim that her impending vacation would not be a distraction. The district court's decision was based on a credibility determination to which we defer. *See Anderson*, 603 N.W.2d at 356 ("On review, this court will not

lightly substitute its own judgment for that of the [district court] because the [district court] is in the best position to evaluate the testimony and demeanor of potential jurors."). The district court's decision to dismiss M.M.D. for cause was not erroneous.

Champs contends that "[a] trial judge should not have the sole power to determine who can sit on a jury—some decisions should not be made by judges," and that "the defense was deprived of its right to have the jury of its choosing." Champs does not cite binding legal authority in support of these rather significant contentions. In fact, precedent refutes his arguments. In order to prevail on appeal from a district court's grant of a challenge for cause, an appellant must show both error and resulting prejudice. *See State v. Kluseman*, 53 Minn. 541, 541, 55 N.W. 741, 741 (1893) (holding that when the district court, on the challenge of the state, improperly rejects a juror, it will not prejudice the defendant if he was tried by an impartial jury). The supreme court explained that a party has "no right to any particular juror being selected, provided [that party] had an impartial jury to try [the] case, and, nothing appearing to the contrary, it is to be presumed that the jury was impartial." *Id.* at 545, 55 N.W. at 741. *Kluseman* was cited with approval in *State v. Hurst*, where the supreme court explained:

> As already pointed out, the right to reject is not a right to select. No party can acquire a vested right to have a particular member of the panel sit upon the trial of his cause until he has been accepted and sworn. It is enough that it appear that his cause has been tried by an impartial jury. It is no ground of exception that, against his objection, a juror was rejected by the court upon insufficient grounds, unless, through rejecting qualified persons, the necessity of accepting others not qualified has been purposely created. Thus, in the process of impaneling, no party is entitled, as of right, to have the first juror sit who has the statutory qualifications, though

> there are authorities to the contrary, chiefly based on exaggerated views of the rights of the accused in criminal trials. But this is on principle quite untenable; since, if the prisoner has been tried by an impartial jury, it would be nonsense to grant a new trial or a venire de novo upon this ground, in order that he might be again tried by another impartial jury.

153 Minn. 525, 532-33, 193 N.W. 680, 683 (1922) (quotation omitted).

Champs has not shown that he had a right to have any particular veniremember serve on the jury. Nor does Champs claim that his jury was partial. Accordingly, his claim regarding the district court's grant of the state's challenges for cause fails.

III.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits the use of peremptory strikes based on race. *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717 (1986). In *Batson*, the Supreme Court established a three-step process to determine whether a peremptory challenge was racially motivated. *Id.* at 96-98, 106 S. Ct. at 1723-24; *see also* Minn. R. Crim. P. 26.02, subd. 7(3) (adopting the *Batson* three-step process). First, the objecting party must establish a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723. Second, if the party objecting to the strike establishes a prima facie case, then the proponent of the strike must provide a race-neutral explanation. *Id.* at 97, 106 S. Ct. at 1723. Third, the district court must determine whether the objecting party has proven purposeful discrimination. *Id.* at 98, 106 S. Ct. at 1724.

A prima facie case of purposeful discrimination is established by showing (1) "that one or more members of a racial group have been peremptorily excluded from a jury"

and (2) "that circumstances of the case raise an inference that the exclusion was based on race." *State v. Martin*, 773 N.W.2d 89, 101 (Minn. 2009) (quotation omitted). However, "[t]he fact that the prospective juror is a member of a racial minority, alone, does not raise an inference that the exclusion was based on race." *State v. Wren*, 738 N.W.2d 378, 388 (Minn. 2007). The prima facie showing is based on "'the totality of [the] relevant facts' of a prosecutor's conduct" in the trial. *Martin*, 773 N.W.2d at 101 (quoting *Miller-El v. Dretke*, 545 U.S. 231, 239, 125 S. Ct. 2317, 2324 (2005)). "[U]on review of a district court's determination under step one of the *Batson* process that a prima facie showing of discrimination has not been established, [a reviewing court] will reverse only in the face of clear error." *State v. White*, 684 N.W.2d 500, 507 (Minn. 2004). The appellate courts "afford great deference [to a district court's ruling] because the record may not reflect all of the relevant circumstances that the court may consider." *Martin*, 773 N.W.2d at 101 (quotation omitted).

