STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0219

State of Minnesota,
Respondent,

vs.

Anthony James Martin,
Appellant.

Filed October 9, 2012
Affirmed
Johnson, Chief Judge

Ramsey County District Court
File No. 62-CR-11-309

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Patrick M. Arenz, Brian N. Aleinikoff, Robins, Kaplan, Miller & Ciresi, L.L.P., Minneapolis, Minnesota; and John C. Conard, Law Offices of John C. Conard, Woodbury, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Johnson, Chief Judge; and Rodenberg, Judge.

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

JOHNSON, Chief Judge

A Ramsey County jury found Anthony James Martin guilty of being an ineligible person in possession of a firearm. His conviction is based on three key pieces of evidence: (1) testimony that two stolen handguns and three boxes of ammunition were present in the apartment of Martin's friend, Kanesha Walker; (2) Walker's pre-trial statement that the handguns and ammunition belonged to Martin; and (3) expert testimony that DNA testing revealed that one of the handguns contained genetic material that is possessed by Martin and only three percent of the population.

On appeal, Martin argues that (1) the district court erred by admitting DNA-related evidence and not limiting the manner in which it was presented to the jury; (2) the district court erred by admitting Walker's pre-trial statement into evidence under the residual hearsay exception; (3) the district court erred by denying his motion for a mistrial after a police officer testified about his service in the police department's gang unit; and (4) the district court erred by not instructing the jury that Martin's friend was an accomplice to the offense of which he was convicted. We affirm.

FACTS

Martin and Walker are the parents of an infant son. In 2010, Walker lived in an apartment building in the city of St. Paul that is operated by a non-profit organization that provides supportive housing for families in crisis, including young mothers and their children. At that time, Walker and Martin did not have a romantic relationship,

according to Walker's trial testimony, but were "[t]rying to be a family" for the sake of their son.

On October 7 and 8, 2010, Martin visited Walker at her apartment. At approximately 2:00 a.m. on October 8, another of Martin's female friends came to Walker's apartment building, screamed and yelled for Walker, and broke a window. Later that day, three employees of the non-profit organization visited Walker to discuss the previous night's disturbance. The employees expressed concern that there might be a weapon in Walker's apartment. The non-profit organization prohibits firearms in the apartment building. During this conversation, Walker went into her bedroom three times, once for seven to eight minutes, before eventually leaving the bedroom with Martin and carrying a diaper bag. Walker walked out of her apartment with the diaper bag and asked a neighbor to hold onto it.

The employees of the non-profit organization called the police. After officers arrived, they recovered the diaper bag and found two handguns and three boxes of ammunition inside of it. One handgun was a Smith & Wesson; the other was a Glock. The officers later determined that both handguns had been stolen. The police arrested both Martin and Walker and took their son into protective custody. When questioned by police officers later that day, Walker explained that the handguns did not belong to her, and she suggested that Martin had brought them to her apartment. She also said that Martin had packed the handguns into the diaper bag. Police released her without charging her.

In January 2011, the state charged Martin with one count of being an ineligible person in possession of a firearm, a violation of Minn. Stat. § 624.713, subd. 1(2) (2010), and one count of receiving stolen property, a violation of Minn. Stat. § 609.53, subd. 1 (2010).

Before trial, Martin filed motions *in limine*, which sought, among other things, three types of relief that are relevant to this appeal. First, Martin requested "an order precluding the State from asserting or suggesting that Mr. Martin's DNA is found on either of the two firearms in dispute," "precluding the State from equating the State's DNA testing of the second firearm with the likelihood of Mr. Martin's guilt," either "overtly or by insinuation," and "excluding any reference to the quantitative, exclusionary percentage (97%) at trial." The district court denied these requests for relief. Second, Martin sought an order precluding the state from impeaching Walker with her statement to the police. The district court denied that request for relief. Third, Martin also sought "to exclude any reference at trial to any alleged affiliation with a gang." The state agreed to abide by that request.

