STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0409
A19-1493

State of Minnesota,
Respondent,

vs.

Willie B. Brown, Jr.,
Appellant.

Filed August 24, 2020
Affirmed in part, reversed in part, and remanded
Bryan, Judge

Hennepin County District Court
File Nos. 27-CR-18-14949, 27-CR-18-10755

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Slieter, Judge; and Bryan, Judge.

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

BRYAN, Judge

In this consolidated appeal, appellant challenges his convictions for second-degree murder and drive-by shooting, arguing that the district court made the following four

errors: (1) the district court granted respondent's request to join the second-degree murder charge with separate drive-by shooting/second-degree assault charges; (2) the district court denied appellant's motion to suppress the evidence obtained from the execution of the warrant to obtain his blood sample; (3) the district court denied appellant's motion to suppress evidence regarding the "show-up" identification; and (4) the district court admitted prejudicial evidence regarding a history of appellant's strained relationship with T.F. Appellant also filed a pro se supplemental brief in which he raised several issues, including an argument that the respondent presented insufficient evidence at trial to sustain his second-degree murder conviction, which would require remand for entry of judgment of acquittal pursuant to the Double Jeopardy Clause of the U.S. Constitution.

Because the erroneous joinder of the offenses prejudiced appellant, we reverse and remand for separate proceedings on the second-degree murder charge and the drive-by-shooting/second-degree assault charges. We also conclude that, because the search warrant was not supported by probable cause, the district court erred when it denied appellant's motion to suppress the results of the blood test. In addition, because respondent did not satisfy the requirements for admission of relationship evidence, we conclude that the district court erroneously admitted this evidence at trial. Finally, we conclude that because the respondent presented sufficient evidence of appellant's guilt, the appropriate remedy in this case is to remand for separate proceedings on the two case files and not to remand for entry of judgement of acquittal.

FACTS

In April 2018, respondent State of Minnesota charged appellant Willie Brown, Jr., with second-degree murder in district court file number 27-CR-18-10755. Brown frequently stayed at T.F.'s residence on Sheridan Avenue (the Sheridan Avenue residence) along with several other individuals, including T.F.'s brothers and T.F.'s second cousin, D.H. In the early morning hours of April 26, 2018, Brown had an argument with T.F.'s brothers. Brown and D.H. left the Sheridan Avenue residence together in a black Chevrolet Impala rented to D.H.'s wife. According to the complaint, at approximately 5:00 a.m. on April 26, 2018, Brown shot D.H., and left the scene driving the black Chevrolet Impala. In June 2018, the state charged Brown by a separate complaint with two additional crimes: drive-by shooting and second-degree assault in district court file number 27-CR-18-14949. The new drive-by shooting and second-degree assault allegations in this complaint relate to the same conduct: at 7:39 a.m. on April 26, 2018, approximately 2.5 hours after D.H. was killed, Brown fired multiple rounds at the Sheridan Avenue residence.

The state subsequently moved to join the offenses, and the district court granted the joinder motion over Brown's objection. After ruling on various pretrial motions and granting the state's request to admit relationship evidence, the case proceeded to trial. The jury found Brown guilty of all three charged offenses, and the district court sentenced Brown to 386 months for second-degree murder and 48 months for drive-by shooting, to be served consecutively. This appeal followed.[1] Given the issues raised, we first discuss

[1] After Brown filed his appeal challenging his convictions, the district court issued an amended restitution order requiring Brown to pay restitution. Brown appealed the

the facts relating to the district court's disposition of the parties' pretrial motions. Next we discuss the facts related to the district court's decision to admit evidence of Brown's prior acts as relationship evidence. Finally, we summarize the facts established during the trial.

A. Suppression and Joinder Motions

In the months leading up to the trial, the parties made several motions. For the purposes of this appeal, we will focus on the following three motions: (1) the state moved to join the offenses and to proceed with a single trial; (2) Brown moved to suppress the results of a blood test; and (3) Brown moved to suppress witness identification evidence. Although the district court held an evidentiary *Rasmussen*[2] hearing, the state only presented evidence in opposition to Brown's motion to suppress the identification evidence at this evidentiary hearing. The state made arguments regarding the remaining motions based on the complaints. We address each of the three motions in turn.

First, the state moved to join the separate offenses for a single trial. In support of its motion for joinder, the state argued that, based on the allegations in the complaint, the second-degree murder offense occurred at a different location from the drive-by-shooting/second-degree assault offenses, but both locations were in the same general part

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sentence, challenging the district court's restitution order. This court consolidated the two appeals. Brown, however, makes no arguments challenging restitution. Given our decision to remand for separate proceedings, we need not address the restitution issue.