During voir dire, the state exercised a peremptory challenge to G.A., and Champs objected under *Batson*. Champs's purported prima facie showing was based on the fact that if G.A. were excused, the parties would be left with "a grand total of one [African-American] person who is effectively on the jury." Champs's attorney argued that it would be preferable to have more than one minority juror. While this argument stated a desirable goal, it did not set forth a claim of juror exclusion based on race. Champs never argued that the prosecutor's peremptory strike was motivated by racial discrimination. Even if we were to broadly interpret Champs's argument as an assertion that the state was purposefully attempting to limit the number of minority jury members, the record does

not support the assertion. G.A. was the fourth African-American veniremember questioned during voir dire. Of the three African-American veniremembers previously called for questioning, one was seated, one was "excused" by Champs after he initially moved to strike her for cause, and one was struck for cause on Champs's motion without objection by the state. G.A. was the first minority veniremember that the prosecutor moved to excuse from the jury. On this record there is no indication that the state was attempting to limit the number of minority jury members. The district court did not clearly err by finding that Champs failed to make a prima facie showing under *Batson*.

IV.

District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). Refusal to give a requested jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996).

A defendant may not be convicted based "upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense." Minn. Stat. § 634.04 (2004). This accomplice-testimony instruction "must be given in any criminal case in which any witness against the defendant might reasonably be considered an accomplice to the crime." *State v. Shoop*, 441 N.W.2d 475, 479 (Minn. 1989). When "the facts of the case are undisputed and

there is only one inference to be drawn as to whether or not the witness is an accomplice, then it is a question for the court to decide." *State v. Flournoy*, 535 N.W.2d 354, 359 (Minn. 1995). However, "[w]hen it is unclear whether a witness is an accomplice or not, it generally becomes a question of fact for the jury to decide." *State v. Reed*, 737 N.W.2d 572, 582 (Minn. 2007) (citing *State v. Gail*, 713 N.W.2d 851, 863 (Minn. 2006)).

The "general test for determining 'whether a witness is an accomplice [under Minn. Stat. §] 634.04 is whether he could have been indicted and convicted for the crime with which the accused is charged.'" *State v. Lee*, 683 N.W.2d 309, 314 (Minn. 2004) (quoting *State v. Henderson*, 620 N.W.2d 688, 701 (Minn. 2001)). "A person is criminally liable for a crime committed by another if the person *intentionally* aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2004) (emphasis added). However, for purposes of imposing accomplice liability, the court should "distinguish between [a person] playing a knowing role in the crime and having [a] mere presence at the scene, inaction, knowledge and passive acquiescence." *State v. Palbicki*, 700 N.W.2d 476, 487 (Minn. 2005) (quotation omitted).

Q.B. and T.B. were with Champs when he shot A.B., and they testified against him at trial. The district court instructed the jury that Champs could not be found guilty based upon uncorroborated accomplice testimony and instructed the jury that T.B. was an accomplice. But the district court submitted the question of whether Q.B. was an accomplice to the jury, instructing that if it "find[s] that [Q.B.] is a person who could be charged with the same crime as [Champs, it] cannot find [Champs] guilty of a crime on

that testimony, unless the testimony–that testimony is corroborated." Champs contends that the district court abused its discretion by failing to instruct the jury that Q.B. was an accomplice.

The district court's decision to submit the issue of Q.B.'s status as an accomplice to the jury finds support in the record. Q.B.'s involvement in the crime was substantially less than that of T.B. Q.B. testified that while he was in the car with T.B. and Champs when the shooting occurred, he was talking on his cell phone and "[p]aying no attention to what [T.B. and Champs] were doing." There is no direct evidence in the record that Q.B.'s involvement in the shooting was anything other than knowledge and passive acquiescence. Unlike Q.B., T.B. admitted that he was driving the car from which Champs shot A.B. T.B. testified that he spotted the car that A.B. was riding in and pointed it out to Champs. T.B. further testified that when Champs told him to slow down, T.B. took his foot off the gas, allowing the car to coast, at which point Champs began shooting.

