STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1178

Richard Joseph Akande, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 7, 2014
Affirmed
Rodenberg, Judge

Hennepin County District Court
File No. 27-CR-10-21113

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth A.R. Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Klaphake, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving 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

RODENBERG, Judge

Appellant Richard Akande appeals the district court's denial of his petition for postconviction relief. Akande challenges (1) the admission of evidence obtained from a search of his mother's home, (2) the sufficiency of the evidence to support his conviction, (3) the district court's refusal to conduct an in camera review concerning the confidential reliable informant's identity, (4) errors at trial and prosecutorial misconduct that he claims amount to cumulative error that denied him a fair trial, and (5) the fairness of his sentencing trial. Because we conclude that these and appellant's pro se claims are without merit, we affirm.

FACTS

The search

On February 10, 2010, Officer Matthew Olson of the Minneapolis Police Department received information from a confidential reliable informant (CRI) that "Rich Kid," later identified as appellant Richard Akande, was in possession of one ounce of cocaine and of firearms. The CRI provided Officer Olson with the address where Akande was living and where he stored the narcotics and firearms, and gave a physical description of the residence. The CRI also gave a physical description of Akande and identified Akande in a photograph.

Officer Olson had arrested Akande for a loitering offense 30 days before receiving this information. During that arrest, Akande identified his address as being the address identified by the CRI. Akande was also a suspect in an ongoing investigation involving

several drug dealers selling narcotics at an apartment complex. Upon receiving this information, and with the assistance of the CRI, Officer Olson surveilled the residence. Officer Olson observed Akande use a key to enter and exit the house's front door on three different occasions. With this information, Officer Olson applied for a search warrant by affidavit. The district court issued the warrant.

On February 10, 2010, officers executed the search warrant. Akande's mother and her husband, who have resided at the house for nine years, were present when the warrant was executed. In a bedroom, officers found a black Ruger nine millimeter semiautomatic handgun located between a mattress and box spring. They also found in the bedroom: a Catholic Charities identification card belonging to Akande, located on the bedside table; a shoe box with letters addressed to Akande under the bed; a bundle of money totaling $910 in the top drawer of a dresser; and men's clothing that would fit a man of Akande's stature both in the closet and in piles in the bedroom. In the basement, officers found a suitcase, from which the butt of a sawed-off shotgun was protruding. The length of the gun was such that it could not be contained entirely within the suitcase. The suitcase also contained a Mac-12 .380 caliber handgun with magazine and clip, and another shotgun. In the kitchen, officers found two pieces of mail addressed to Akande at the address being searched. The letters were unopened, and were postmarked February 9, 2010.

On May 10, 2010 the state charged Akande with one count of possession of a firearm by a prohibited person, in violation of Minn. Stat. § 624.713 subd. 1(2) (2008), adding three similar counts in an amended complaint on April 22, 2011.

Pretrial motions

Before trial, appellant moved to suppress the evidence seized pursuant to the search warrant, arguing that the warrant was not supported by probable cause. The district court denied the motion.

The district court also heard motions in limine, including one concerning the state's intention to introduce evidence that Akande's mother was previously convicted of misdemeanor obstruction of justice for an incident that occurred on August 10, 2009. On that date, police responded to a domestic disturbance call at Akande's mother's house and were looking to speak with Akande. Police stated that Akande's mother physically blocked their ability to enter the upstairs after one officer saw Akande run up the stairs. The district court ruled that the state could not offer evidence of the prior conviction, but could impeach Akande's mother with the specific instance under Minn. R. Evid. 608(b)(1) should she testify.

The state also sought to introduce evidence of Akande's five previous felony convictions: two for controlled substances, two for assault, and one for burglary. The district court allowed the state to prove one controlled-substance conviction, one assault conviction and the burglary conviction, but prohibited proof of the two other convictions as insufficiently probative and unnecessarily prejudicial.

Because Akande's theory of defense was that he did not reside at his mother's house, the state sought to introduce Akande's prior contacts with police and officials in which he had given his mother's address as his residence. Akande objected to this evidence being admitted through a records custodian, because he would not be able to

cross-examine the specific people to whom he gave the address. The district court determined that this evidence did not implicate the Confrontation Clause. However, the district court ordered that the testimony be "sanitized" to eliminate any reference to criminal conduct having been the occasion for these reports. The district court also precluded any reference by the state to controlled substances, except for Akande's previous conviction, which it allowed solely for impeachment purposes.

Akande requested that the identity of the CRI be revealed, or, in the alternative, that an in camera review of the evidence relating to the CRI be conducted to determine whether the identity should be revealed. The district court denied the motion, concluding that Akande failed to make a prima facie showing that the CRI's testimony would assist the defense.

Evidence at trial

At trial, the officers testified to searching the home and seizing the weapons, some money, an identification badge, a box of letters and other pieces of mail, and clothing. The state also played a recording of a phone conversation between Akande and his mother while Akande was in custody. In the recording, Akande mentions the money in the dresser, and that he will be able to recover it after he is acquitted.

Akande's DNA was compared to samples taken from the four guns seized on February 10. There was insufficient genetic information to determine whether Akande's DNA matched the samples. However, Akande could not be excluded as a contributor to the DNA discovered on the Remington shotgun, which was found in the suitcase.