The case was tried to a jury for three days in late November and early December of 2011. The state called ten witnesses: Walker, one of Walker's neighbors, the three employees of the non-profit housing organization, four police officers, and a forensic scientist from the Bureau of Criminal Apprehension (BCA). Martin called no witnesses and did not testify. The jury convicted Martin of being an ineligible person in possession of a firearm but acquitted him of receiving stolen property. The district court sentenced Martin to 60 months of imprisonment. Martin appeals.

D E C I S I O N

I. DNA Evidence

Martin argues that the district court erred in its rulings on the state's evidence concerning DNA testing of the Glock handgun for two reasons. First, he argues that the state's DNA-related evidence is inadmissible because the DNA sample was a mixed-source sample without a predominant profile, rather than a single-source sample or a mixed-source sample with a predominant profile. Second, he argues that the evidence of a 97-percent exclusion rate tended to unfairly suggest a 97-percent probability that Martin is guilty of the offense charged.

A. Type of DNA Sample

We first consider Martin's argument that the state's DNA-related evidence should have been excluded on the ground that it is based on a mixed-source DNA sample without a predominant profile. As stated above, Martin challenged the state's DNA evidence in his motions *in limine*, but it is unclear whether Martin adequately preserved the argument he makes on appeal. In his brief, he argues that "the district court erred by not excluding [DNA-related] evidence from Mr. Martin's trial." In his motion *in limine*, he requested "an order precluding the State from asserting or suggesting that Mr. Martin's DNA is found on either of the two firearms in dispute," "precluding the State from equating the State's DNA testing of the second firearm with the likelihood of Mr. Martin's guilt," either "overtly or by insinuation," and "excluding any reference to the quantitative, exclusionary percentage (97%) at trial." One could read the motion *in limine* as a request to exclude all DNA evidence entirely, or as a request to merely limit

the form of the evidence introduced by the state and the manner in which the evidence was described to the jury. If Martin's motion *in limine* is construed in the latter manner, the plain-error rule would apply on appeal. We will assume without deciding that Martin adequately preserved his appellate argument.

In denying Martin's motion *in limine*, the district court reasoned that "the type of DNA evidence that the state wishes to use here and the manner in which they have offered that they would use it certainly is admissible and has been admissible in many different trials that I've presided over during the years." Martin contends that the district court erred because of a general rule of exclusion reflected in a trio of supreme court opinions: *State v. Carlson*, 267 N.W.2d 170, 176 (Minn. 1978); *State v. Boyd*, 331 N.W.2d 480, 481-83 (Minn. 1983); and *State v. Kim*, 398 N.W.2d 544, 548 (Minn. 1987). Since 1987, however, the supreme court has considered the admissibility of DNA evidence in several additional cases, which provide authority for the district court's rulings. For example, in *State v. Bloom*, 516 N.W.2d 159 (Minn. 1994), the supreme court recognized a "DNA exception to the rule against admission of quantitative, statistical probability evidence in criminal prosecutions to prove identity," which permits the admission of expert evidence concerning the probability of a random match between a DNA sample and the defendant. *Id.* at 167. As the *Bloom* court acknowledged, its holding was a "modification" of *Kim* and the *Carlson-Boyd-Kim* trilogy. *See id.* at 167-68.

Consistent with *Bloom*, the supreme court has affirmed the admission of expert statistical evidence based on a single-source DNA sample, *i.e.*, a sample containing the

DNA profile of one person. *State v. Roman Nose*, 667 N.W.2d 386, 398 (Minn. 2003). In that case, an expert witness testified that the probability of a random match between blood found on the appellant's clothing and the appellant's genetic profile was 1 in 63 trillion. *Id.* at 390-91. The supreme court also has affirmed the admission of expert statistical evidence based on a mixed-source DNA sample with a predominant profile, *i.e.*, a sample containing the DNA profile of more than one person but with one person's DNA profile predominating over the other profiles. *State v. Hannon*, 703 N.W.2d 498, 508-09 (Minn. 2005). In that case, an expert witness testified that the predominant profile was so similar to the appellant's genetic profile that a match would not be expected to occur more than once in the world's population among unrelated individuals. *Id.* at 504, 508. In both *Roman Nose* and *Hannon*, the supreme court relied on a technical report issued by the DNA Advisory Board, which established guidelines for the calculation and use of statistical evidence concerning DNA samples. *Roman Nose*, 667 N.W.2d at 394 n.5, 398 n.10 (citing DNA Advisory Board, *Statistical and Population Genetics Issues Affecting the Evaluation of the Frequency of Occurrence of DNA Profiles Calculated from Pertinent Population Database(s)*, at 5); *Hannon*, 703 N.W.2d at 508 (referring to same report).

