APPENDIX A

STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1509

State of Minnesota,
Respondent,

vs.

Aaron Jude Schnagl,
Appellant.

Filed December 18, 2017
Affirmed
Florey, Judge

Chisago County District Court
File No. 13-CR-13-1022

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

Janet Reiter, Chisago County Attorney, Nicholas A. Hydukovich, Special Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Rodenberg, Judge; and Bratvold, Judge.

S Y L L A B U S

In a trial for third-degree murder, under Minn. Stat. § 609.195(b) (2012), a district court does not abuse its discretion by refusing to give a specific joint-acquisition jury instruction based on *State v. Carithers*, 490 N.W.2d 620 (Minn. 1992), if the defendant and the decedent were not spouses.

OPINION

FLOREY, Judge

A jury found appellant Aaron Jude Schnagl guilty of third-degree murder for giving cocaine to a woman who later died. Appellant argues that the evidence is insufficient to sustain the conviction and that the district court erred by refusing to instruct the jury on the defense's theory of joint acquisition of the controlled substance. Appellant also raises a number of pro se arguments. We conclude that the evidence is sufficient to sustain the conviction, the district court did not abuse its discretion by refusing to give a joint-acquisition instruction, and appellant's pro se arguments are unavailing. We therefore affirm appellant's conviction.

FACTS

On the night of December 8, 2012, appellant and a 27-year-old woman, D.J., were using cocaine and drinking alcohol at appellant's house. Appellant claims that he and D.J. jointly purchased and used the cocaine, he passed out, and D.J. was gone when he awoke. D.J.'s body was found approximately five months later floating in a pond about 440 yards west of appellant's residence. She was naked except for a tank top.

The cocaine was obtained at the home of E.T., appellant's business partner. After obtaining several grams of cocaine, appellant and D.J. went to appellant's house, where they drank alcohol and used the cocaine. At 2:38 a.m., on December 9, appellant's burglar alarm went off. A dispatcher called appellant at 2:40 a.m., and appellant gave a code that cleared the alarm. He told the dispatcher that the cause of the alarm was his girlfriend. At

3:07 a.m., the alarm went off again. Appellant called the security company and said that it was a false alarm.

It started snowing in the early morning hours of December 9, and the snow continued throughout the day. D.J.'s family became concerned about her whereabouts. D.J.'s sister called appellant. He told her that he and D.J. went to bed, and he awoke to find she was gone, but she left her personal things, including her purse, shoes, and cellphone at his house. D.J.'s sister reported her missing.

A deputy was dispatched to appellant's home. Upon arriving, he saw appellant's truck in the ditch. He spoke with appellant in appellant's home and observed some women's clothes on the kitchen table, D.J.'s purse and cellphone, and a pair of women's boots near the front door. He did not see signs of a struggle. He took a taped statement from appellant.

Appellant told the deputy that, on December 8, he and D.J. got back to his house around 7:30 or 8:00 p.m. They hung out, were sexually intimate, had four or five drinks, and went to bed between 1:00 and 2:30 a.m. D.J. went to bed in her clothes. Appellant awoke around 9:30 a.m., and D.J. was gone; he was worried that she wandered off into the snow because that morning he saw tracks in the snow in his yard that "stopped at the woods." He searched for her using his truck and got it stuck. The deputy asked why appellant did not contact authorities, and appellant responded variously that he did not know when D.J. woke, he was hung over, and D.J. had "done this before." Appellant said that he and D.J. did not use drugs that night, but later admitted to using marijuana. The deputy gave appellant a preliminary breath test, which indicated that appellant was

intoxicated. Appellant agreed to give a formal statement and was transported to the sheriff's office.

A warrant was obtained to search appellant's home and truck. D.J.'s wallet, license, and cellphone were recovered, as well as a purse, clothing, and women's boots. In the trunk of appellant's BMW, investigators discovered 12 pounds of marijuana. The following day, another search was executed. A paper towel and a tissue containing blood were collected from appellant's home; DNA testing showed a male DNA profile. Trace blood samples from furniture and a bed sheet matched D.J.'s DNA.