Akande was included in the 14.9% of the population that could have contributed to the DNA found on the shotgun. No fingerprints were found on any of the guns.

Akande's mother testified that Akande did not reside in her home at the time of the search, but that he visited occasionally. Akande's mother testified that, at the time of the search warrant, she believed that Akande was living with "Felicia." She testified that Akande would sometimes borrow her truck and would use the key attached to the key ring to enter her home. Akande's mother admitted that Akande keeps personal belongings at the home, including, mail, clothing, and cologne, and "all kinds of stuff like that." She said that when Akande was released from prison in 2009, he came to her house, dropped off these items, and left. Akande's mother testified that neither she nor her husband owns any guns. The state offered a recording of a phone call between Akande and his mother, recorded while Akande was in jail, in which Akande admitted that he had moved the suitcase into the basement at the request of his brother-in-law. Akande's mother also testified that Akande had asked her to inform the police that he was not living with her and that she agreed to do so because that was the truth.

At the end of the state's closing argument, the prosecutor argued, "It is clear that the defendant is guilty beyond a reasonable doubt of all four charges against him. The defendant has lost his presumption of innocence." The district court overruled Akande's objection and denied his motion for mistrial. The jury found Akande guilty on four counts of possession of a firearm.

Sentencing trial

The state requested an upward sentencing departure based on these convictions being Akande's third violent crime under Minn. Stat § 609.1095, subd. 2 (2008), and a sentencing trial was held. Over objection, the district court admitted parts of the complaints and of the warrants of commitment for five previous convictions. It instructed the jury by paraphrasing the statute upon which the state based its upward-departure request. The jury found that Akande is a threat to public safety. The district court sentenced Akande to an executed term of 120 months, a double upward durational departure. Akande petitioned for postconviction relief, which the district court denied. This appeal followed.

D E C I S I O N

I.

Akande first argues that the district court erred in finding that the search warrant was supported by probable cause because the affiant failed to corroborate the CRI's claims. He also argues that the probable cause was stale due to the 72-hour lapse of time between when the CRI claimed to have witnessed Akande possessing drugs and when the search warrant was executed.

The United States and Minnesota Constitutions provide that no warrant shall be issued without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, a search is lawful only when it is executed pursuant to a valid search warrant issued by a neutral and detached judge based on a finding of probable cause. *See* Minn. Stat. § 626.08 (2008); *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999). When

reviewing whether a search warrant is supported by probable cause, we afford great deference to the district court's probable cause determination. *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985). "[O]ur only consideration is whether the judge issuing the warrant had a substantial basis for concluding that probable cause existed." *State v. Jenkins*, 782 N.W.2d 211, 222-23 (Minn. 2010) (quotation omitted).

Probable cause is determined under a totality-of-the-circumstances test:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 223 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). When determining whether a search warrant application establishes probable cause, we are "restricted to consider[ing] only the information presented at the time of the application for the search warrant." *State v. Gabbert*, 411 N.W.2d 209, 212 (Minn. App. 1987).

When a search warrant application is based on information provided by a CRI, the supporting affidavit must include sufficient information to allow the magistrate judge to "personally assess the informant's credibility." *State v. Siegfried*, 274 N.W.2d 113, 114 (Minn. 1978). A magistrate must consider the informant's "veracity" and "basis of knowledge" when assessing an informant's credibility. *State v. Souto*, 578 N.W.2d 744, 750 (Minn. 1998). There are multiple ways in which an affidavit can show a CRI's veracity: 1) by showing that the informant has, in the past, provided police with accurate

information; 2) "by showing that in the particular case the circumstances strongly suggest that the information is reliable"; and 3) by showing corroboration of the details of the tip demonstrating that the informant "is telling the truth on this occasion." *Siegfried*, 274 N.W.2d at 114-15.

"[A]n informant who has given reliable information in the past is likely also currently reliable." *State v. Ross*, 676 N.W.2d 301, 304 (Minn. App. 2004). An affidavit sufficiently states that an informant has previously been reliable when it includes "a simple statement that the informant has been reliable in the past." *Id.* This is because the statement "indicates that the informant had provided accurate information to the police in the past and thus gives the magistrate reason to credit the informant's story." *Id.* (quotations omitted).

Reviewing the totality of the circumstances, we conclude that the district court did not err in determining that the search warrant was supported by probable cause. The affidavit adequately demonstrated the CRI's reliability. The affidavit states:

> This CRI has been used numerous times by police officers in the past and has provided information that has led to the recovery and arrest of parties that were in possession of cocaine and other narcotics. . . . The information provided by the CRI has led to numerous convictions in state court for narcotic-related charges.

Officer Olson swore that he had worked with this CRI in the past. Under *Siegfried*, an informant's veracity is established by a showing that he has a proven track record of providing the police with accurate information. 274 N.W.2d at 114-15. The district court did not err in concluding that the affidavit established the informant's veracity.