In this case, the state introduced expert statistical evidence based on a mixed-source DNA sample that did not have a predominant profile. Martin contends that the district court erred because there is no Minnesota caselaw approving of expert statistical evidence based on such a sample. It appears that the Minnesota appellate courts have not issued a published opinion in a case in which this particular type of DNA sample was the

basis of expert statistical evidence. But that does not necessarily mean that the district court erred. The same DNA Advisory Board report that was deemed authoritative in both *Roman Nose* and *Hannon* approves of certain types of statistics derived from a mixed-source sample without a predominant profile. The board's report states that the absence of a predominant source can make testing and interpretation more complicated but that, nonetheless, it is possible to perform statistical calculations that "convey the probative value of the evidence." DNA Advisory Board, *Statistical and Population Genetics Issues Affecting the Evaluation of the Frequency of Occurrence of DNA Profiles Calculated From Pertinent Population Database(s)* (Feb. 23, 2000) *available at* http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/july2000/dnastat.htm. One such calculation is a probability of exclusion, which is "valid and for all practical purposes [is] conservative," even though such a calculation "does not make use of all of the available genetic data." *Id.* Presumably this explains why the probability of exclusion in this case was relatively low (only 97 percent, or approximately 1 in 33) when compared to the probabilities that have been derived from single-source samples. *See, e.g.*, *Roman Nose*, 667 N.W.2d at 390-91 (1 in 63 trillion, or 99.999999999998 percent). The board's report concludes that a probability of exclusion is "acceptable" and "strongly recommends that" a probability of exclusion or an alternative calculation (a likelihood ratio) "be carried out whenever feasible and a mixture is indicated." *Statistical and Population Genetics Issues Affecting the Evaluation of the Frequency of Occurrence of DNA Profiles Calculated From Pertinent Population Database(s)*, *supra*. We thus conclude that the district court

did not err by admitting the state's expert evidence concerning DNA testing of a mixed-source sample without a predominant DNA profile.

B. Suggestiveness of Exclusion Rate

We next consider Martin's argument that the district court erred on the ground that the state's expert evidence concerning a 97-percent exclusion rate unfairly suggested a 97-percent probability that Martin is guilty of the offense charged. Martin contends that "the State's use of this bald statistic was prejudicial error." Martin again relies on the *Carlson-Boyd-Kim* trilogy, which expressed concern that statistical evidence might have an "exaggerated impact" on the jury, *Carlson*, 267 N.W.2d at 176 (citing Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329 (1971)), and thereby might "undermine the presumption of innocence, erode the values served by the reasonable doubt standard, and dehumanize our system of justice," *Boyd*, 331 N.W.2d at 483; *see also Kim*, 398 N.W.2d at 547-49 (reviewing *Carlson* and *Boyd*).

This argument was preserved at trial. In denying Martin's motion *in limine* on this point, the district court urged "caution [by] the parties and particularly the prosecution in the presentation of that evidence, to be careful as to how it is presented so as not to undermine the defendant's presumption of innocence and the improper inferences that a jury could draw from it." At trial, a BCA forensic scientist, Alyssa Bance, testified that DNA testing of the Glock handgun revealed a mixture of DNA from four or more persons. Bance explained, "It is estimated that 97 percent of the general population can be excluded as contributors to the DNA mixture" on the Glock but that neither Martin nor

Walker could be excluded. On cross-examination, Bance clarified that the testing did not determine whether Martin's DNA was in the DNA mixture found on the Glock but only that Martin's DNA could not be excluded. Defense counsel asked Bance whether Martin's son would have a DNA profile similar to Martin's DNA profile, and whether Martin's son's DNA could have been on the handgun because it was in the child's diaper bag; Bance answered by stating that it was possible. Defense counsel also asked Bance whether three percent translates into 1 in 33 and whether, in a random selection of 33 people, at least 1 person would be included; Bance answered that it was statistically likely.