On December 12, 2012, appellant, with his attorney present, gave a statement to law enforcement. He said that on the day in question he and D.J. shopped, picked up food, and then stopped at his house where he "grabbed some stuff . . . like a mixer." They then went to E.T.'s house for a quick visit. Appellant and D.J. returned to appellant's house where D.J. snorted "[p]robably ten" lines of cocaine. Appellant said that there were, at most, five grams of cocaine at his house that night. The next morning he may have awoken as early as 7:00 a.m., and he saw that D.J. was gone. He then went back to sleep for several hours. At some point that morning, he searched his house and outside for D.J. He saw tracks in the snow, but no sign of D.J. He texted D.J.'s friends, and he texted his neighbor to see if the neighbor had seen D.J. Then he searched for her using his truck and got it stuck, after which he panicked because he was "still intoxicated." He then drove to E.T's. home in a third vehicle. During the interview, he mentioned that his "house shoes" were missing. However, investigators found those shoes in appellant's bedroom when they executed the

search warrant. When asked why he did not contact police in the morning, appellant responded, "Because I was still drunk . . . ."

The Duffel Bag

J.J. owned an auto-repair shop next to appellant's business. On December 9, 2012, after getting stuck and driving to E.T.'s home in a panic, appellant called J.J. and asked him to pick up a duffel bag from inside appellant's BMW. J.J. went to appellant's house that day, grabbed a duffel bag containing marijuana, and brought it to the home of C.B.

After J.J. left the bag at C.B.'s house, E.T. called J.J. and asked him to go to appellant and E.T.'s shop because he was worried that "there may be stuff there." J.J. went to the shop, grabbed some drug-related items, placed the items in a paper bag, and placed the paper bag in the duffel bag at C.B.'s house. J.J. eventually confessed to the existence of the duffel bag, and authorities recovered it. The paper bag contained benocyclidine pills, bags of marijuana, and a digital scale. The duffel bag also contained approximately 23 grams of cocaine and a type of sugar used as a cutting agent to increase the volume of cocaine.

Appellant told investigators that he was only aware of the marijuana in the duffel bag, and J.J. must have put the cocaine in the duffel bag. J.J. later testified that he did not see the cocaine when he briefly inspected the contents of the duffel bag, but the cocaine may have been among the items that he grabbed from appellant and E.T.'s shop.

Indictment and Trial

Appellant was indicted on one count of third-degree murder. The indictment alleged that appellant proximately caused D.J.'s death by providing her with cocaine. At

trial, appellant testified in his defense that he did not give cocaine to D.J. in exchange for money. He and D.J. together bought about five grams of cocaine from E.T. for $80, with each pitching in $40.

Dr. Strobl, a forensic pathologist, testified that nothing in D.J.'s external examination suggested a cause of death, and she could not say with any degree of medical certainty what caused D.J.'s death. D.J. had a significant amount of alcohol in her system, as well as cocaine, cocaine metabolites, and a small amount of an antihistamine. The doctor opined that her death could have been the result of cocaine toxicity, hypothermia, or drowning. Dr. Strobl testified that cocaine likely contributed to D.J.'s death, either through direct cocaine toxicity, or as a result of "unpredictable behavior" brought on by the use of cocaine, such as leaving the house and dying from hypothermia or drowning. Dr. Wigren, a forensic pathologist, echoed Dr. Strobl's conclusion that the cause of D.J.'s death could not be determined with any degree of medical certainty.

E.T. testified that on December 8, 2012, he went to Minneapolis to pick up cocaine at appellant's request. Appellant gave E.T. directions to an apartment building. When E.T. pulled up, a guy came out, took a box of marijuana from E.T., and left the cocaine. The marijuana had come from appellant's home. Appellant and D.J. later showed up at E.T.'s home, and appellant cut the cocaine, increasing its volume by adding additional "stuff." Appellant created ten ounces of cut cocaine, but reserved some of the uncut cocaine. He packaged the cut cocaine and left it with E.T., but took "about 7 grams or so" of the uncut cocaine, saying, "That will probably be enough." E.T. sold some of the cut cocaine to other people that night, including a person named C.S. According to E.T., he

and appellant agreed to split the profits from the sale of the cocaine, but appellant would be entitled to a return of his original investment.

According to E.T., appellant called him the next morning "kind of freaked out" because D.J. was not there when he awoke, but her boots and cellphone were still at his house. Appellant asked E.T. to help remove the duffel bag of marijuana from his garage, but E.T. declined. E.T. testified that he became concerned about ecstasy and marijuana being found at the shop, so he asked J.J. to "clear the stuff out of the shop just in case anything happens."

D.H. testified at trial that he shared a jail cell with appellant in December 2012. Appellant initially told D.H. that he did not know what happened to D.J. However, according to D.H., appellant later said that he and D.J. were having intercourse and she started convulsing and foaming at the mouth. Appellant said that he blacked out in panic, but he remembered taking her out and "pushing her in the water," his feet were cold, and he lost his "house shoes."