Akande also argues that Officer Olson did not sufficiently corroborate the CRI's tip. However, under *Siegfried*, veracity can be established by having provided accurate information in the past *or* by corroborating the tip. *Id.* Here, the search warrant application was supported by *both* the CRI's history of providing reliable information *and* corroboration of the CRI's tip. Officer Olson corroborated several aspects of the CRI's information. He verified that the given address was, in fact, Akande's current address by his Minnesota driver's license. He surveilled the residence during different times of the day and witnessed Akande enter and exit the front door using a key. "Even corroboration of minor details lends credence to an informant's tip and is relevant to the probable-cause determination." *State v. Holiday*, 749 N.W.2d 833, 841 (Minn. App. 2008). Corroboration of "part of the informer's tip as truthful may suggest that the entire tip is reliable." *Siegfried*, 274 N.W.2d at 115. Corroboration concerning Akande's residence helped to bolster the CRI's credibility.

"A person's criminal record is among the circumstances a judge may consider when determining whether probable cause exists for a search warrant." *Holiday*, 749 N.W.2d at 844. The affidavit here stated that Akande "was charged with a 2nd degree assault and convicted with Burglary-2nd degree on 05/09/2006. The same seller was also convicted of Assault-3rd Degree on 08/28/2006 and also numerous drug convictions." Akande's criminal convictions provide weak support for probable cause and are of minimal probative value. However, in light of the totality of circumstances, neither the magistrate judge nor the district court erred in considering Akande's prior convictions in determining that probable cause existed to support the search warrant.

Further, as the affidavit states, the CRI gave specific information about his personal observations within 72 hours of reporting to Officer Olson. Viewing the affidavit as a whole, the inclusion of recent personal observation of possession of drugs supports the magistrate's finding of probable cause. *See Wiley*, 366 N.W.2d at 268.

Finally, Akande argues that the probable cause supporting the warrant was stale by the time the warrant was issued. He argues that the CRI's awareness that Akande possessed one ounce of cocaine 72 hours earlier is insufficient to show a likelihood that drugs would be found at the residence. "Whether a delay in executing a search warrant is unconstitutional depends on whether the probable cause recited in the affidavit still exists at the time of execution of the warrant—that is, whether it is still likely that the items sought will be found in the place to be searched." *State v. Yaritz*, 287 N.W.2d 13, 16 (Minn. 1979). In *Yaritz*, the supreme court found a six-day delay was reasonable when executing a search warrant based on information about drug sales. *Id.* at 17. Similarly here, Officer Olson's affidavit stated that he "believe[s] that the seller . . . positively ID as Richard Joseph Akande . . . is storing and selling cocaine" out of the relevant address. The CRI claimed to have witnessed Akande in possession of an ounce (28 grams) of cocaine. Here, the district court acted within its discretion in finding probable cause despite the 72-hour lapse of time because Officer Olson's affidavit included information of past drug sales.

II.

Akande argues that the evidence presented at trial was insufficient. In considering a claim of insufficient evidence, we review the record to determine whether the evidence,

viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). When a conviction is based on circumstantial evidence, however, we apply a "heightened scrutiny" standard of review. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). This heightened scrutiny requires us to consider "whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt." *Id.* (quotation omitted). We must 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).

Akande was convicted on four counts of violating Minn. Stat. § 624.713, which prohibits certain persons from possessing firearms. Under the statute, possession may be actual or constructive. *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). Actual possession involves "direct physical control." *Jacobson v. Aetna Cas. & Sur. Co.*, 233 Minn. 383, 388, 46 N.W.2d 868, 871 (1951). Constructive possession may be established either (1) by proof that the item was in a place under the defendant's "exclusive control to which other people did not normally have access" or (2) by proof of a strong probability that "the defendant was at the time consciously exercising dominion and control over it," even if the item was in a place wherein others had access. *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975).

> The purpose of the constructive-possession doctrine is to include within the possession statute those cases where the state cannot prove actual or physical possession at the time of

> arrest but where the inference is strong that the defendant at one time physically possessed the substance and did not abandon his possessory interest in the substance but rather continued to exercise dominion and control over it up to the time of the arrest.

Id. at 104-05, 226 N.W.2d at 610. This case involves only constructive possession, as the state concedes that it produced no evidence of actual possession of the firearms on February 10, 2010.

In reviewing a conviction based on circumstantial evidence, we apply a two-part test. We first identify the circumstances proven in support of the conviction, giving deference to "the jury's acceptance of the proof of these circumstances as well as to the jury's rejection of evidence in the record that conflicted with the circumstances proved." *Al-Naseer*, 788 N.W.2d at 473. Viewed in the light most favorable to the verdict, the state proved the following circumstances relevant to constructive possession: Minneapolis police officers knew Akande from previous contact and Akande had previously given his mother's address as his own. While conducting surveillance on February 10, 2010, Officer Olson observed Akande enter and exit the front door using a key to lock and unlock the door. Akande's mother and her husband owned the house at the time the search warrant was executed. Many family members lived in the home over the past three years. Akande would borrow his mother's truck, and the truck keys were on the same key ring as keys to the house. Akande had personal property at his mother's house, including mail addressed to him at that address. In an upstairs bedroom officers found the following items: $910 cash in a dresser drawer; a loaded nine millimeter gun between the mattress and box spring; a photo identification card from Catholic Charities

bearing Akande's name; a box containing over 100 letters written to Akande from family members; and clothing in piles and hung up in the closet belonging to a male approximately the size of Akande. Officers found a suitcase in the basement with the butt of a sawed-off shotgun protruding from it. They also found a semiautomatic pistol and a pump action shotgun in a plastic bag in the suitcase. All four guns, including the gun found in the bedroom, were functional and designed to fire bullets. Akande told his mother that he had moved the suitcase to the basement at his brother-in-law's request. Akande asked his mother to say that he was not living with her, and she agreed to make that statement. Akande told his mother that he would be able to recover the $910 that was seized during the search warrant execution. Although another male may have lived in the house, he did not keep possessions in the upstairs bedroom. Akande has told multiple people in official positions that he lived at the address in question. None of the firearms belonged to Akande's mother or her husband.