In closing argument, the prosecutor referred to the DNA evidence as follows:

> [R]egarding the Glock 17, Exhibit 14, 97 percent of the population can be excluded, three percent cannot. The defendant and Kanesha Walker cannot be excluded, and 97 percent of the population is a huge and colossal number. Ninety-seven percent of the population can be excluded from being a contributor to the DNA in that mixture on this gun and the defendant cannot.

Defense counsel also referred to the DNA evidence in closing argument:

> Alyssa Bance can't tell you from the science that Mr. Martin never touched that gun. The science does not support that because they don't know when or how or under what circumstances any profile got on there. They don't know if [Martin's] is on there, only that it can't be excluded, and they don't know if he just falls into the one in 33. Of course, he's already half there depending on his kid's DNA and his kid's baby bag got on the gun. That's what the state's expert told you. The science does not mean he ever touched the gun.

As these excerpts demonstrate, the state's evidence was carefully framed so as to comply with the district court's pre-trial ruling. We note that the state's expert evidence

in this case was not as mathematically extreme as DNA-related evidence in other cases. As a consequence, the evidence in this case was not potent enough to create a high risk that the jury would infer guilt from that evidence alone. In fact, the state's DNA-related evidence permitted the jury to infer that approximately 15,000 persons residing in Ramsey County could have touched the handgun, or that approximately 150,000 persons residing in Minnesota could have done so. The evidence could have been used by the defense to show that a reasonable doubt exists about Martin's guilt. In any event, the verbal formulation of the expert evidence did not run afoul of the supreme court's warnings in *Bloom* to avoid a statement that a DNA profile is "unique" or a definite statement that the defendant was the source of the DNA sample that was tested. *See* 516 N.W.2d at 168. The expert evidence in this case appears to be similar to the expert evidence in *Hannon*, which led the supreme court to conclude that the expert witness "did not give a bald percentage that the jury could mistake for a measure of the probability of Hannon's guilt." 703 N.W.2d at 508-09. We thus conclude that the state's evidence was "not presented in a prejudicial or misleading manner." *Roman Nose*, 667 N.W.2d at 397.

Thus, the district court did not err in its rulings on Martin's pre-trial motions *in limine* concerning the state's expert statistical evidence of DNA testing of the Glock handgun.

II. Residual Hearsay Exception

Martin also argues that the district court erred by admitting Walker's pre-trial statement into evidence under the residual hearsay exception. *See* Minn. R. Evid. 807.

As stated above, police officers questioned Walker on the day of Martin's arrest. At that time, she disclaimed any responsibility for the handguns and attributed them to Martin. The following day, while Martin was in custody, he called Walker from jail to ask about her conversation with the officers. Martin asked whether the officers were "trying to make you say" that the handguns belonged to him. Walker responded by confirming that the officers asked such a question but also said that she did not know who owned the guns.

The district court considered Martin's motion *in limine* at length and ultimately determined that Walker's statement is admissible under the residual hearsay exception of Minn. R. Evid. 807. The district court reasoned that Walker's pre-trial statement was not coerced but that, to the contrary, she appeared to talk freely with the officers. The district court also reasoned that Walker told police officers that she feared Martin and feared testifying against him.

At trial, the state called Walker to testify during its case-in-chief. When presented with a transcript of her pre-trial statement, Walker testified that she did not remember giving the statement. She also testified that, before leaving her apartment to allow police officers to search it, she retrieved two handguns from her closet and placed them in a diaper bag. She testified that she did not give this information to police officers earlier because she wanted to maintain custody of her son. The state then offered an audio-recording of Walker's pre-trial statement, which was played for the jury. The prosecutor later asked Walker why the handguns and ammunition were present in the closet of her apartment, and Walker responded that she did not know. On cross-examination by

Martin's counsel, Walker testified that the handguns were present at her apartment before Martin's October 8, 2010 visit and that she never saw Martin possess any firearms on that date.

