**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A16-0586**

State of Minnesota,
Respondent,

vs.

Robert Sam Raisch, Jr.,
Appellant.

**Filed March 27, 2017**
**Affirmed**
**Reyes, Judge**

Pine County District Court
File No. 58-CR-15-321

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Reese Frederickson, Pine County Attorney, Pine City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Robert Sam Raisch, Jr., Bayport, Minnesota (pro se appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

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

**REYES**, Judge

Appellant challenges his convictions of second-degree intentional murder, second-degree felony murder, and first-degree assault, claiming that the district court abused its discretion by admitting *Spreigl* evidence, denying appellant's mistrial motion, and declining to instruct the jury on accomplice testimony. Appellant asserts additional claims in his pro se supplemental brief. We affirm.

## FACTS

### I. The fire and initial investigation

Prior to midnight on March 7, 2015, a police deputy was dispatched to the victim's trailer on a report of a fire. After firefighters put out the fire, the deputy discovered human remains in the debris, which were later identified as those of the victim.

During the subsequent examination of the victim's remains, the medical examiner observed "dried, flaky, red-brown material that was very consistent with blood," which is not typical of "just fire-related injuries." The medical examiner also noticed at least six depressed skull fractures and trauma to the brain including coloration consistent with bleeding. Although police recovered several tools from the crime scene, the medical examiner was not able to determine which tool caused the injuries. The medical examiner determined that the cause of death was attributed to blunt-force injuries of the head, smoke inhalation, and thermal injuries.

On March 9, 2015, three police investigators questioned a friend of the victim about the case. During the questioning, R.W. exited a vehicle that pulled into the

driveway and approached the investigators and the victim's friend. R.W. appeared nervous, and one of the investigators noticed a person in the vehicle ducked down in the backseat. Based on the suspicious occurrence, investigators had patrol officers stop the vehicle after it left. Appellant Robert Sam Raisch, Jr. was identified as one of the passengers in the vehicle.

## II. Charges and trial

The Pine County Attorney charged appellant with second-degree intentional murder, without premeditation, in violation of Minn. Stat. § 609.19, subd. 1 (2014); second-degree felony murder, without intent, in violation of Minn. Stat. § 609.19, subd. 2(1) (2014); first-degree arson in violation of Minn. Stat. § 609.561, subd. 1 (2014); and first-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (2014).

At the trial, the jury heard testimony from numerous witnesses including A.L. and E.N., who testified for the state, and appellant, who testified on his own behalf. The state also presented *Spreigl* evidence of appellant's prior convictions for aggravated robbery and vehicle theft.

### A. A.L. and E.N.'s testimony

A.L. testified that, in the late afternoon on March 7, appellant, R.W., and E.N. went to A.L.'s house and requested a ride in A.L.'s truck. A.L. had not previously met appellant or E.N. A.L. attempted to dissuade the men from using her truck, but eventually agreed, and appellant drove E.N. and A.L. to the victim's trailer.

Upon arriving at the victim's trailer, E.N. testified that he, appellant, and the victim discussed a prior event involving appellant borrowing the victim's truck. After the

conversation, appellant, E.N., and A.L. drove away; made a stop at appellant's mother's house; and then returned to the victim's trailer. Upon arrival, appellant and E.N. exited but told A.L. to stay in the truck.

E.N. testified that, inside the trailer, appellant and the victim began to argue about the victim's truck, and appellant forcefully pushed the victim onto the floor and into "a bunch of tools."[1] E.N. went outside to tell A.L. to start the truck because he thought the fight was getting out of hand, and he wanted to prompt appellant to leave. Appellant, however, had the keys to the truck. E.N. went back inside, where he saw appellant but not the victim. When E.N. asked appellant where the victim was, appellant told E.N. that the victim "was in the middle bedroom" and E.N. "didn't have to worry about him." E.N. went to look for the victim and found him unconscious on the floor with blood on his face and chest. When E.N. left the bedroom, he observed fire in both the kitchen and living room.

Once outside, E.N. testified that he saw appellant standing on the porch, holding the victim's .22 rifle. When appellant and E.N. returned to the vehicle, A.L. saw them put "things in the back of the truck," including a large television and some speakers. When appellant and E.N. got back in the vehicle, A.L. observed blood on appellant's

[1] Another witness testified that, in early March, she observed a confrontation between appellant and the victim over money. Appellant pushed the victim, and the victim "said that he would pay him." The witness testified that at the time of the confrontation, appellant said he could kill the victim and "mentioned something about burning the house down."

hand and E.N.'s cheek. E.N. testified that he did not see any blood on appellant, but he could smell it.