[2] In *State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3, 13-14 (Minn. 1965), *review denied* (Minn. Mar. 31, 1966), the Minnesota Supreme Court established procedures, including a pretrial evidentiary hearing, to address certain types of pretrial motions, such as motions to suppress the results of searches or seizures, motions for joinder or severance, and motions to dismiss pending charges.

of Minneapolis, about a mile apart.[3] The state also argued that Brown committed the drive-by-shooting/second-degree assault offenses approximately 2.5 hours after he committed the second-degree murder. The state surmised that Brown committed these offenses out of a desire to retaliate against both D.H. and T.F. Although the state presented no evidence on this issue, the district court granted the motion for joinder, concluding that the offenses shared a unity of time, place, and purpose. Specifically, the district court concluded that the criminal objective motivating the conduct in the offenses was "retaliation/revenge," and, therefore, the offenses were part of the same behavioral incident.

Second, Brown challenged the probable cause supporting the search warrant that the district court issued to obtain a blood sample from Brown after his arrest. The search warrant application included the statement that Brown "was believed to have been under the influence of narcotics at the time of his arrest." The search warrant application did not include any other statements or observations to support this belief. The district court signed the warrant and the results of testing from the blood sample revealed amphetamines in Brown's system. Brown argued that the application accompanying the warrant request did

[3] The state's one-sentence motion is a conglomeration of several different potential bases for admission of other acts evidence, including the following: (a) that the evidence is of other acts that are admissible under rule 404(b) of the Minnesota Rules of Evidence; (b) that the evidence is of other acts that are intrinsic to the charged offenses as inextricably intertwined with the charged offenses and not subject to rule 404(b); (c) that the evidence is of other acts that are intrinsic to the charged offenses as immediate episode evidence and not subject to rule 404(b); "and/or" (d) that the two offenses "are subject to joinder." The motion makes only a passing, general reference to the two complaints and does not specify any specific rule 404(b)(1) purpose. It does not contain any description of the individual acts, wrongs, or other crimes that it seeks to admit. A second sentence notes that the motion is based on "the file, the pleadings, the arguments of counsel, and any memoranda of law subsequently filed," but the state did not submit any legal memoranda.

not contain sufficient facts to establish probable cause and justify the warrant. The district court denied Brown's motion to suppress the results of the blood test. Relying on the single statement that officers suspected Brown was "under the influence of narcotics at the time of his arrest," the district court concluded that the application established sufficient probable cause.

Third, Brown moved to suppress the evidence of a show-up identification that police conducted with two witnesses, J.P. and A.G. At the *Rasmussen* hearing, the state offered the testimony of the officer who conducted the identification. The state did not offer any testimony from either J.P. or A.G. The state also introduced the video recording from the officer's body camera, and the district court admitted this exhibit into the record. The officer testified that he arrived at the intersection of Thomas Avenue North and 30th Avenue after other law enforcement officers. He responded to a report of shots being fired and damaged property. He learned that a suspect was in custody, other officers had recovered firearms somewhere in the area, a vehicle was involved and parked on Thomas Avenue, and that officers had identified two possible witnesses. The officer observed a black Impala facing southbound on Thomas Avenue and briefly inspected it. The black Impala was parked in the street, right in front of J.P. and A.G.'s residence. He noticed a bullet hole on the passenger side door panel that appeared to have come from inside the vehicle. He also observed what appeared to be blood on the seats. The officer met with both J.P. and A.G., and asked them to describe the person they saw that morning. J.P. described the individual as a tall, African-American male wearing a black t-shirt and gray sweatpants. A.G. provided a general description of the individual's clothing and

appearance. The officer testified that both J.P. and A.G. explained that they observed this individual get out of the black Impala and walk through the yards nearby. The officer then described how he explained the identification procedure to J.P. and A.G. and separately drove J.P. and A.G. to the Sheridan Avenue residence one at a time for the show-up identifications. Each time, Brown stepped out of the squad car restrained by hand cuffs, and both J.P. and A.G. separately identified Brown as the individual who had been driving the Impala. Based on this evidence, the district court denied the motion to suppress the identification, finding that the circumstances were not unnecessarily suggestive.

B. The State's Motion on the Eve of Trial

On the Friday before the trial was to begin, the state made a second hybrid motion. The state captioned the motion as a "notice," titling the request as "Notice of Intent to Introduce Relationship Evidence." In this pleading, the state requested admission of evidence regarding Brown's conduct prior to the morning of April 26, 2018, as either immediate episode evidence or as relationship evidence. The state's written "offer of proof" consisted of 17 separate paragraphs and included allegations that Brown murdered D.H., that Brown committed a drive-by shooting at the Sheridan Avenue address, and that Brown committed the following other specific acts that allegedly occurred on April 24, 25, and 26, 2018:

1. Brown recklessly discharged a weapon at 4:12 a.m. on April 24;
2. Brown appeared naked and sexually propositioned T.F. in front of her young daughter in the early morning hours of April 24;
3. Brown told T.F. he planned to rob someone at the Sheridan Avenue residence on April 24;

4. Brown did rob someone, possibly at gunpoint, in the garage of the Sheridan Avenue residence on April 24;
5. Brown asked T.F. to film a video of him wearing stolen jewelry on April 24;
6. Brown brandished and discharged a firearm a second time on April 24;
7. Brown broke into the vehicle of someone who lived at the Sheridan Avenue residence on April 25;
8. Brown "was taken away from the residence by police" on April 25;
9. Brown's significant other came to the Sheridan Avenue residence and took Brown's handgun from the residence on April 25;
10. Brown returned to the Sheridan Avenue address and propositioned T.F. a second time on April 25; and
11. Brown returned to the Sheridan Avenue residence after murdering D.H. in possession of a firearm at 5:19 a.m., 6:05 a.m., 6:18 a.m., and 6:26 a.m. on April 26.