Martin contends that the district court erred by ruling that Walker's pre-trial statement is admissible under the residual exception to the hearsay rule. Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted in the statement. Minn. R. Evid. 801(c); *State v. Litzau*, 650 N.W.2d 177, 182-83 (Minn. 2002). An out-of-court statement is not admissible as substantive evidence unless it is non-hearsay or is within an exception to the hearsay rule, such as the residual exception in rule 807. *State v. Greenleaf*, 591 N.W.2d 488, 502-03 (Minn. 1999). Under the residual exception, a hearsay statement that is not admissible under any other exception is nonetheless admissible if it has "equivalent circumstantial guarantees of trustworthiness" and the court determines that (1) "the statement is offered as evidence of a material fact"; (2) "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts"; and (3) "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." Minn. R. Evid. 807.

To determine whether a hearsay statement has "circumstantial guarantees of trustworthiness," we apply a totality-of-the-circumstances approach. *State v. Keeton*, 589 N.W.2d 85, 90 (Minn. 1998); *State v. Byers*, 570 N.W.2d 487, 492 (Minn. 1997). In doing so, we look "to all relevant factors bearing on trustworthiness." *State v. Stallings*, 478 N.W.2d 491, 495 (Minn. 1991). The relevant factors include

> [t]he character of the witness for truthfulness and honesty, and the availability of evidence on the issue; whether the testimony was given voluntarily, under oath, subject to cross-examination and a penalty for perjury; the witness' relationship with both the defendant and the government and his motivation to testify . . . ; the extent to which the witness' testimony reflects his personal knowledge; whether the witness ever recanted his testimony; the existence of corroborating evidence; and, the reasons for the witness' unavailability.

Keeton, 589 N.W.2d at 90 (quoting *Byers*, 570 N.W.2d at 493 (quotation omitted) (second alteration in original)). These factors are not exclusive; a court also may consider additional factors. *See State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007). We apply an abuse-of-discretion standard of review to the district court's ruling on Martin's motion *in limine*. *Stallings*, 478 N.W.2d at 495.

In this case, the district court admitted Walker's pre-trial statement after thoroughly reviewing a transcript of the interview and listening to an audio-recording twice. The district court noted that the transcript "doesn't give a full tenor of the conversation" and that the audio-recording reflects that Walker was not reticent but, rather, "quite willing to give information to law enforcement." The district court noted that Walker volunteered information about her life history and her struggles raising her son. The district court also noted that Walker had received a *Miranda* warning. From this careful review of the record, the district court determined that the statement was "not coerced to the point to get her to say something that she otherwise would not have eventually stated during the course of this interview." The district court also determined that the recorded interview demonstrates in several ways that Walker feared Martin and

feared testifying against him. Walker's expressed fear of Martin is corroborated to some degree by Martin's jailhouse telephone call to Walker, in which he insisted that Walker tell him about the police interview. The district court noted that "the matter of trustworthiness" was the key issue and concluded that "for the jury not to hear this particular statement as substantive evidence would certainly be contrary to the truth-seeking function and the interests of justice."

The district court's ruling is properly based on the factors for determining trustworthiness. The district court considered "whether the testimony was given voluntarily" and concluded that it was. *See Keeton*, 589 N.W.2d at 90. Walker was available for trial and, thus, was "subject to cross-examination." *See id.* In fact, Walker was examined by both parties at trial. The district court considered "the witness' relationship with both the defendant and the government and [her] motivation to testify" and concluded that Walker's recantation was motivated by her fear of Martin. *See id.* Indeed, the overwhelming factor for the district court seems to have been Walker's fear of Martin, which essentially made her pre-trial statement more reliable than her anticipated trial testimony. The district court did not abuse its discretion when it decided to admit Walker's pre-trial statement, especially in light of the careful, deliberate manner in which the district court considered Martin's motion *in limine*.