A.L. also testified that during the event at the victim's trailer, appellant opened the door to the truck while holding a big metal tool. Appellant then said that "[he] just killed that guy." A.L. told appellant that he was crazy, and appellant said, "You're right, I didn't do it. I didn't."

After leaving the victim's trailer, appellant drove to two other houses, to the casino, and to another house where he and E.N. sold the items in the back of the truck. Subsequently, Officer Heidt pulled over appellant, E.N., and A.L. while appellant was driving. Officer Heidt told A.L. that she had to drive.

After making another stop, A.L. drove the men back to appellant's mother's house. E.N. testified that, while E.N. was taking a shower at appellant's mother's house, appellant took E.N.'s clothes away, and E.N. never again saw the clothes he and appellant wore that night. A.L. testified that she later gave a statement to the police; showed the police the locations to which she, appellant, and E.N. traveled on March 7; allowed the police to search her vehicle and house; surrendered the clothes she wore on that day; and provided a DNA sample.

**B. Appellant's testimony**

Appellant testified that he and the victim became acquainted in February 2015 because the victim had connections for obtaining methamphetamine. Appellant further testified that, prior to March 7, an argument ensued between the victim and E.N. because

the victim owed E.N. money for drugs. The victim also accused appellant of stealing his truck.

Appellant testified that the purpose of going to the victim's trailer on March 7 was for E.N. to get the money owed to him. After the first visit to the victim's trailer, appellant testified that he, E.N., and A.L. went to the liquor store, where appellant left E.N. and A.L. alone. When E.N. and A.L. arrived at appellant's mother's house, E.N. asked if appellant knew where to sell a television and speakers. With reference to the victim's death, appellant testified that he "didn't kill [the victim.] [E.N.] and [A.L.] did it."

At the end of a ten-day trial, the jury found appellant guilty of second-degree intentional murder, second-degree felony murder, and first-degree assault. After the trial, appellant filed a motion for judgment of acquittal and a new trial. The district court denied appellant's motion. The district court entered judgment of conviction and sentenced appellant to 480 months in prison for second-degree intentional murder. This appeal follows.

## D E C I S I O N

### I. The district court did not abuse its discretion by admitting evidence of appellant's prior convictions for aggravated robbery and motor-vehicle theft.

Appellant argues that the district court abused its discretion by admitting evidence of appellant's prior aggravated robbery and vehicle-theft convictions because the prior incident was not markedly similar to the current offense, the potential for unfair prejudice

outweighed the probative value of the evidence, and the evidence was used as improper propensity evidence. We disagree.

"Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). However, a district court may admit evidence of another crime, wrong, or act to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," often referred to as *Spreigl* evidence. *Id.*; *see also State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965).

We review a district court's decision to admit *Spreigl* evidence for an abuse of discretion. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). In order for *Spreigl* evidence to be admitted, the following must occur:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

*Id.* at 686. Appellant does not challenge the existence of the first three factors.

**A. The *Spreigl* evidence was relevant and material.**

Appellant argues that the other crimes are not relevant and material because the prior and current acts were not even the "same generic type" of crime and "allegations underlying the two incidents were not markedly similar" to prove a common scheme or plan. We are not persuaded.

To determine "whether a bad act is admissible under the common scheme or plan exception, it must have a marked similarity in modus operandi to the charged offense." *Id.* at 688. The prior crime need not be a "signature" crime. *State v. Blom*, 682 N.W.2d 578, 612 (Minn. 2004). Rather, the prior crime need only be sufficiently similar to the current charge. *Id.* "However, if the prior crime is simply of the same generic type as the charged offense, it ordinarily should be excluded." *State v. Wright*, 719 N.W.2d 910, 917-18 (Minn. 2006) (quotation omitted).

Here, the *Spriegl* evidence concerned a crime that occurred in 2004. The elderly victim told Investigator Bowker that "[h]e walked out of the barn, and then the next thing he knew he woke up in a pool of blood," and his vehicle was missing. At the time of the interview, Investigator Bowker observed a serious injury to the elderly victim's eye area and blood on his face. Appellant was convicted of aggravated robbery and vehicle theft with reference to this event.