D.B. also testified that he was a cellmate of appellant. He testified that appellant told him that D.J. used cocaine and got "really aggressive." Appellant and D.J. had sex and then got into a fight because she wanted more cocaine and he did not want to give it to her. Appellant got mad and "put [D.J.] outside the door or something," but she came back inside. Appellant said that D.J. busted his nose, so he threw the cocaine at her and went to clean up the blood. Appellant came back and D.J. was on the couch, unresponsive. Appellant did not see D.J. the next morning; he went looking for her and ended up crashing his truck in the ditch. D.B. testified that appellant said he had "something like an ounce"

of cocaine that night. According to D.B., appellant stated that D.J.'s body would not be found. Appellant sent a letter to D.B. in March 2013 in which he said that D.J. "was a drunk and a [c]oke head but I get the blame because I am the dealer."

Appellant was convicted of third-degree murder and sentenced to 160-months imprisonment. However, the jury concluded that the state had not proved beyond a reasonable doubt that appellant had concealed D.J.'s body. This appeal followed.

ISSUES

I. Was there sufficient evidence to establish that appellant proximately caused D.J.'s death by giving her cocaine?

II. Did the district court commit reversible error by refusing to instruct the jury on appellant's joint-acquisition theory?

III. Do appellant's pro se arguments have merit?

ANALYSIS

I. There was sufficient evidence to establish that appellant proximately caused D.J.'s death by giving her cocaine.

Appellant first argues that the state did not prove beyond a reasonable doubt that cocaine toxicity caused D.J.'s death, and therefore, appellant's conviction must be reversed. In considering a claim of insufficient evidence, this court's review is limited to a thorough analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "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). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant was convicted of violating Minn. Stat. § 609.195(b), which provides that "[w]hoever, without intent to cause death, proximately causes the death of a human being by, directly or indirectly, unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering a controlled substance classified in Schedule I or II, is guilty of murder in the third degree." Cocaine is a schedule II controlled substance. *See* Minn. Stat. § 152.02, subd. 3(b)(4) (2012). For purposes of Minn. Stat. § 609.195(b), the term "proximate cause" is defined for jurors as "something that had a substantial part in bringing about the individual's death either directly and immediately or through happenings that follow one after another." 10 *Minnesota Practice*, CRIMJIG 11.40 (2015).

We first must determine the appropriate standard for review. Appellant asserts that the evidence supporting the proximate-cause element of his conviction was completely circumstantial, and a circumstantial-evidence standard of review applies. The state contends that a significant amount of direct evidence was presented to prove that cocaine caused D.J.'s death, and therefore, we should use a direct-evidence standard of review. We conclude that a circumstantial-evidence standard is appropriate.

The issue here is whether cocaine played a substantial part in D.J.'s death, and any affirmative conclusion requires some level of inference and reliance on circumstantial

evidence. Any conclusion that the cocaine had a substantial part in bringing about D.J.'s death by hypothermia or drowning, "either directly and immediately or through happenings that follow one after another," is based on circumstantial evidence, such as the location of her body, her lack of clothing, and the presence of cocaine in her system. *Id.* Likewise, any conclusion that D.J. overdosed and died because of cocaine toxicity requires reliance on circumstantial evidence. Neither Dr. Strobl nor Dr. Wigren could say with any degree of medical certainty that cocaine toxicity killed D.J. Dr. Strobl could only say that cocaine likely contributed in some manner to D.J.'s death. D.H.'s testimony concerned only symptoms from which an overdose could be inferred, and the same is true of D.B.'s testimony. "[W]hen a disputed element is sufficiently proven by direct evidence alone, . . . it is the traditional standard, rather than the circumstantial-evidence standard, that governs." *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016). Because any conclusion, beyond a reasonable doubt, that cocaine proximately caused D.J.'s death requires inference and reliance on circumstantial evidence, a circumstantial-evidence standard of review is appropriate. However, even under that heightened standard of review, we must conclude that the evidence was sufficient.

Under the circumstantial-evidence standard, an appellate court reviews the evidence using a two-step analysis. The appellate court first identifies the circumstances proved, deferring "to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate." *State v. Robertson*, 884 N.W.2d 864, 871 (Minn. 2016) (quotations omitted). Second, the reviewing court "independently examine[s] the reasonableness of all inferences that might

be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt." *Id.* (quotations omitted). "In order to sustain a conviction based on circumstantial evidence, the reasonable inferences that can be drawn from the circumstances proved as a whole must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted). The reviewing court must view not only the circumstances proved as a whole, but also must consider the inferences drawn therefrom as a whole. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017).