Champs argues that Q.B. was a member of the same gang as Champs, was involved in the fight between the two gangs that precipitated the shooting, and was in the car while Champs pursued A.B. But this evidence does not lead to only one inference as to whether Q.B. was an accomplice to the shooting. Champs also argues that "there is evidence in the police reports … that [Q.B.], in fact, was one of the persons who was shooting at the car, which ultimately led to the death here." While such evidence would suggest accomplice liability, this evidence was not introduced in the trial and is not part of the record on appeal. *See* Minn. R. Civ. App. P. 110.01 (stating that the record on

appeal consists of "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any").

Because it is at least unclear whether Q.B. was an accomplice, the district court did not err by submitting the question to the jury. The district court's instruction fairly and adequately explained the law and was not an abuse of discretion

V.

A reviewing court applies a modified plain-error test to unobjected-to prosecutorial misconduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "For objected-to prosecutorial misconduct, [appellate courts] have utilized a harmless error test, the application of which varies based on the severity of the misconduct." *Wren*, 738 N.W.2d at 389. When reviewing claims of prosecutorial misconduct, we must first determine whether misconduct occurred. *See id.* at 390 ("We first address whether there was misconduct, and if so, whether it entitles [appellant] to a new trial."). To determine whether a prosecutor's statements during closing argument are improper, a reviewing court looks to the "closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Champs argues that he was denied a fair trial because of several alleged instances of prosecutorial misconduct during the state's closing arguments. Champs argues that the prosecutor improperly stated that Champs had lost the presumption of innocence, vouched for the state's evidence, disparaged Champs's defense, and implied that Champs had a burden of proof. A review of the record indicates that Champs objected only once

during closing arguments, when the state commented that Champs had lost the presumption of innocence. We address each category of alleged misconduct in turn.

Presumption of Innocence

Champs argues that the prosecutor repeatedly misstated the presumption of innocence during her closing argument and thereby committed prosecutorial misconduct. It is improper for a prosecutor to misstate the presumption of innocence. *See State v. Thomas*, 307 Minn. 229, 231, 239 N.W.2d 455, 457 (1976) (condemning the state's argument that the presumption of innocence and the requirement of proof beyond a reasonable doubt are meant to protect the innocent and not to shield the guilty).

At the beginning of the prosecutor's closing argument, she stated: "Ladies and gentlemen, as the judge has told you, the defendant in any trial is presumed innocent, until and unless proven guilty beyond a reasonable doubt. The defendant has now lost that presumption as a result of the evidence that we've heard and seen in this trial." Champs's attorney objected, and the district court instructed the jury to rely on the instructions that the district court had given regarding the presumption of innocence. That instruction had been provided immediately before closing arguments as follows: "The defendant is presumed innocent of the charges made. This presumption remains with the defendant, unless and until the defendant has been proven guilty beyond a reasonable doubt."

At the end of her closing argument, the prosecutor accurately described the definition of proof beyond a reasonable doubt and then stated:

> In this case, based on the testimony that we've heard, the evidence that we've seen, our reason and common sense tell us that the defendant, Marcus Champs, committed each of the crimes that he's accused of: First-degree premeditated murder and first-degree and second-degree drive-by murder, and all of those crimes were committed for benefit of a gang. That is clear beyond a reasonable doubt. The defendant has lost his presumption of innocence. Ladies and gentlemen, I ask you to render the only verdict that fits with that evidence and the law, that the defendant is guilty on all counts.

Finally, in her rebuttal argument, the prosecutor said:

> The law is that a defendant is presumed innocent until and unless proven guilty beyond a reasonable doubt. In this case, that is exactly what has happened. At the corner of 37th and Cedar shots were fired from a gold car. Those shots were fired by Marcus Champs. They killed [A.B.]. That has been proven beyond a reasonable doubt. There is no other reasonable possibility. That's what happened. And for that reason, we would ask you to return a verdict of guilty on all counts.

