

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1477**

State of Minnesota,
Respondent,

vs.

KaFuba FoFana,
Appellant.

**Filed October 23, 2023
Affirmed
Frisch, Judge**

Hennepin County District Court
File No. 27-CR-21-14346

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Adam Petras, Assistant County Attorney,
Minneapolis, Minnesota (for respondent)

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

Considered and decided by Gaïtas, Presiding Judge; Slieter, Judge; and Frisch,
Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Following his conviction for attempted second-degree murder, appellant argues that
the district court abused its discretion by admitting evidence of a rap music video posted

on YouTube and that the warrant of commitment incorrectly reflected a conviction for a crime for which the jury returned a not-guilty verdict. Because the district court did not abuse its discretion in admitting the video, the introduction of such evidence was otherwise harmless, and any error in the warrant of commitment has already been corrected, we affirm.

FACTS

Respondent State of Minnesota charged appellant KaFuba FoFana with aiding and abetting attempted second-degree intentional murder, in violation of Minn. Stat. § 609.19, subd. 1(1) (2020), aiding and abetting attempted second-degree intentional murder for the benefit of a gang, in violation of Minn. Stat. § 609.19, subd. 1(1), and aiding and abetting first-degree assault, in violation of Minn. Stat. § 609.221, subd. 1 (2020). The following facts were elicited at trial.

In the early hours of July 12, 2021, two groups of men were at a gas station store in Brooklyn Center. One group consisted of FoFana and two other men, and the second group consisted of the victim and the victim's brother. Eventually, the victim and his brother left the store and walked toward a red Chevy parked directly in front of the store. From the store entryway, FoFana and another person from his group fired multiple shots at the red Chevy. FoFana testified that before he fired shots, he paused and saw the victim reach for a firearm. The victim's brother returned fire. FoFana ran from the scene.

Responding officers and paramedics found the victim on the ground in the parking lot. The victim had a gunshot wound to his lower chest and was not in possession of a

firearm when responders arrived. Responders treated the victim for significant injuries to his kidney, liver, and lower spinal vertebrae.

At trial, FoFana admitted that he shot at the victim but claimed that he did so in self-defense. FoFana testified that while in the store, the victim and his brother approached FoFana near the checkout counter and asked FoFana if he was “from 83rd.” FoFana testified that the victim said to “check it outside.” The victim also lifted his shirt to reveal a firearm. FoFana testified that he believed that the red Chevy was involved in a drive-by shooting occurring earlier at FoFana’s home.

Detective Jarod Miller testified about the three “main gangs” in Brooklyn Park—the 073, 076, and 083 gangs—and about the use of social media by gang members. He also testified about his investigation into a drive-by shooting occurring at FoFana’s home about an hour after the victim was shot. Detective Miller testified that he believed that the shooting was in retaliation for the incident occurring earlier at the gas station. Detective Miller identified FoFana in the gas station’s surveillance-camera footage of the shooting.

Detective Miller also testified about a one-minute and forty-three-second rap music video posted on YouTube depicting FoFana rapping, smoking, and handling real or replica firearms. Detective Miller identified FoFana and the other men who accompanied him at the gas station in the YouTube video. Detective Miller testified that the YouTube video included references to the 076 gang and that the individuals in the video used a hand gesture connected to the 083 gang and otherwise referenced the 083 gang. FoFana objected to the admission of the video before trial, arguing it was prior-act evidence that was more prejudicial than probative because it would cause jurors to fear FoFana, encourage jurors

to look up the video during trial, and because the depiction of firearms would disturb and intimidate jurors. The district court overruled the objection, in part because the video was probative of FoFana's identity and gang involvement.

The jury found FoFana guilty of aiding and abetting attempted second-degree intentional murder and aiding and abetting first-degree assault, but not guilty of aiding and abetting attempted second-degree intentional murder for the benefit of a gang. The district court convicted FoFana of aiding and abetting attempted second-degree intentional murder and aiding and abetting first-degree assault and sentenced FoFana to 180 months in prison for the murder charge. The warrant of commitment incorrectly reflected that FoFana was also convicted of aiding and abetting attempted second-degree intentional murder for the benefit of a gang. But before this appeal was filed, the district court filed a corrected warrant of commitment reflecting that FoFana was acquitted of that charge.

FoFana appeals.