The circumstances proved are that D.J. was a 27-year-old woman. On the night of December 8, she drank alcohol and used cocaine at appellant's home. Appellant orchestrated the acquisition of the cocaine and took approximately five to seven grams of uncut cocaine for use that night, saying, "That will probably be enough." Appellant told D.H. that he and D.J. were having intercourse that night, and D.J. began convulsing and foaming at the mouth. When D.J.'s body was found months later, she was naked except for a tank top. Appellant also told D.H. that he lost his "house shoes" while pushing her body into water, and he used the same specific term, "house shoes," in a statement to investigators. He told D.B. that she was last seen unresponsive and was missing the next morning, and he told D.B. more than once that "they're not going to find the body." Appellant did not contact the authorities on the morning of December 9, 2012. Despite claiming to have gone to sleep by 2:30 a.m., records indicate that he was cognizant enough to call his security company to report a "false alarm" after the alarm was tripped at 3:07 a.m. D.J.'s body was found in a pond near appellant's home. She had alcohol, cocaine,

and cocaine metabolites in her system. The reasonable inferences that might be drawn from these circumstances are consistent with appellant's guilt; that is, it is reasonable to infer that cocaine played a substantial role in bringing about D.J.'s death, either by a fatal overdose or through irrational decisions that led to D.J. succumbing to hypothermia or drowning.

Appellant contends that the "circumstances proved support a reasonable inference that [D.J.] left [appellant's] house under her own power, accidentally fell into the pond due to the blizzard conditions and died of exposure or by drowning," or "someone else showed up at [appellant's] house while he was passed out and did something to [D.J.] that resulted in her death." The alternative hypothesis that D.J. left appellant's house is not reasonable when one considers that D.J. would have had to leave appellant's house in the middle of the night, in December, wearing virtually no clothing, and walk over 440 yards, eventually succumbing to hypothermia or drowning. The medical examiner did not see any wounds on D.J.'s legs or feet, despite evidence that there was buckthorn in the area, which is inconsistent with the suggested alternative inference. Moreover, even if the suggested act occurred, the behavior itself would tend to suggest that cocaine substantially affected D.J.'s reasoning and behavior.

There is no indication that there was an alternative perpetrator. There were no signs of a struggle, and no signs that D.J. was injured. Speculation is not enough to support a proposed alternative hypothesis. *State v. Al-Naseer*, 788 N.W.2d 469, 480 (Minn. 2010). In sum, appellant's alternative theories are unreasonable. *See State v. French*, 402 N.W.2d

805, 808 (Minn. App. 1987) (concluding that circumstantial evidence did not rationally suggest that victim or a third party caused victim's death).

On the morning of December 9, appellant did not contact authorities, despite now claiming that it is quite possible that D.J. may have wandered off into the snow that night. The jury could have reasonably inferred that appellant was more concerned with removing controlled substances from his home. When authorities finally arrived, appellant denied using drugs other than marijuana. *See State v. McTague*, 190 Minn. 449, 453-54, 252 N.W. 446, 448 (1934) (providing that concealment and related conduct is admissible to show consciousness of guilt). Viewing the evidence in the light most favorable to the conviction, there is no reasonable inference other than that appellant proximately caused D.J.'s death by giving her cocaine.

II. The district court did not commit reversible error by refusing to instruct the jury on appellant's joint-acquisition theory.

Appellant next argues that the district court committed reversible error by refusing to provide a requested jury instruction stating that appellant has not "given away" cocaine if the jury finds "that the decedent and [appellant] jointly acquired the cocaine." We review the district court's refusal to give a requested jury instruction for an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). An abuse of discretion occurs if the evidence warrants a requested jury instruction that was not given. *Turnage v. State*, 708 N.W.2d 535, 546 (Minn. 2006).

We begin our analysis with an examination of both Minn. Stat. § 609.195(b) and *Carithers*, 490 N.W.2d 620, the case from which appellant's joint-acquisition defense is

drawn. We then examine the few cases that have followed and discussed *Carithers*. Ultimately, we conclude that the district court did not abuse its discretion by refusing to give a specific joint-acquisition jury instruction.