"The second step is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). In making this determination, "we do not review each circumstance proved in isolation" but instead consider the circumstances on the whole. *State v. Andersen*, 784 N.W.2d 320, 332 (Minn. 2010). "The [s]tate does not have the burden of removing all doubt, but of removing all reasonable doubt." *Al-Naseer*, 788 N.W.2d at 473. We independently examine the reasonableness of the possible inferences and "give no deference to the fact finder's choice between reasonable inferences." *Id.* at 473-74. To ensure that no reasonable doubt exists as to the

defendant's guilt, there must be no reasonable inference inconsistent with guilt. *Id.* at 474.

Akande argues that, because there were reasonable inferences inconsistent with his guilt, the evidence is insufficient to prove that he constructively possessed the firearms. He argues that seven other people have lived or were living in the home at the time officers executed the search warrant. But, one may constructively possess controlled substances "singly or with others." *C.I.R. v. Fort*, 479 N.W.2d 43, 46 (Minn. 1992). Additionally, no matter how many people might have access to a weapon, a defendant may still have constructive possession of it. *See Florine*, 303 Minn. at 105, 226 N.W.2d at 611 (holding that defendant who had abandoned car to which anyone had access, had constructive possession of cocaine found inside). Thus, access to the weapons by other persons is not inconsistent with Akande having constructively possessed them.

Akande also argues that the evidence allows reasonable inferences other than that he had physical possession of the guns at one time and that he "continued to consciously exercise dominion and control over [the guns]." *Id.* at 105, 226 N.W.2d at 620. The jury's conclusion that Akande had, at one time, possessed the firearms is the only rational inference drawn from the evidence presented.

The firearm found under the mattress was in a room filled with Akande's belongings, including a photo identification card and personal letters written to Akande. The record contains no indication of anyone else having any reason to have kept a weapon under Akande's mattress. The $910 seized from the bedroom was claimed by

Akande to be his. On these facts, it is not reasonable to infer that the gun under Akande's mattress belonged to anyone else.

The jury's conclusion that Akande constructively possessed all of the items in the bedroom is the only rational inference from the evidence. The jury could also reasonably infer, from the recorded phone call, that Akande was responsible for placing the suitcase, from which the shotgun partially protruded, in the basement. Akande admitted having put the suitcase in the basement. A shotgun was protruding from it in plain view when the warrant was executed, and the record reveals no evidence to rebut the inference that the suitcase contained guns when Akande placed it in the basement. We must assume the jury believed the evidence presented by the state. *See Moore*, 438 N.W.2d at 108. "An offender who placed a firearm where it is discovered has constructive possession of the firearm, even if the offender does not own it." *Salcido-Perez v. State*, 615 N.W.2d 846, 848 (Minn. App. 2000) (Syllabus by the Court), *review denied* (Minn. Sept. 13, 2000).

Akande also argues that the jury could have reasonably inferred that he placed the guns in the basement in order to relinquish his possessory interest. However, no evidence presented at trial supports this inference. There was no evidence that Akande resided elsewhere, other than his mother's belief that he was living with "Felicia." There was no evidence that the firearms belonged to anyone else. The only reasonable inference from the evidence presented is that Akande constructively possessed the guns in the basement and under the mattress. Thus, there are no rational inferences that are inconsistent with Akande's constructive possession of the guns.

III.

Akande argues that the district court abused its discretion in denying his motion for disclosure of the identity of the CRI or, in the alternative, that the district court conduct an in camera review to consider disclosure of the CRI's identity. We review a district court's order regarding disclosure of a CRI's identity for an abuse of discretion. *State v. Rambahal*, 751 N.W.2d 84, 90 (Minn. 2008). One seeking disclosure of a CRI's identity must show that the need for disclosure outweighs the state's interest in protecting its sources. *Id.*

A district court is required to consider four nonexclusive factors when determining whether to order disclosure of a confidential informant's identity: "(1) whether the informant was a material witness; (2) whether the informant's testimony will be material to the issue of guilt; (3) whether testimony of officers is suspect; and (4) whether the informant's testimony might disclose entrapment." *Id.* (quotations omitted).

Akande believes that the CRI is his brother-in-law. He moved for an in camera review of the identity of the CRI because, as he stated in a recorded jailhouse phone call, Akande believed that his brother-in-law "set him up" for the crime. Akande argues that, if the CRI is his brother-in-law, this would have been material to the issue of guilt because of a possible alternative-perpetrator defense. Akande argues that, because he did not know the identity of the CRI, he could not effectively present this defense.

Akande's argument is unavailing. First, Akande did not present any evidence or file any notices of alternative-perpetrator or entrapment theories. *See State v. Atkinson*, 774 N.W.2d 584, 590 (Minn. 2009) (requiring "evidence that has an inherent tendency to

connect the alternative perpetrator to the commission of the charged crime" before a defendant can raise an alternative-perpetrator defense). He merely speculated about his brother-in-law's involvement. Further, the district court fully considered Akande's argument concerning disclosure of the CRI's identity and, in denying his motion, stated:

> In the court's view, the defendant has not provided information that explains precisely what the informant would testify to and how that testimony would be relevant to the case. Thus, in the court's view, the defendant has failed to meet his burden.