DECISION

FoFana argues that he is entitled to a new trial because the district court abused its discretion by admitting the YouTube video. He claims that the YouTube video was not relevant, was prejudicial, and that there is a reasonable possibility that the erroneous admission of the YouTube video significantly affected the outcome of his trial. We disagree.

As a threshold matter, we assume without deciding for the purposes of this appeal that the YouTube video is evidence of a prior crime, wrong, or act, also known as *Spreigl* evidence. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (citing *State v. Spreigl*,

139 N.W.2d 167 (Minn. 1965)). Evidence of such a prior act is “not admissible to prove the character of a person in order to show action in conformity therewith.” Minn. R. Evid. 404(b)(1). But *Spreigl* evidence may be admissible for other purposes, such as to show “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.*

The overarching concern associated with the admission of *Spreigl* evidence is that “it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts.” *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). To guard against these improper purposes, such evidence “must be relevant and material to the state’s case” and “the probative value of the evidence must not be outweighed by its potential prejudice to the defendant” for the evidence to be admitted. *Id.* at 685-86.

“A district court’s decision to admit *Spreigl* evidence [under Minn. R. Evid. 404(b)] is reviewed for an abuse of discretion.” *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016). If a district court abused its discretion by admitting the evidence, we “must then determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *Id.* at 262. FoFana bears the burden to establish both that the district court erred and that the resulting prejudice significantly affected the jury’s verdict. *See id.* at 261.

Against this backdrop, FoFana first argues that the district court abused its discretion in admitting the YouTube video because it is not relevant. In assessing the relevance and materiality of *Spreigl* evidence, “the district court must identify the precise disputed fact

to which the *Spreigl* evidence would be relevant.” *Ness*, 707 N.W.2d at 686 (quotation omitted); *see* Minn. R. Evid. 401 (defining relevant evidence as evidence tending to make more or less probable the existence of any consequential fact).

The district court ruled that the video was relevant to show “the potential identification of Mr. FoFana and his possible involvement in a gang or whether this crime was committed for the benefit of a gang.” Evidence presented to establish that an act was carried out for the benefit of a gang is relevant when that element is part of the charged offense. *See State v. Jackson*, 770 N.W.2d 470, 473 n.1, 483-84 (Minn. 2009) (acknowledging that evidence of a certain incident was “probative” on the issue of whether the defendant, who was charged with attempted murder for the benefit of a gang, was affiliated with a gang and that the state’s case depended on showing that affiliation); *see also Moore v. State*, 945 N.W.2d 421, 434-35 (Minn. App. 2020) (affirming the postconviction court’s determination that a YouTube rap video showing the defendant wearing a gang-affiliated color displaying gang signs, and the defendant’s association with gang members was not erroneously admitted), *rev. denied* (Minn. Dec. 15, 2020). Here, the state was required to prove that FoFana acted for the benefit of a gang to prove its charge of aiding and abetting attempted murder for the benefit of a gang. *See* Minn. Stat. § 609.229, subd. 2 (2020). And Detective Miller’s testimony about the YouTube video demonstrated gang membership or activity. He specifically testified that he viewed the YouTube video and identified 083-connected hand gestures, FoFana and other individuals who were present at the gas-station shooting, and references to the 083 and 076 gangs. In other words, the YouTube video evidence was relevant to link FoFana to the 083 gang.

We therefore see no abuse of discretion in the district court’s determination that the video was relevant to and probative of FoFana’s affiliation with a gang.¹

FoFana next argues that the district court abused its discretion in admitting the video because its admission was unfairly prejudicial—portraying him as a “dangerous, violent, aggressive and reckless young man.” A district court abuses its discretion by admitting *Spreigl* evidence if the probative value of the evidence does not outweigh the danger of prejudice. *See Ness*, 707 N.W.2d at 686. Prejudice does not mean the damage to a party’s case “from the legitimate probative force of the evidence.” *State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015) (quotation omitted). Instead, “it refers to the unfair advantage” resulting from “the capacity of the evidence to persuade by illegitimate means.” *Id.* (quotation omitted).