In 1987, Minnesota enacted the third-degree murder statute, Minn. Stat. § 609.195(b). 1987 Minn. Laws ch. 176, § 1, at 373. The statute was created in response to an opinion from this court wherein we concluded that felony murder could not be predicated on the sale of cocaine. *State v. Aarsvold*, 376 N.W.2d 518, 522 (Minn. App. 1985), *superseded by statute*, 1987 Minn. Laws ch. 176, § 1, at 373 (codified at Minn. Stat. § 609.195(b) (Supp. 1987)); *see also Carithers*, 490 N.W.2d at 621 (discussing *Aarsvold*).

Five years after enactment, in *Carithers*, the supreme court examined Minn. Stat. § 609.195(b) while answering a certified question: "When a married couple jointly acquires a Schedule I controlled substance, and one of the partners uses that substance and subsequently dies from a drug overdose, did the legislature intend that the surviving partner be subject to prosecution under Minn.[]Stat. § 609.195(b)?" 490 N.W.2d at 620. The supreme court concluded that criminal liability could not be imposed where there was "joint acquisition and possession of drugs under circumstances where neither defendant's conduct [could] be fairly characterized as involving a sale or transfer or delivery to the person who died." *Id.* at 622, 624. In reaching that conclusion, the supreme court pondered the legislative intent behind the statute, noting that it is "directed at the control of the commercial distribution of controlled substances," and requires an "unlawful transfer" of a schedule I or II controlled substance. *Id.* at 622. The court examined the criminalization of giving away a controlled substance, as proscribed by Minn. Stat. § 152.09, subd. 1(1)

(1986), noting that imposing criminal liability for such acts was intended "(a) to cover the practice of giving youngsters or other potential customers drugs in order to encourage subsequent purchase and (b) to prevent defendants charged with an unlawful sale from denying that the transaction constituted a sale because they did not receive any money for the drug in question." *Id.* The supreme court recognized potential issues with Minn. Stat. § 609.195(b), such as murder liability resulting from friends sharing drugs, but did not reach such issues and limited the holding to the certified question presented. *Id.* at 623-24.

The supreme court reasserted the limited scope of *Carithers* in *State v. Varner*, a case where the court was asked to consider whether an exchange of sexual favors for drugs constituted a sale. 643 N.W.2d 298, 300 (Minn. 2002). In answering that question in the affirmative, the court took the opportunity to describe *Carithers* as "narrow" and involving "a married couple" who jointly acquired a controlled substance. *Id.* at 307. The supreme court rejected the argument that *Carithers* applied to the circumstances presented in *Varner*, noting that there was no evidence "that any of the parties involved were married." *Id.*

The supreme court again addressed *Carithers* in *Barrow v. State*, a case in which a defendant was allowed to withdraw his guilty plea to sale of a controlled substance because the defendant's admission that he gave cocaine to his wife so she could hide it did not constitute a "sale." 862 N.W.2d 686, 687, 690 n.2 (Minn. 2015). Although *Barrow* involved a husband and wife, the supreme court distinguished the circumstances presented in *Barrow* from *Carithers* because the drugs had not been jointly acquired. *Id.* at 690 n.2.

The aforementioned cases indicate that the holding in *Carithers* is narrow, and the existence of a marriage relationship is an important element in establishing joint acquisition and possession for purposes of a defense.

In *State v. Vasquez*, this court addressed *Carithers* in a case where two people, A.E.W. and Robert Chapman, both contributed $20 to buy a $40 bag of heroin from George Vasquez. 776 N.W.2d 452, 455 (Minn. App. 2009). A.E.W. overdosed and died. *Id.* Chapman and A.E.W. were not involved romantically. *Id.* We held that Chapman was Vasquez's accomplice because he aided in the commission of the crime by taking possession of the heroin and by manufacturing the lethal dose with which A.E.W. injected herself. *Id.* at 459. Therefore the district court should have given a jury instruction on the requirement of corroboration of accomplice testimony. *Id.* The state argued that *Carithers* was controlling for purposes of determining whether Chapman was an accomplice. *Id.* at 457-58. We concluded that the holding in *Carithers* is narrow and only applies to married couples. *Id.* at 458.