We agree with the district court. An alternative-perpetrator defense posits that another person committed the crime with which the defendant is charged. *Id.* at 589-90. But the unlawful possession charges here are specific to Akande. Akande's brother-in-law could not have committed this specific crime, even if he did give the firearms to Akande and then tell police about it. As discussed above, evidence that additional people may have constructively possessed the guns does nothing to prove that Akande did not constructively possess them.

Akande also argues that the CRI was a material witness. But at no point was the jury informed of the CRI or of any information provided by the CRI. The state's evidence consisted solely of the surveillance, the search, and its fruits. The CRI would not have been a material witness. *See State v. Marshall*, 411 N.W.2d 276, 280 (Minn. App. 1987) (concluding that an informant was not material when he simply provided information to support a search warrant application that defendant possessed drugs), *review denied* (Minn. Oct. 26, 1987).

Even if the CRI is Akande's brother-in-law, and even if he did direct Akande to place the suitcase in the basement, this supports no conclusion other than that Akande possessed the firearms. *See State v. Dickey*, 827 N.W.2d 792, 796 (Minn. App. 2013) ("A person may constructively possess contraband jointly with another person.") The firearms were too large to fit in the zipped suitcase and at least one firearm was evident to anyone looking at or moving the suitcase. Akande admitted in his conversation with his mother that he had moved the suitcase to the basement, either at his brother-in-law's direction or on his own volition. In either case and regardless of the CRI's identity, Akande admitted possessing the suitcase. And as discussed above, nothing in the record supports an argument that the guns were placed in the suitcase after appellant had moved it to the basement.

The district court acted within its discretion in determining that Akande failed to make a prima facie showing that the CRI's identity would be helpful to his defense or that the CRI was a material witness.

IV.

Akande argues that cumulative error at trial violated his right to a fair trial. In rare cases, "the cumulative effect of trial errors can deprive a defendant of his constitutional right to a fair trial when the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Davis*, 820 N.W.2d 525, 538 (Minn. 2012) (quotation omitted). Akande's claim of cumulative error fails, as he has not demonstrated any error and there is nothing to accumulate.

Akande argues that the district court abused its discretion in allowing the state to impeach Akande's mother by reference to her conviction of obstruction of justice in the August 10, 2009 incident. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted).

The district court ruled that the August 10, 2009 incident involving Akande's mother was a specific instance of conduct admissible under Minn. R. Evid. 608(b)(1). The district court carefully crafted its ruling to preclude testimony about why the officers were at Akande's mother's house, so as to minimize unfair prejudice to Akande. Akande's mother's credibility was central to this case. She testified that Akande did not reside at her house when the search warrant was executed. The district court acted within its discretion in allowing evidence of the earlier incident and, by carefully tailoring the evidence, the district court properly avoided unfair prejudice to Akande.

Akande next argues that the district court erred in determining that three of his prior convictions would be admissible as impeachment evidence should he testify. The district court would have allowed one of Akande's controlled-substance convictions, one of his two assault convictions, and his burglary conviction to "aid the jury by allowing the jury to see the whole person, and better judge the truthfulness of the defendant's testimony." We will not reverse a district court's ruling on the impeachment of a witness

by a prior conviction absent an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

Evidence of a defendant's prior conviction is admissible for purposes of impeachment when the crime for which the defendant was convicted is punishable by more than one year in prison and the probative value outweighs the prejudicial effect. Minn. R. Evid. 609(a)(1). To determine whether the probative value of prior-conviction evidence outweighs its prejudicial effect, the district court must consider the following factors:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of [the] defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). Akande admits that factors two, three and five weigh in favor of admission. He argues that the district court erred in weighing factors one and four in favor of admission of three of his five prior convictions.

Impeachment of a defendant by his "prior crime aids the jury by allowing it to see the whole person and thus to judge better the truth of his testimony." *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotations omitted). Our supreme court has specifically stated that "*any* felony conviction is probative of a witness's credibility, and the mere fact that a witness is a convicted felon holds impeachment value." *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011). The district court determined that, while Akande's felony assault and controlled-substance convictions do not involve dishonesty, those

convictions have probative value under the whole-person rationale. The district court found that burglary involved a form of dishonesty.

> [T]he intent of rule 609(a) seems plain. There is one category for crimes of dishonesty or false statement . . . and another that allows for a broader credibility [assessment . . . .] Although credibility might be most directly and concretely assessed through considerations of past dishonesty that not only rose to the level of a crime but that also were established beyond a reasonable doubt, credibility in evidence law is broader than just those types of crimes.

State v. Flemino, 721 N.W.2d 326, 329 (Minn. App. 2006). The district court properly regarded Akande's burglary conviction as involving a form of dishonesty and that all three convictions were properly considered for the "broader credibility assessment." The district court did not err in considering this factor as favoring admission of the three convictions.