Both the past and current offenses occurred at approximately midnight in a rural area. In both crimes, appellant struck an older male in the head, causing bleeding and unconsciousness. Further, in the prior crime, appellant stole the elderly victim's truck, and in the current offense, appellant stole the victim's television, speakers, and .22 rifle. Thus, the evidence indicates that the modus operandi of the crimes were markedly similar. *State v. Kennedy*, 585 N.W.2d 385, 391 (Minn. 1998) ("*Spreigl* evidence need not be identical in every way to the charged crime."); *State v. Moorman*, 505 N.W.2d 593, 603 (Minn. 1993) (noting that consistency of injuries helps demonstrate common

modus operandi). Accordingly, the *Spreigl* evidence was relevant and material to prove a common scheme or plan.

### B. The probative value of the *Spreigl* evidence was not outweighed by its potential prejudice to appellant.

Appellant argues that the *Spreigl* evidence is of little probative value because the disputed issue in this case is whether appellant or E.N. and A.L. caused the victim's death, the evidence was not necessary for the state to meet its burden in the case, and the evidence was unfairly prejudicial because it "only portrayed [appellant] as a violent criminal." We disagree.

To determine whether the probative value of the *Spreigl* evidence is not outweighed by its potential for unfair prejudice, "we balance the relevance of the other offenses, the risk of the evidence being used as propensity evidence, and the State's need to strengthen weak or inadequate proof in the case." *State v. Fardan*, 773 N.W.2d 303, 319 (Minn. 2009).

First, as analyzed above, the prior crime is relevant to prove a common scheme or plan. Any relevancy concerns based on the remoteness in time of the prior crime are decreased because appellant was in custody from 2004 until three months before the current offense. *Ness*, 707 N.W.2d at 689 (noting that, where defendant was incapacitated for significant time due to incarceration, relevancy concerns due to remoteness are decreased). Relevancy concerns are further decreased because appellant "was actually convicted of a crime based on the prior bad act, thus reducing the prejudice." *Id.*

Next, the district court reduced any risk that the jury could use the *Spreigl* evidence as propensity evidence when it gave the jury a limiting instruction both before the jury heard the prior-convictions evidence and during the final jury instructions. "We presume that the jury followed these cautionary instructions." *State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015).

Finally, the state needed the *Spreigl* evidence to strengthen its case. The state presented numerous witnesses at trial, none of whom directly witnessed the events that led to the victim's death. Thus, the *Spreigl* evidence was necessary to the state's case to corroborate E.N.'s and A.L.'s testimonies about the events that occurred on March 7, and the district court did not abuse its discretion by admitting the evidence.

## II. The district court did not abuse its discretion when it denied appellant's mistrial motion based on the testimony of two state witnesses.

Appellant argues that the district court abused its discretion by denying appellant's mistrial motion after (1) Officer Heidt testified that appellant was a suspect in a motor vehicle theft and (2) Investigator Bowker testified that appellant used an alias during the 2004 *Spreigl* incident and that a second vehicle was stolen after the incident. Appellant further asserts that the district court's curative instructions did not remove any prejudice. We disagree.

"[A] mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (quotation omitted).

We review a district court's denial of a motion for a mistrial for an abuse of discretion. *Id.*

### A. The outcome of the trial would not have been different had Officer Heidt's impermissible testimony not occurred.

Officer Heidt testified that when he pulled over appellant, E.N., and A.L., appellant provided Officer Heidt with his brother's date of birth. Appellant's brother has the same name as appellant. When Officer Heidt provided dispatch with the incorrect birthdate, he received information about appellant's brother, and Officer Heidt testified as follows:

> A: Pine County dispatch advised me that Robert was listed – or mentioned as a suspect in a vehicle theft that occurred in Pine County.
>
> MR. GUPTIL: Objection, 404(b), move to strike.
>
> THE COURT: The objection is sustained. The motion is granted. The jury will disregard the answer.

After appellant objected to Officer Heidt's testimony about the vehicle theft, the state offered into evidence a video recording of the traffic stop. The state intended to play the video without sound; however, appellant requested that the video be played with sound. During the video, the jury heard dispatch tell Officer Heidt that "Robert" was a suspect in a vehicle theft. Appellant did not object to the statement made during the video or move for a mistrial after Officer Heidt's testimony.

The challenged testimony was a very small portion of the ten-day trial. *State v. Bahtuoh*, 840 N.W.2d 804, 819 (Minn. 2013) (concluding that district court did not abuse its discretion when it denied mistrial motion where disputed evidence "was isolated and

brief," occurring once during four-day trial). Moreover, appellant requested that the video of the traffic stop be played with sound, which repeated the challenged testimony. "[Appellant] cannot on appeal raise his own trial strategy as a basis for reversal." *See State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007) (citing *State v. Helenbolt*, 334 N.W.2d 400, 407 (Minn. 1983)). Further, in light of the evidence presented, the brief nature of Officer Heidt's statement, the district court's curative instruction, and appellant's request for audio during the traffic-stop video, there is no reasonable probability that the outcome of the case would have been different absent Officer Heidt's statement. Thus, the district court did not abuse its discretion in denying appellant's mistrial motion based on Officer Heidt's statements.