Carithers indicates that Minn. Stat. § 609.195(b) is directed at commercial drug transactions. *See Carithers*, 490 N.W.2d at 622 ("Certainly, the legislative enactment of section 609.195(b) was directed at the control of the commercial distribution of controlled substances."). But the supreme court, in *Carithers*, did not reach the issue of whether controlled-substance murder can be predicated on a noncommercial drug transaction, and there is no Minnesota caselaw supporting a defense to controlled-substance murder based on joint acquisition of the controlled substance, except under the unique circumstances of a married couple that jointly acquires the drugs. There remains some uncertainty as to the

exact scope of criminal liability under Minn. Stat. § 609.195(b). *See id.* at 623-24 (declining to address whether the statute imposes criminal liability under circumstances where friends share drugs). But, in this case, we are presented with a limited question: whether a district court abuses its discretion by refusing to give a specific joint-acquisition jury instruction in a case involving an unmarried couple. District courts have broad discretion in formulating jury instructions and determining whether to give a specific jury instruction. *State v. Onyelobi*, 879 N.W.2d 334, 353 (Minn. 2016); *State v. Hysell*, 449 N.W.2d 741, 744 (Minn. App. 1990), *review denied* (Minn. Mar. 15, 1990). Although a defendant may assert a theory at trial, a district court "has discretion not to instruct the jury on the theory" if there is no evidence to support the theory. *State v. Vazquez*, 644 N.W.2d 97, 99 (Minn. App. 2002). It is not our role to extend existing law to expand the scope of the joint-acquisition defense. That task falls to the supreme court or legislature. *State v. Thomas*, 890 N.W.2d 413, 420 (Minn. App. 2017), *review denied* (Minn. Mar. 28, 2017). Given the lack of any caselaw establishing joint acquisition as a defense to controlled-substance murder, except in cases where spouses jointly acquire the controlled substance, we conclude that the district court did not abuse its discretion.

III. Appellant's pro se arguments do not establish reversible error.

Appellant also raises a number of pro se arguments. He alleges numerous deficiencies in the grand-jury proceedings that led to his indictment, argues that his conviction violates Minn. Stat. § 609.035 (2012), raises several due-process arguments, and points to several instances of alleged prosecutorial misconduct. We address each of these arguments in turn.

A. Grand-Jury Proceedings

Appellant challenges his indictment on several grounds, arguing that the state failed to disclose a favorable statement concerning a drug transaction between C.S. and E.T. and also fabricated and misrepresented evidence. "A grand jury proceeding is not a trial on the merits, and jurors do not determine guilt or innocence, but rather determine if there is probable cause to believe the accused has committed the crime." *State v. Scruggs*, 421 N.W.2d 707, 717 (Minn. 1988). Indictments are presumed to be legitimate and are rarely invalidated. *State v. Roan*, 532 N.W.2d 563, 569 (Minn. 1995). A defendant seeking to overturn an indictment bears a heavy burden. *Id.* That burden is especially apparent here, as appellant brings his challenge to the indictment after being found guilty beyond a reasonable doubt after an extensive jury trial. *See Scruggs*, 421 N.W.2d at 717.

Regarding the statement from C.S., there is no indication that the statement was knowingly withheld by the prosecution. Rather, it appears that the statement was obtained as part of a separate criminal investigation and was immediately provided to the defense once its existence became known to the prosecutor. Presuming, but not deciding, that there was a failure to disclose the statement to the grand jury, such a failure requires dismissal of the indictment only "if the evidence would have materially affected the grand jury proceeding." *State v. Miller*, 754 N.W.2d 686, 698 (Minn. 2008) (quotation omitted). Here, appellant was convicted, despite the availability of the statement at trial. We therefore cannot conclude that the grand-jury proceedings would have been materially affected by inclusion of the statement.

After review, we conclude that appellant's claims concerning fabricated evidence, false testimony, and cumulative errors likewise provide no basis to invalidate the indictment. Presuming but not deciding that the evidence was improper, we conclude that it is extremely unlikely that the evidence affected the outcome. *See State v. Reed*, 737 N.W.2d 572, 587 (Minn. 2007) (concluding that there was no basis to invalidate indictment because of false testimony where it was extremely unlikely that the testimony affected the decision to indict). Further, the possibility of prejudice is questionable, as no indictment was required. *See* Minn. R. Crim. P. 17.01, subd.1 (stating that an indictment is required for an offense punishable by life imprisonment); *see also* Minn. Stat. § 609.195(b) (setting the maximum term of imprisonment for third-degree murder at 25 years).[1]