Akande argues that the district court's determination that his prior convictions were admissible caused him not to testify and that his testimony was important, which is surely would have been. "[A] judge might exclude even a relevant prior conviction if he determines that its admission for impeachment purposes will cause [a] defendant not to testify and if it is more important in the case to have the jury hear the defendant's version of the case." *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980).

"If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). Here, had Akande testified, his credibility would have been a central issue

in the case and impeachment evidence would have been important. Thus, the district court correctly weighted this factor in favor of admissibility.

Because all five *Jones* factors weigh in favor of admission, the district court acted within its discretion in finding that appellant's three prior felony convictions were admissible for impeachment purposes. The district court's careful consideration of the *Jones* factors is further evidenced by its having prohibited the state from proving two additional convictions. Those additional convictions would have added little to the state's case and would have prejudiced Akande. The district court did not err in allowing impeachment by three of appellant's five prior convictions.

Over objection, a Hennepin County records custodian testified that Akande had provided his mother's address as his own on four separate occasions. Akande argues that the records custodian's testimony implicated his Confrontation Clause rights. "We review de novo whether admitted testimony violates a defendant's rights under the Confrontation Clause." *State v. Usee*, 800 N.W.2d 192, 196-97 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

Both the U.S. and Minnesota Constitutions guarantee a defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to confrontation is violated when testimonial hearsay statements are admitted into evidence, unless the declarant is unavailable and the defendant has had a prior chance to cross-examine the witness. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004)). Whether a record is testimonial depends on whether it was made "under

circumstances that would lead an objective witness reasonably to believe that the statement would be available at a later trial." *Id.*

The district court allowed the evidence because it tended to prove Akande's address. The district court prohibited reference to any of the officials being identified as "jailers" to reduce the potential prejudice to Akande.

Business records of this type, used for this purpose, are not testimonial. *State v. Vonderharr*, 733 N.W.2d 847, 853 (Minn. 2007) (holding that Department of Public Safety driver's license records are not testimonial because "the mere fact that the DPS records can be used in a criminal prosecution does not mean that they were created for that purpose"); *see also United States v. Torres-Villalobos*, 487 F.3d 607, 612-13 (8th Cir. 2007) (holding that warrants of deportation admitted to prove that the deportee had been deported in the past were created for the "primary purpose [of maintaining] records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions" and thus were not testimonial). None of these records were created to aid in future criminal prosecution and none were prepared in contemplation of proving that Akande was illegally possessing firearms. The district court correctly concluded that the Hennepin County records custodian's testimony did not implicate the Confrontation Clause.

Akande argues that the district court erred in instructing the jury concerning "constructive possession." "[W]hen a district court exercises its discretion and refuses to give a requested instruction, no error results if no abuse of discretion is shown." *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). District courts are allowed "considerable

latitude" in the selection of language for jury instructions. *State v. Peou*, 579 N.W.2d 471, 475 (Minn.1998). "[J]ury instructions must be reviewed as a whole." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *Kuhnau*, 622 N.W.2d at 556. To prove constructive possession, the state must prove: (a) that police found the firearms in a location "under defendant's exclusive control to which other people did not normally have access" or (b) the police located the firearms where other people had access, but "there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it." *Florine*, 303 Minn. at 105, 226 N.W.2d at 611.

Akande asserts that the following instruction given to the jury was erroneous:

> A person who is not in actual possession of a thing, but who, nevertheless, knowingly has both the power and the intention at a given time to exercise authority and control over it, either directly or through another person, is then in constructive possession of it.

The district court's instruction differs from the model jury instruction defining "possession," which states that a person possesses an item "if it was in a place under [that person's] exclusive control to which other people did not normally have access, or if the person knowingly exercised dominion and control over it." 10A *Minnesota Practice*, CRIMJIG 32.42 (2006). Reading the instructions as a whole, the jury was properly instructed.[1] The district court acted within its discretion in giving this instruction.

[1] We have previously held that the specific instruction given by the district court here does not materially misstate the law on constructive possession. *State v. Nelson*, No. A09-0956, 2010 WL 2484668 (Minn. App. June 22, 2010). We note that using the pattern jury instructions is improper in certain situations. *See, e.g.*, *State v. Kelley*, 734

Akande argues that the prosecutor committed misconduct when a state's witness, an officer who assisted in the execution of the search warrant, testified that the search warrant listed "narcotics" as the purpose for the search, in contravention of a pretrial order. Akande also argues that prosecutor committed misconduct when he stated in his closing argument that Akande had lost his presumption of innocence.

> When reviewing claims of prosecutorial misconduct, we reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial. If the state has engaged in misconduct, the defendant will not be granted a new trial if the misconduct is harmless beyond a reasonable doubt. We will find an error to be harmless beyond a reasonable doubt only if the verdict rendered was surely unattributable to the error.

Swanson, 707 N.W.2d at 658 (citations and quotation marks omitted).

A prosecutor may commit misconduct by intentionally eliciting inadmissible testimony. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Before trial, the district court granted Akande's motion in limine that the state could not elicit evidence or argument concerning narcotics, other than reference to three past convictions should Akande testify. When the state questioned the officer about the search in this case, the following exchange occurred:

> PROSECUTOR: When you're searching the kitchen, give me an example of what type of evidence you would be looking for in this type of case.
> OFFICER: Every search warrant has specifics as to what you're allowed to look for. In, I believe, this case it was narcotics.