FoFana has not met his burden to demonstrate that the danger of unfair prejudice outweighed the probative value of the video. To guard against the danger of unfair prejudice, the district court issued a cautionary instruction. The district court specifically instructed the jury not to convict FoFana “on the sole basis of anything in the video, but, rather, evaluate whether the video, just like any other piece of evidence, tends to prove any

¹ FoFana argues that the video was not relevant because it was not specific as to time or a particular gang. Any deficiency in such specificity relates to the weight or credibility of the evidence, not its admissibility. Likewise, FoFana’s assertion that his notice of self-defense, the absence of an alibi witness, and Detective Miller’s testimony about gang activity in the area obviated the necessity of the YouTube video is unavailing. The state was required to prove FoFana’s identity as a gang member, which it attempted to accomplish through introduction of the video. And we disagree that the evidence was cumulative and instead was corroborative of Detective Miller’s testimony, which was challenged on cross-examination.

of the elements of the offenses charged.” This cautionary instruction, which the district court read before introduction of the video to the jury, mitigated the danger of unfair prejudice to FoFana. *See State v. Tomlinson*, 938 N.W.2d 279, 287-88 (Minn. App. 2019) (concluding that the district court did not abuse its discretion in admitting potentially prejudicial *Spreigl* evidence in light of its cautionary instructions to the jury), *rev. denied* (Minn. Feb. 26, 2020); *State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009) (stating that juries presumably follow instructions).

We also cannot conclude that the district court abused its discretion in concluding that the probative value of the evidence outweighed the danger of unfair prejudice. Even considering the prejudicial nature of the video showing FoFana engaged in gang-related behavior and his association with others who were present at the shooting, the video provided context and support for the state’s theory that shooting was motivated by gang rivalry and established FoFana’s affiliation with area gangs.

Because the YouTube video was relevant and material and the danger of unfair prejudice was not outweighed by the video’s probative value, the district court did not abuse its discretion by admitting the video.

Even if the admission of the video amounted to an abuse of discretion by the district court, the admission of the video did not significantly affect the verdict. FoFana argues that a reasonable possibility exists that the erroneous admission of the YouTube video had a substantial impact on the verdict because the state’s evidence against him was “not particularly overwhelming,” the video led the jury to conclude that FoFana was not credible which undermined his self-defense claim, and the video led the jury to conclude he had a

propensity for violence, possessing a gun, and shooting a gun.² Even if a district court errs in admitting *Spreigl* evidence, we will not reverse unless “there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *Griffin*, 887 N.W.2d at 262.

We acknowledge the possibility that the video could have affected FoFana’s credibility. But the jury returned a not guilty verdict on the charge of aiding and abetting attempted second-degree intentional murder for the benefit of a gang, which strongly suggests that the jury was not improperly influenced by, or that it based its decision on, the YouTube video alone. In other words, the jury’s verdict reflects its determination that the state did not meet its burden of proof even though Detective Miller testified that the YouTube video depicted FoFana’s gang involvement. Such a result suggests that there is no reasonable probability that admission of the evidence significantly affected the verdict.

And the state’s case against FoFana was strong even in the absence of the YouTube video. The state’s evidence also included surveillance-camera footage of inside and outside the gas-station store from multiple angles, eyewitness testimony, a 911 call placed shortly after the shooting, and testimony that the victim did not have a weapon when

² FoFana also asserts that the district court’s cautionary instruction was insufficient because the instruction did not specifically direct the jury to not use the evidence to prove FoFana’s character or show that he acted in conformity with such character. FoFana also argues on appeal that the district court only delivered the cautionary instruction at the time the video was played to the jury but not at the end of trial. Because FoFana did not make these objections before the district court, we review such objections for plain error affecting FoFana’s substantial rights. *See State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). FoFana does not argue on appeal that either of these unobjected-to errors were plainly erroneous or otherwise affected his substantial rights requiring reversal.

responders arrived. And we note that the state played the under two-minute YouTube video twice during a three-day jury trial. Based on the totality of evidence at trial, we cannot say that there was a reasonable possibility that the YouTube video significantly affected the verdict.

Finally, FoFana argues that we must vacate his conviction of aiding and abetting attempted second-degree intentional murder for the benefit of a gang, which was incorrectly recorded as a conviction on the original warrant of commitment. But a decision on the merits is no longer necessary because the district court corrected the error prior to the filing of the notice of appeal. *See* Minn. R. Crim. P. 27.03, subd. 10 (stating that the district court may correct a clerical error at any time); Minn. R. Civ. App. P. 108.01, subd. 2 (suspending a district court’s authority “to make any order that affects the order or judgment appealed therefrom”). Thus, the issue is now moot because no decision on the merits will provide relief. *Dean v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015) (“An appeal should be dismissed as moot when a decision on the merits is no longer necessary or an award of effective relief is no longer possible.”).

Affirmed.