Martin attempts to contradict this conclusion by pointing to three general reasons why Walker's pre-trial statement does not have the necessary "guarantees of trustworthiness," as required by the first clause of rule 807. First, he contends that Walker's statement is untrustworthy because she was an accomplice to the charge of

receiving stolen property. The district court instructed the jury that Walker was an accomplice for purposes of the charge of receiving stolen property but not for purposes of the charge of being an ineligible person in possession of a firearm. Second, Martin contends that Walker's statement is untrustworthy because it was "*ex parte*, unsworn, and self-exculpatory." Third, Martin contends that Walker's statement is untrustworthy because it was coerced by the threat that police officers might cause Walker's son to remain in protective custody. Martin compares this case to *Lynumn v. Illinois*, 372 U.S. 528, 83 S. Ct. 917 (1963), in which the United States Supreme Court reversed the drug-related conviction of a single mother of two children on the ground that the woman's confession

> was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not "cooperate." These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly "set her up." There was no friend or adviser to whom she might turn. She had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.

Id. at 534, 83 S. Ct. at 920.

These arguments address, in a general way, factors that may bear on the determination of trustworthiness. Those factors may, in some cases, cause a pre-trial statement to be untrustworthy and, thus, inadmissible. But they do not overcome the district court's case-specific analysis of the pre-trial statement in this case. To adopt Martin's arguments would unavoidably mean that many trustworthy out-of-court statements are categorically deemed inadmissible, merely because the statements were

made by persons who may have been complicit in criminal conduct, or because the statements were not made under oath, or because the declarants may have some personal interest at stake. In short, Martin's arguments may contain reasons why a district court, in an appropriate case, may rule that an out-of-court statement is inadmissible, but his arguments do not persuade us that the district court in this case abused its discretion in ruling that Walker's pre-trial statement is admissible.

Thus, the district court did not err by denying Martin's motion *in limine* and ruling that Walker's pre-trial statement is admissible under the residual exception to the hearsay rule.

III. Testimony Concerning "Gang Unit"

Martin also argues that he was denied a fair trial because a police officer testified that he was a member of the St. Paul Police Department's gang unit. Martin argues that the officer's comments violate a pre-trial agreement between Martin and the state "to exclude any reference at trial to any alleged affiliation with a gang."

This issue, or a related issue, was first raised in a motion *in limine* in which Martin sought "to exclude any reference at trial to any alleged affiliation with a gang." The district court did not need to rule on the motion because the state agreed to abide by the request. At trial, Officer Darryl Boerger testified for the state. When the prosecutor asked introductory questions regarding the officer's background, Officer Boerger answered, in part, by stating that he was assigned to the police department's gang unit, both in 2008 and on the day of Martin's arrest in 2010. Martin objected and moved for a

mistrial, arguing that Officer Boerger's references to the gang unit violated the pre-trial agreement and deprived him of a fair trial. The district court responded by stating:

> I don't see a violation of the [pre-trial] order. I don't think there's a need for–certainly does not rise to the level of a mistrial. If counsel would like a curative instruction, I would be glad to give that but I think that would only create more–or draw more of an issue to it. The officer was just simply stating where he was working, and I suppose the jury could draw some inference from that, but I don't–and I would have rather he not have said that. However, it was said in the course of what his job duties are, so I don't see that it was a direct violation.

Martin declined a curative instruction.

Martin contends that he was denied his right to due process of law. *See* U.S. Const. amend. VI, XIV; Minn. Const. art. I, § 7. He relies on *State v. Harris*, 521 N.W.2d 348 (Minn. 1994), in which the supreme court wrote that "the state will not be permitted to deprive a defendant of a fair trial by means of insinuations and innuendos which plant in the minds of the jury a prejudicial belief in the existence of evidence which is otherwise inadmissible." *Id.* at 354 (quotation omitted). We apply an abuse-of-discretion standard of review to a district court's ruling on a motion for a new trial on the ground of prosecutorial misconduct. *State v. Henderson*, 620 N.W.2d 688, 702 (Minn. 2001). We "will not disturb a district court's conclusion that no misconduct occurred unless the misconduct, viewed in light of the entire record, was so inexcusable, serious, and prejudicial that the defendant's right to a fair trial was denied." *Id.*