Champs contends that these arguments misstated the presumption of innocence. Champs cites a number of cases in support of his position. However, all of the cases predate *State v. Young*, 710 N.W.2d 272 (Minn. 2006), which is dispositive. In *Young*, the prosecutor argued:

> When the trial began, the Court told you that that young man right there is an innocent man. He was. Until the defense stood up and rested. Because at that time the state had presented to you sufficient evidence to find the defendant guilty of all the crimes that the Court just gave you the—instructions on. He's no long [sic] an innocent man. The evidence that's been presented to you by the state has shown you that he's guilty beyond a reasonable doubt.

Young, 710 N.W.2d at 280.

The supreme court concluded that, when read in context, the prosecutor's argument was simply that "the state had produced sufficient evidence of Young's guilt to overcome the presumption of innocence, not that he was not entitled to the presumption in the absence of proof beyond a reasonable doubt." *Id.* at 280-81. The supreme court noted that the prosecutor's statement was analogous to the standard Minnesota jury instruction used to define the presumption of innocence. *Id.* at 281. And the supreme court recognized that it had previously recommended that when explaining the presumption of innocence, "counsel would be wise to adopt some definition which has already received the general approval of the authorities, especially those in our own state." *Id.* (quotations omitted). The supreme court held that the prosecutor's argument was not a misstatement of law and did not constitute error. *Id.*

In this case, as in *Young*, the prosecutor's statement was analogous to the district court's instruction that, "[t]he defendant is presumed innocent of the charges made. This presumption remains with the defendant, unless and until the defendant has been proven guilty beyond a reasonable doubt." The prosecutor's arguments that the state had produced sufficient evidence of guilt to overcome the presumption of innocence do not constitute misconduct.

Vouching

Champs argues that the prosecutor improperly vouched for her own credibility when she said that prosecutors are "ministers of justice" whose job it is to "seek the truth." Improper vouching occurs "when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion

as to a witness's credibility." *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003) (quotations omitted). We consider the prosecutor's statement in its context: It was made during rebuttal argument in response to Champs's argument that if the state had a "great case" it would not have had to "cut deals." The statement was an attempt to explain why the state sometimes has to rely on statements from people who are incarcerated, and on plea agreements, in order to move investigations forward and to obtain convictions. The statement did not imply a guarantee as to the truthfulness of the state's witnesses, and it was not improper vouching.

Champs also argues that the prosecutor improperly vouched for the evidence by stating that the evidence at trial had caused the defendant to lose the presumption of innocence. This statement was a comment on the adequacy of the state's evidence; it was not misconduct. *See Young*, 710 N.W.2d at 280-81.

Disparaging the Defense

Champs argues that the prosecutor improperly disparaged the defense when she told the jury that it "may hear the victim bad-mouthed [] in closing," relying on *State v. Griese*, 565 N.W.2d 419 (Minn. 1997). In *Griese*, the supreme court noted that it is improper for a prosecutor to suggest that a particular defense is "the sort of defense that defendants raise when nothing else will work." 565 N.W.2d at 428 (quotation omitted). The prosecutor's comment in the present case is distinguishable from the disparaging comments at issue in *Griese*. The prosecutor did not suggest that the defense was employing a particular defense strategy because nothing else would work. Instead, the

prosecutor's comment regarding "victim bad-mouthing" was a reasonable prediction of what the defense might argue in its closing argument.

In opening statement, defense counsel repeatedly referred to the victim by his nickname, "Killer Tay." And defense counsel stated that the state would call as witnesses "a motley assortment of the worst kind of rogues and scoundrels as have ever entered an American courtroom," and that "[e]veryone of these people has things in their background which make them unreliable . . . [t]hey do what criminals do. They commit crimes; they get in trouble. And then they scatter like rats from a sinking ship, and try and get out of the trouble they got themselves into." Given the nature of Champs's opening statement, the prosecutor was justified in anticipating that the defense might disparage the victim in its closing argument. *See State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993) ("[P]rosecutors are of course free to make arguments that reasonably anticipate arguments defense counsel will make in closing argument."). The prosecutor's statement was not misconduct.

Burden of Proof

Finally, Champs argues that the prosecutor committed misconduct in her rebuttal argument when she told the jury that Champs "predictably talked a lot about the witnesses to whom [Champs] confessed, because he has to. He has to try to neutralize that." Champs argues this statement improperly implied that Champs had a burden of proof.