B. Minn. Stat. § 609.035

On February 12, 2013, appellant pleaded guilty to aiding and abetting second-degree possession of cocaine. *See State v. Schnagl*, No. A16-1998, 2017 WL 3687474, at *1 (Minn. App. Aug. 28, 2017). He now argues that, given his prior conviction, his murder conviction violates the protections against multiple prosecutions and punishments provided by Minn. Stat. § 609.035. We conclude that section 609.035 has not been violated. The two crimes at issue are not part of a single behavioral incident. Appellant's conviction for aiding and abetting second-degree possession of cocaine involved the 23 grams of cocaine recovered from the duffel bag, not the cocaine given to D.J. by appellant. *Id.* The offenses

[1] Appellant argues that he was denied the right to testify at the grand-jury proceedings. However, a defendant does not have an absolute right to testify before a grand jury. *State v. Morrow*, 834 N.W.2d 715, 721 (Minn. 2013).

occurred at different times and places and were motivated by different criminal objectives. *See State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014) (outlining test for determining whether offenses were part of a single course of conduct).

C. Due Process

Appellant asserts that he did not receive a fair trial. He challenges the denial of his request for an alternative-perpetrator jury instruction, he argues that the district court should have sua sponte instructed the jury on the requirement of corroboration of accomplice testimony, and he argues that a lesser-included-offense instruction should have been provided on the uncharged offense of second-degree manslaughter. We conclude that the district court did not err.

No alternative-perpetrator instruction was required because the substance of the instruction was contained in the instructions given; that is, if someone else caused D.J.'s death, then the jury could not convict appellant of proximately causing her death. *See State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995) (stating that if "the substance of a particular instruction is already contained in the court's instructions to the jury, the [district] court is not required to give the requested instruction").

Regarding the accomplice instruction, appellant elected to proceed under the theory that E.T. was an alternative perpetrator rather than an accomplice. "An accomplice instruction must be given if a witness could have reasonably been charged with and convicted of aiding and abetting the crime at issue." *State v. Larson*, 787 N.W.2d 592, 602 (Minn. 2010). However, "when a defendant presents evidence and argues at trial that a witness is an alternative perpetrator, [then] that witness is not an accomplice as a matter of

law, and an accomplice instruction is not required." *Id.* Because appellant expressly proceeded under an alternative-perpetrator theory, the district court did not err by failing to provide an accomplice-corroboration instruction.

Appellant asserts that a jury instruction for the lesser-included offense of second-degree manslaughter should have been provided. Appellant fails to provide any binding authority to support the assertion that second-degree manslaughter is a lesser-included offense of controlled-substance murder. When determining whether to provide a lesser-included-offense instruction, district courts "must determine whether 1) the lesser offense is included in the charged offense; 2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and 3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *State v. Dahlin*, 695 N.W.2d 588, 595 (Minn. 2005). The relevant elements of second-degree manslaughter, under Minn. Stat. § 609.205(1) (2012) are that a person causes the death of another "by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." It does not appear that second-degree manslaughter is a lesser-included offense of controlled-substance murder. "A lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former." *State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986). "In determining whether an offense is a lesser-included offense, [we look] at the elements of the offense, not the facts of the particular case." *Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986). Second-degree manslaughter requires culpable negligence, which is "gross negligence coupled with the element of recklessness." *State v.*

Back, 775 N.W.2d 866, 869 (Minn. 2009) (quotation omitted). Controlled-substance murder requires an unlawful transfer of certain controlled substances. Minn. Stat. § 609.195(b). Committing the latter does not necessarily mean that one has committed the former. Even assuming that second-degree manslaughter is a lesser-included offense, in this instance there was no rational basis for the jury to acquit on the third-degree murder charge and convict on a second-degree manslaughter charge. Either appellant gave away cocaine to D.J. and thereby proximately caused her death, or he did not. The evidence did not provide a rational basis for the jury to conclude that there was a lesser degree of culpability.

Finally, appellant asserts that the prosecutor committed discovery violations and failed to preserve evidence, in violation of appellant's right to due process, and the district court abused its discretion by denying a motion for a mistrial and denying a request for a change of venue. After reviewing these claims, we conclude that they are unavailing.

D. Prosecutorial Misconduct

Appellant asserts that he should be granted a new trial because of prosecutorial misconduct, which occurred when the prosecutor stated in the opening statement and closing argument that, for appellant, D.J.'s life "was just a cost of doing business," and, to appellant, D.J. was nothing but a "crack whore." Appellant objected to these statements.