N.W.2d 689, 694-95) (Minn. App. 2007) (concluding that the jury instructions improperly required the jury to make additional findings), *review denied* (Minn. Sept. 18, 2007).

> DEFENSE: Objection, Your Honor.
> THE COURT: All right. Ladies and gentlemen, . . . I'm going to ask you to disregard that last statement that the officer made. All right? Objection is sustained.

Akande moved for a mistrial, arguing that he was unduly prejudiced by the statement. The district court denied his motion because the officer's answer was to a poorly formed question, and was an "inadvertent mention of the items that he was authorized to be looking for." The record supports the district court's determination that the reference was inadvertent. There was no error. Akande's objection to that testimony was sustained and the jury was instructed to disregard the statement. The jury is "presumed to have followed the court's instructions and to have disregarded any question to which an objection was sustained." *State v. Steward*, 645 N.W.2d 115, 122 (Minn. 2002).

"[C]ourts must look at the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence to determine whether reversible error has occurred." *State v. McDaniel*, 777 N.W.2d 739, 751 (Minn. 2010) (quotation omitted).

In its summation, the prosecutor argued:

> Ladies and gentlemen, the judge has given you an instruction about proof beyond a reasonable doubt, and you know what that definition is. In this case, the testimony that you've heard and the evidence that you have seen, reason and common sense. Use your common sense when you go back to the jury room and deliberate.
>
> It is clear that the defendant is guilty beyond a reasonable doubt of all four charges against him. The defendant has lost his presumption of innocence.

Akande objected. Outside the hearing of the jury, the district court overruled the objection because it had already instructed the jury on the presumption of innocence and that, if a lawyer made a comment contrary to what the district court instructed, it must disregard the lawyer's comment. The district court also pointed to appellate caselaw concerning the presumption of innocence instruction and holding that an argument tied to the facts of the case that the presumption has been overcome is not prosecutorial misconduct.

The district court did not err in overruling this objection. It correctly stated that there is no error in the state's closing argument when it sufficiently ties the reference of the presumption of innocence having been overcome to the evidence presented. The district court cited *State v. Vue*, 797 N.W.2d 5 (Minn. 2011), wherein the supreme court held that the prosecutor's closing argument was not plain error. In *Vue*, the prosecutor twice stated that the defendant had lost his presumption of innocence, the statement most analogous was:

> In this case, ladies and gentlemen, based upon the testimony that we have heard and the evidence that we have seen, our reason and common sense tell us that [the defendant] committed the crimes that he is accused of . . . . That is clear beyond a reasonable doubt. Therefore, the defendant has lost his presumption of innocence.

797 N.W.2d at 13-14. The statement is almost identical to that made by the prosecutor in this case. Here, as in *Vue*, the prosecutor's comments were tied to the elements of the crime, arguing that the presumption has been overcome by proof beyond a reasonable doubt.

The district court had instructed the jury that Akande is "presumed to be innocent of each of these charges unless and until proved guilty by a unanimous jury by proof beyond a reasonable doubt." It also gave final instructions before deliberation that "the defendant is presumed innocent of all charges made, and that presumption remains with the defendant unless and until the jury determines the defendant has been proved guilty beyond a reasonable doubt." In light of these instructions, the state's argument, similar to that in *Vue*, was not misconduct.

Because we find no error to accumulate, we conclude that no cumulative error deprived Akande of a fair trial.

V.

Akande next argues that he did not receive a fair sentencing trial due to violations of the Confrontation Clause and an improper jury instruction.

The rules of evidence and protections of the Confrontation Clause apply at sentencing jury trials. *State v. Rodriguez*, 754 N.W.2d 672, 681, 683-84 (Minn. 2007). Whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law, which we review de novo. *Caulfield*, 722 N.W.2d at 308.

The state moved for an upward sentencing departure. Under Minnesota law,

> [w]henever a person is convicted of a violent crime that is a felony, and the judge is imposing an executed sentence based on a Sentencing Guidelines presumptive imprisonment sentence, the judge may impose an aggravated durational departure from the presumptive imprisonment sentence up to the statutory maximum sentence if the offender was at least 18 years old at the time the felony was committed, and:

> (1) the court determines on the record at the time of sentencing that the offender has two or more prior convictions for violent crimes; and
>
> (2) the fact finder determines that the offender is a danger to public safety . . . .

Minn. Stat. § 609.1095 subd. 2 (2008). To prove that the defendant was a danger to public safety, the state introduced five exhibits at the sentencing trial: 1) a warrant of commitment for fifth-degree possession to which Akande pled guilty on June 27, 2005; 2) a warrant of commitment for third-degree assault to which Akande pled guilty on February 15, 2006; 3) a sentencing for third-degree aiding and abetting assault and aiding and abetting second-degree burglary; 4) a warrant of commitment and sentencing for second-degree burglary dated August 28, 2006; and 5) a warrant of commitment for second-degree attempted controlled-substance crime dated April 27, 2007. Over defense foundation and hearsay objections, the state read into evidence portions of the charging sections of five complaints relating to the convictions listed above.