### B. The outcome of trial would not have been different absent Investigator Bowker's impermissible testimony.

When Investigator Bowker testified about the 2004 *Spreigl* incident, he mentioned that "another vehicle had been stolen" and that "several aliases" were used during the arrest of an adult-male vehicle-theft suspect. Appellant objected to these statements. The district court determined that the testimony about another stolen vehicle and the aliases was not admissible and that it would give the following curative instruction to the jury:

> Ladies and gentlemen, I am going to give you an instruction at this time. You are to disregard all references to Investigator Bowker's testimony to an alias having been used, and you are to disregard any and all references in Investigator Bowker's testimony to any incidents in Blaine, Minnesota other than the evidence that [the elderly victim's] pickup was found in Blaine on Highway 65 out of gas.

Appellant moved for a mistrial, and the district court denied the motion.

Here, the district court asked the jury to leave the courtroom and conferenced with the attorneys between Investigator Bowker's statement and the time at which the district court gave the instruction. While appellant complains that the district court's instruction drew attention to the challenged testimony, refreshing the jury's memory to make the instruction effective was necessary due to the time that passed while the jury was not in the courtroom. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (stating that district court has "considerable latitude" in selecting language of jury instructions).

The district court also instructed the jury not to draw inferences about appellant's propensity with reference to the 2004 *Spreigl* incident. Further, Investigator Bowker's statement was brief and isolated, consisting of approximately half of one page out of over 1,800 pages of trial transcript. *State v. Mahkuk*, 736 N.W.2d 675, 689 (Minn. 2007) (concluding that district court did not abuse its discretion when it denied Mahkuk's mistrial motion because inadmissible evidence was brief). Thus, considering all of the evidence presented at trial, the district court did not abuse its discretion when it denied appellant's motion for a mistrial because there is no reasonable probability that the verdict would have been different absent Investigator Bowker's statement.

## III. It was not an abuse of discretion for the district court to decline to instruct the jury on accomplice testimony with respect to A.L.

Appellant argues that the district court abused its discretion when it denied appellant's request to give the jury an accomplice instruction with reference to A.L. We disagree.

To determine whether a witness is an accomplice, the district court assesses "whether the witness could have been indicted and convicted for the crime with which the accused is charged." *State v. Henderson*, 620 N.W.2d 688, 701 (Minn. 2001). "A witness who is alleged to have committed the crime *instead* of the defendant is, as a matter of law, not an accomplice under section 634.04," but rather an alternative perpetrator. *State v. Swanson*, 707 N.W.2d 645, 653 (Minn. 2006). We review a district court's decision to decline to give the jury instruction on accomplice testimony for an abuse of discretion. *State v. Palubicki*, 700 N.W.2d 476, 487 (Minn. 2005).

Here, the only evidence offered to prove that A.L. was involved in the crime is appellant's testimony. Under *Swanson*, appellant's testimony does not make A.L. an accomplice under section 634.04 because appellant testified that A.L. and E.N. committed the crime *instead* of appellant. 707 N.W.2d at 653.

In addition, the record does not provide a sufficient basis to consider A.L. an accomplice. First, there is no evidence of A.L.'s presence or active participation in the crimes charged because A.L. and E.N. testified that A.L. stayed in the truck, rather than entered the victim's trailer, and appellant testified that he was not present with A.L. and E.N. when the crime was committed. *Palubicki*, 700 N.W.2d at 488 (finding evidence insufficient to create jury question whether witness was accomplice where evidence did not indicate that witness was present at time of murder or participated in any way); *State v. Cox*, 820 N.W.2d 540, 549 (Minn. 2012) (stating that accomplice plays knowing role in crime). Next, there is no evidence of A.L.'s participation in the planning of the crime even though A.L. testified that she "heard specifics about maybe a plan that [appellant,

E.N., and R.W.] had." *Palubicki*, 700 N.W.2d at 488 (finding no abuse of discretion where district court denied request for accomplice instruction when there was no evidence that witness who overheard plans to rob victim participated in making plans).

Based on the evidence presented, A.L. could not have been charged and convicted of appellant's crimes. Accordingly, the district court did not abuse its discretion when it rejected appellant's request to give an accomplice instruction to the jury.