A prosecutor may argue "reasonable inferences from the facts presented." *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000). And a prosecutor need not present a colorless argument. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). But the prosecutor should refrain from making remarks that are intended to inflame the passions

and prejudices of the jury. *State v. Mayhorn*, 720 N.W.2d 776, 786-87 (Minn. 2006). Evidence showed that appellant made disparaging remarks about D.J., such as referring to her as a "[c]oke [w]hore." As such, to the degree that the prosecutor's statements constituted misconduct, the misconduct was of the less-serious variety, requiring us to analyze "whether the misconduct likely played a substantial part in influencing the jury to convict." *State v. Nissalke*, 801 N.W.2d 82, 105 (Minn. 2011) (quotation omitted). We cannot conclude that the brief statements likely influenced the verdict.

Appellant argues that, in closing argument, the prosecutor "disparaged the defense's alternative perpetrator theory" that it was E.T. who sold the cocaine to appellant and D.J. The prosecutor referred to this theory as "ridiculous," and appellant objected. The district court instructed the jury to disregard the statement. *See State v. Hoppe*, 641 N.W.2d 315, 321 (Minn. App. 2002) (stating that it is misconduct to refer to the defense's argument as ridiculous), *review denied* (Minn. May 14, 2002). Again, we cannot conclude that the comment likely influenced the verdict. *See Nissalke*, 801 N.W.2d at 105. We presume the jury followed the district court's instructions to disregard the objected-to statement. *See State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002) (noting that we presume a jury follows a district court's instructions).

Appellant argues that the prosecutor committed misconduct during closing arguments by stating that the state's case was "undisputed." Appellant mischaracterizes the prosecutor's statement. The prosecutor stated that it was "undisputed . . . that [D.J.] and [appellant] were out at the mall." This statement was not misconduct.

Appellant argues that the prosecutor committed misconduct by stating, "Now, I want to talk about another possibility in terms of cause of death. One raised by Dr. Wigren, the [d]efense's paid expert in this case." Appellant argues that it was improper to characterize Dr. Wigren as a paid expert. While it is improper to assert, without grounds, that a professional witness is testifying in a predetermined manner for money, *State v. Wahlberg*, 296 N.W.2d 408, 420 (Minn. 1980), such is not the case here, where the prosecutor merely referred to the witness as a paid expert; Dr. Wigren testified that he was being paid. We therefore conclude that the statement was not misconduct.

Lastly, appellant argues that the state committed misconduct by showing pictures and introducing evidence of the 12 pounds of marijuana. However, the district court had previously ruled that the evidence of the marijuana found in the BMW and the drugs found in the duffel bag was admissible as evidence of a common scheme or plan. Therefore, the prosecutor did not engage in misconduct by presenting such evidence.[2]

DECISION

We conclude that the evidence was sufficient to sustain the conviction, the district court did not abuse its discretion by failing to give a joint-acquisition jury instruction because appellant and D.J. were not spouses, and appellant's pro se arguments are unavailing.

Affirmed.

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[2] Appellant alleges additional instances of purported misconduct and due process violations. We have reviewed these claims and conclude that they are unavailing.

APPENDIX B

STATE OF MINNESOTA **COURT OF APPEALS**

JUDGMENT

State of Minnesota, Respondent, vs. Aaron Jude Schnagl, Appellant

Appellate Court # A16-1509

Trial Court # 13-CR-13-1022

Pursuant to a decision of the Minnesota Court of Appeals duly made and entered, it is determined and adjudged that the decision of the Chisago County District Court herein appealed from be and the same hereby is affirmed and judgment is entered accordingly.

Dated and signed: February 28, 2018

FOR THE COURT

Attest: AnnMarie S. O'Neill
Clerk of the Appellate Courts

By: _____
Assistant Clerk

STATE OF MINNESOTA

COURT OF APPEALS
TRANSCRIPT OF JUDGMENT

I, AnnMarie S. O'Neill, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

In the City of St. Paul *February 28, 2018*
Dated

Attest: AnnMarie S. O'Neill
Clerk of the Appellate Courts

By: [signature]
Assistant Clerk

APPENDIX D

FILED
February 28, 2018
OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA

IN SUPREME COURT

A16-1509

State of Minnesota,

Respondent,

vs.

Aaron Jude Schnagl,

Petitioner.

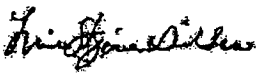
ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Aaron Jude Schnagl for further review be, and the same is, denied.

Dated: February 28, 2018

BY THE COURT:



Gildea, Lorie
Feb 28 2018 10:14 AM

Lorie S. Gildea
Chief Justice