As discussed above, the Confrontation Clause is implicated by testimonial hearsay, offered to prove the truth of the matter asserted. *See Crawford*, 541 U.S. at 59 n.9, 124 S. Ct. at 1369 n.9. The evidence of Akande's previous convictions was offered to prove the *fact* of the convictions. It was not offered to prove the underlying facts supporting those convictions, and is therefore not testimonial. *But see State v. McClenton*, 781 N.W.2d 181, 193 (Minn. App. 2010) (holding that the probable cause statements from seven complaints offered to show that the current offenses were "committed as part of a pattern of criminal conduct" were testimonial because the jury was required to determine whether the past crimes had similar characteristics sufficient to

determine that there was a pattern of conduct). By offering Akande's previous convictions as evidence of a high frequency of past criminal conduct, and providing the jury with the information contained in the charging portion only of the underlying complaints, the state proved *only that the convictions occurred*. The fact that the convictions occurred provided a sufficient basis for the jury to find that Akande had engaged in a high frequency of criminal conduct, or had a long involvement in criminal conduct. The district court properly concluded that admission of the exhibits and parts of the complaints underlying those convictions did not implicate Akande's right to confront witnesses against him.

The district court, in instructing the jury on the sentencing issues, adopted the state's proposed jury instruction, which read: "You must determine whether or not the defendant is a danger to public safety. You may consider the offender's high frequency rate of criminal activity, or long involvement in criminal activity."

Akande objected to this instruction and proposed his own instruction. Akande argued that the state's proposed instruction directed the jury to find Akande had a high rate of criminal activity rather than instructing them to determine *whether* Akande's criminal history amounted to a "high" rate of criminal activity.

District courts are allowed "considerable latitude" in selecting language for jury instructions." *Peou*, 579 N.W.2d at 475. The jury charge must be read as a whole, and if the charge correctly states the law in language that can be understood by the jury, there is no reversible error. *Id.* An instruction is erroneous when it materially misstates the law. *Kuhnau*, 622 N.W.2d at 556.

Akande relies on *State v. Moore* in arguing that the district court's instruction "effectively constituted a directed verdict." 699 N.W.2d 733, 737 (Minn. 2005). In *Moore*, the district court instructed the jury that "the loss of a tooth is a permanent loss of the function of a bodily member." *Id.* at 736. An element of the charged offense was that the victim had suffered "great bodily harm," which is defined as injury that "causes a permanent . . . loss . . . of the function of any bodily member or organ." *Id.* at 736-37. The supreme court concluded that the district court's instruction was reversible error, as it removed from the jury's consideration whether loss of a tooth amounted to great bodily harm. *Id.* at 737. Here, the jury instruction is readily distinguishable from *Moore*. This jury was not instructed to make any particular finding or conclusion. It was instructed to consider whether Akande was a threat to public safety, and that it may, but was not required to, consider his past criminal behavior.

The district court did not abuse its discretion in using the statutory language in its jury instruction. Using the statutory language may have resulted in stilted or unclear language, and it might have been preferable to more clearly instruct the jury that it may consider *whether* the offender has a high frequency rate of criminal activity or juvenile adjudications, or a long involvement in criminal activity. But the district court is accorded "considerable latitude" in its selection of language. The instruction, read as a whole, did not misstate the law. *See Kuhnau*, 622 N.W.2d at 556. The district court did not abuse its discretion in instructing the jury as it did at the sentencing trial.

VI.

In his pro se brief, Akande reiterates the argument that the search warrant was not supported by probable cause, previously addressed. He also points to a possible discrepancy between the facts alleged in the affidavit supporting the warrant and the testimony of Officer Olson at the *Rasmussen* hearing. The affidavit states: "The information provided by the CRI has led to numerous convictions in State Court for narcotics related charges." At the *Rasmussen* hearing, the following exchange occurred:

> DEFENSE: You do not indicate in your application for the search warrant whether or not any . . . information from this CRI has ever led to any convictions, though, is that correct?
> OFFICER: That is correct.
> DEFENSE: And would it be fair to say you're not sure whether or not any convictions had resulted from this information?
> OFFICER: Please repeat that question?
> DEFENSE: Yes. I'll phrase it slightly differently. The reason that you put in the application for search warrant arrests rather than convictions is because you are not able to say under oath whether or not the CRI has ever been able to provide information that's led to a conviction.
> OFFICER: That is correct.

Akande argues that Officer Olson's testimony proves that he provided false information in the affidavit supporting the request for a search warrant. But a careful reading of the exchange reveals that counsel's question was not whether information from this CRI actually led to convictions. The question concerned the contents of the affidavit. The uncertainty to which reference is made in the transcript is about the contents of the affidavit, not about the information provided by the CRI.

Further, we look to the totality of the circumstances to determine whether the issuing judge had a substantial basis for finding probable cause. *Holiday*, 749 N.W.2d at 839. Despite our careful consideration of this additional issue raised in the pro se brief, there is no reason to believe, on this record, that the issuing magistrate relied on the CRI having given information leading to convictions in the past. The application for the warrant made no such claim. The district court did not err in determining that the search warrant was supported by probable cause.

In sum, we conclude that the district court properly denied Akande's motion to suppress the evidence obtained from the search warrant, that the evidence supported Akande's convictions of constructive possession of the firearms, that the district court acted within its discretion in denying Akande's motion to conduct an in camera review of the CRI, that there was no cumulative error at trial, that the district court did not abuse its discretion in the admission of evidence or in its instruction to the jury at the sentencing trial, and that Akande's pro se arguments are without merit.

Affirmed.