**IV. Appellant's pro se arguments lack merit.**

Appellant presents eight arguments in his pro se supplemental brief explaining why he is entitled to a reversal. We address each in turn.

First, appellant argues that there is insufficient evidence that he caused the victim's death because appellant was not convicted of arson. Appellant's argument is misguided because he asserts that the state did not prove beyond a reasonable doubt that he caused the victim's death. However, appellant erroneously claims that the cause of death was arson where the medical examiner testified that the strikes to the victim's head could have been fatal.

Second, appellant asserts that the district court prejudiced him when it admitted evidence of several tools found in the victim's trailer consistent with the victim's skull injuries. The evidence of the tools was relevant to the state's case to establish that appellant had the means to cause the victim's skull fractures. Minn. R. Evid. 402 (explaining that relevant evidence is generally admissible).

Third, appellant argues that the fire marshal received misleading information about someone confessing to starting the fire, making the admission of all arson evidence

improper. The jury did not find appellant guilty of first-degree arson. Thus, even if there were an error, there is no reasonable probability that the verdict would have changed absent the error. *State v. Hohenwald*, 815 N.W.2d 823, 835 (Minn. 2012) (noting that defendant must show reasonable probability that error substantially affected verdict to obtain reversal).

Fourth, appellant argues that the district court violated appellant's Sixth Amendment right to confrontation when it did not admit evidence that E.N. had a prior conviction for assault against a police officer. Evidence of E.N.'s prior conviction and of E.N.'s tendency to become violent when drunk is not relevant to the case at hand and does not implicate appellant's Sixth Amendment right. *Ness*, 707 N.W.2d at 868 (stating that evidence of prior bad acts must be relevant).

Fifth, appellant asserts that he is entitled to reversal because the district court declined to allow the jury to listen to E.N.'s prior statement during deliberations, and it denied the jury's request to pause surveillance video during deliberations. Appellant cites no caselaw to support his assertion. The district court did not abuse its discretion because the district court decides whether the jury may review evidence. *See* Minn. R. Crim. P. 26.03, subd. 20(2) ("[T]he court *may* allow the jury to review specific evidence." (emphasis added)); *State v. Lane*, 582 N.W.2d 256, 260 (Minn. 1998) (affirming trial court's denial of request to reread testimony).

Sixth, appellant asserts that the guilty verdicts of second-degree intentional murder and second-degree felony murder are contradictory, providing a case citation with no elaboration. Appellant's argument fails because "the verdicts of . . . second-degree

intentional murder and second-degree felony murder are not legally inconsistent, for no element of one crime negates a necessary element of the other." *State v. Cole*, 542 N.W.2d 43, 51 (Minn. 1996).

Seventh, appellant claims that the medical examiner's testimony requires reversal. First, appellant asserts that the medical examiner's testimony was confusing. Appellant's argument is unavailing because the medical examiner's testimony was helpful to the jury's determination of the victim's cause of death. *State v. Ritt*, 599 N.W.2d 802, 811 (Minn. 1999) ("Evidence helpful to the jury in fulfilling its responsibilities is admissible." (quotation omitted)). The medical examiner stated that the victim's injuries "[we]re fairly nonspecific" with reference to the fact that "[s]everal different types of tools or implements" could have caused the injuries. Further, the medical examiner consistently referred to the victim's injuries as "depressed skull fractures." Moreover, the examiner concluded that the injuries to the victim's brain "would very much likely be fatal."

Next, appellant contends that the medical examiner's testimony was based on hearsay because the examiner referenced a neuropathologist's report on the victim's injuries. Regardless of whether the examiner's reference to the report was admissible, the brief reference was cumulative of the examiner's testimony regarding the significant injuries to the victim's skull and brain. Consequently, any error in admitting the examiner's reference to the report "was harmless beyond a reasonable doubt because the verdict was surely unattributable to the error." *State v. McAllister*, 862 N.W.2d 49, 62 (Minn. 2015); *see also State v. McDonald-Richards*, 840 N.W.2d 9, 19 (Minn. 2013) ("Improperly admitted evidence is harmless . . . when the evidence is cumulative or there

is other extensive evidence connecting [the defendant] to the commission of the crime." (quotation omitted)).

Finally, appellant argues that the district court judge conducted her own investigation and "created the appearance of impropriety." In support of this argument, appellant cites to an instance in the record when the judge questioned the court reporter to determine whether the court reporter could hear the bench conversation. This does not indicate that the judge acted inappropriately. Further, there are no other instances in the record that would support appellant's contention.

**Affirmed.**