"A prosecutor's misstatement of the burden of proof is 'highly improper' and constitutes misconduct." *State v. Jackson*, 773 N.W.2d 111, 122 (Minn. 2009) (quoting

State v. Hunt, 615 N.W.2d 294, 302 (Minn. 2000)). When determining whether a particular statement impermissibly shifted the burden of proof to the defendant, we will look at the prosecutor's comments as a whole. *See State v. Tate*, 682 N.W.2d 169, 178-79 (Minn. App. 2004) (concluding that a statement that defendant must "explain away" the state's evidence did not amount to burden shifting where the prosecutor also stated that he had the burden of proof), *review denied* (Minn. Sept. 29, 2004). Because the prosecutor acknowledged that the burden of proof rested with the state, beginning her rebuttal argument with, "the state has the burden of proof," the complained-of statement did not impermissibly shift the burden of proof to Champs and was not misconduct.

VI.

Champs claims that the postconviction court erred by summarily denying his postconviction request for a new trial based on newly discovered evidence. A summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). "The denial of a new trial by a postconviction court will not be disturbed absent an abuse of discretion and review is limited to whether there is sufficient evidence to sustain the postconviction court's findings." *State v. Hooper*, 620 N.W.2d 31, 40 (Minn. 2000).

A new trial based on newly discovered evidence may be granted if a petitioner proves:

> (1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or

> doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result.

Rainer v. State, 566 N.W.2d 692, 695 (Minn. 1997). The postconviction court concluded, based on Champs's written submissions, that Champs failed to satisfy this test and that an evidentiary hearing was not necessary.

In his petition for relief, Champs asserted that a previously unidentified witness, K.T., would testify that Champs was on a city bus with K.T. at the time of the shooting and would thereby provide Champs with an alibi defense. Champs argues that the postconviction court was required to hold an evidentiary hearing regarding the potential impact of K.T.'s testimony, because the proposed testimony offered facts that, if proven true, would entitle Champs to relief. *See* Minn. Stat. § 590.04, subd. 1 (2004) (requiring the postconviction court to hold an evidentiary hearing "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief").

The postconviction court correctly reasoned that Champs's alleged presence on a city bus with another person at the time of the crime was known to Champs at the time of trial. But Champs argues that he did not learn the identity of his alleged bus companion until after trial. However, as the postconviction court noted, there is no indication that Champs or defense counsel investigated whether there were witnesses who could corroborate Champs's assertion that he was on the city bus at the time of the shooting. And there is no indication that Champs attempted to discover the identity of any of the passengers on the bus that night or that he attempted to view surveillance video of the bus

or of the bus stop in an effort to learn K.T.'s identity. Finally, nothing in the record indicates that Champs ever suggested, prior to the postconviction proceeding, that he had an alibi defense. The postconviction court correctly concluded that Champs failed to show that K.T.'s identity could not have been discovered through due diligence before trial.

Finally, the postconviction court correctly reasoned that the proposed alibi testimony would unlikely produce an acquittal or a more favorable result because "[a]t least six witnesses for the State testified that [Champs] was the shooter and their testimony was corroborated by other evidence presented at trial." *See generally Race v. State*, 504 N.W.2d 214, 218 (Minn. 1993) (affirming denial of postconviction relief when new evidence would not have produced a more favorable result because state's evidence contradicted and discredited new evidence). The postconviction court noted that Champs's proffer regarding the proposed alibi testimony was not supported by any other evidence, indicating that the postconviction court found the evidence doubtful. We agree with the postconviction court's conclusion that "when this testimony is considered against the testimony and corroborated evidence introduced by the State, it is highly unlikely that the proposed alibi testimony would produce a more favorable result if admitted at a new trial." On this record, it was not an abuse of discretion to deny Champs's request for a new trial without first hearing K.T.'s testimony. Because Champs failed to satisfy the standard for obtaining a new trial based on newly discovered

evidence, the postconviction court did not abuse its discretion by denying his petition for relief.

Affirmed.

Dated:

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Judge Michelle A. Larkin