The district court did not abuse its discretion in determining that Officer Boerger's references to the gang unit do not violate the pre-trial agreement, which arose from the

motion "to exclude any reference at trial to any alleged affiliation with a gang." Officer Boerger did not testify that Martin was affiliated with a gang. The officer's testimony concerning the gang unit was given in the context of questions concerning the officer's background and the structure of the police department. The district court noted the possibility that the jury might infer that the officer came into contact with Martin because Martin was affiliated with a gang but discounted the possibility. The district court did not abuse its discretion in determining that there was no violation of the pre-trial agreement and, thus, did not err by denying the motion for a mistrial. *See Henderson*, 620 N.W.2d at 702. Furthermore, the state did not reiterate the gang-unit references in its closing argument, which suggests that the comments had no impact on the verdict.

Thus, Martin is not entitled to a new trial on the ground that a police officer testified that he was a member of the police department's gang unit.

IV. Instruction Concerning Accomplice

Martin also argues that the district court erred by not instructing the jury that Walker was an accomplice to the charge of being an ineligible person in possession of a firearm.

At trial, Martin requested an instruction that Walker was an accomplice to both alleged offenses under the state's theory of the case. The district court granted the request in part and denied it in part. The district court determined that Walker was an accomplice to Martin for purposes of the charge of receiving stolen property because she could have been charged with the same offense. But the district court determined that Walker was not an accomplice to Martin for purposes of the charge of being an ineligible

person in possession of a firearm. Accordingly, the district court instructed the jury that Walker was an accomplice to Martin only for the limited purpose of the second count, receiving stolen property. Martin contends that the district court erred by limiting the accomplice instruction to only the second count.

A district court must instruct the jury in a way that "fairly and adequately explain[s] the law of the case" and does not "materially misstate[] the applicable law." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). A district court has "considerable latitude" in the selection of language for jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). Accordingly, we apply an abuse-of-discretion standard of review to a district court's jury instructions. *Koppi*, 798 N.W.2d at 361.

Martin's request for a jury instruction is based on a statute that provides, "A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense." Minn. Stat. § 634.04 (2010). "An accomplice instruction must be given in any criminal case in which any witness against the defendant might reasonably be considered an accomplice to the crime." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004) (quotation omitted). "The general test for determining whether a witness is an accomplice for purposes of section 634.04 is whether he could have been indicted and convicted for the crime with which the accused is charged." *Id.* at 314 (quotation omitted).

Martin first contends that the district court erred because it instructed the jury differently with respect to the two counts. He asserts that Walker must be an accomplice

for all purposes if she is an accomplice at all. Martin cites no caselaw to support this assertion. The statute on which the caselaw is based speaks in terms of an individual offense; it states that accomplice testimony must be corroborated by "other evidence as tends to convict the defendant of the commission of *the offense*." Minn. Stat. § 634.04 (emphasis added). The use of a singular noun suggests that the identification of accomplices may be analyzed on an offense-by-offense basis. We conclude that the district court did not abuse its discretion by dividing Martin's request for a jury instruction into two separate requests, one for each charge.

Martin next contends that the district court erred because Walker was an accomplice to the charge of being an ineligible person in possession of a firearm. Martin challenges the district court's reasoning that Walker could not be charged with the same offense because she is not ineligible to possess a firearm. The state concedes that this rationale, which it urged below, does not justify the district court's conclusion. *See State v. Davis*, 685 N.W.2d 442 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004). But the state also contends that Walker nonetheless was not an accomplice because there is no evidence that she played a role in Martin's acquisition of the firearm. *See id.* at 445. The evidence shows that she aided Martin only by placing the handguns in the diaper bag. Neither party has cited caselaw concerning whether a person may be convicted of aiding and abetting a firearms-possession offense by helping an ineligible person maintain possession of an already-acquired firearm. In the absence of such caselaw, Martin cannot demonstrate that an accomplice instruction was required.

Thus, the district court did not abuse its discretion by not instructing the jury that Walker was an accomplice for purposes of the charge of being an ineligible person in possession of a firearm.

Affirmed.