In addition, the proffer included allegations that T.F. confronted or conversed with Brown regarding his conduct, expressing her displeasure to varying degrees on April 24, 25, and again in the early morning hours of April 26. On April 24 and again on April 26, the state asserted that D.H. was present for arguments between Brown on one hand and T.F.'s brothers on the other hand. In this pleading, the state further alleged that the two arguments both ended the same way: with D.H. and Brown leaving the Sheridan Avenue residence together.

The state made no attempt to establish any of the acts by clear and convincing evidence and did not request an evidentiary hearing. Brown did not stipulate to any of the acts listed in the state's pleading. The state argued that these allegations showed animosity between Brown and T.F. In addition, the state argued that these acts also showed animosity between Brown and D.H., although the proffer only mentions D.H. twice, in the following

statements: (a) "D.H. arrived at the home that evening. Eventually, D.H. left with [Brown], in an attempt to remove [Brown] from the volatile situation, and dropped [Brown] off at a different location;" and (b) "D.H. was also present for this incident. . . . T.F. eventually went outside the residence and saw [Brown] getting into the passenger seat of the black Impala and D.H. getting into the driver seat of that vehicle. D.H. and [Brown] then drove off in the Impala."

The district court, over Brown's objection, granted the state's request and found that all of the requested evidence was admissible as relationship evidence. The district court did not determine specifically which of the acts fell within the classification of relationship evidence or which of the acts had been proven by clear and convincing evidence. Nor did the district court analyze the probative value or potential prejudicial effect of any of the proffered acts.

C. Evidence Admitted at Trial

We must provide a summary of the evidence admitted at the trial for purposes of our application of the required balancing tests for the challenge to joinder, the challenge to the admission of relationship evidence, and for purposes of our consideration of the supplemental pro se argument regarding sufficiency of the evidence. The state presented evidence of the following facts at trial.

T.F. lived at the Sheridan Avenue residence with her four children, her mother, her brother A.F., A.F.'s girlfriend, and their two children. According to T.F., many friends and family frequently spent time at the Sheridan Avenue residence, including her brothers,

D.H., her friend S.K., and Brown, who was a friend of A.F. and D.H. Brown and D.H. would come over almost every day.

On April 24, 2018, at about 4:30 a.m., T.F. was awakened by gunshots outside her home. She then observed Brown standing in the middle of the street, but she was unable to see whether he had a gun. S.K. subsequently let Brown into the Sheridan Avenue residence, and T.F. had "words" with Brown. Shortly thereafter, the police arrived at the scene, but Brown told the police that he did not know anything about the gunshots. After the police left, T.F. then laid down on the couch with her daughter. Before she fell asleep, Brown tapped her on the foot. He was "standing directly over [her] daughter, naked." T.F. believed that Brown was propositioning her for sex, and told Brown "no." T.F.'s daughter began to lift up her head, and Brown stepped back before leaving the Sheridan Avenue residence a few minutes later.

Brown returned to the Sheridan Avenue residence in the afternoon of April 24, and told T.F. he was going to "rob somebody behind [the] house." Moments later, T.F. looked out a bedroom window and observed Brown walk past the window with an unfamiliar man behind him. T.F. testified that as they walked into a garage, Brown put something up to the man's neck. T.F. claimed that she was "upset" with Brown because he had just robbed somebody where she and her family live. Later that afternoon, T.F. observed a "silver Audi and white 5.0" drive down the street. Brown, who had been sitting in the passenger seat of W.F.'s van, started shooting when the cars drove by. T.F. then grabbed her kids and left. After she returned to the Sheridan Avenue residence, W.F. and Brown got into an argument. The argument concerned Brown shooting the gun in front of the Sheridan

Avenue residence and Brown propositioning T.F. At some point, D.H. intervened and "defused the situation." Brown and D.H. left together in D.H.'s black Chevrolet Impala. At the time they left the Sheridan Avenue residence, T.F. testified that she did not believe that Brown and D.H. were angry with each other, and she saw nothing to indicate that there was any dispute between them.

At about 5:30 a.m. on April 25, 2018, T.F. saw Brown breaking into S.K.'s truck, which was parked outside of the Sheridan Avenue residence. Brown took a TV out of S.K.'s truck and put it in T.F.'s garage. S.K. called the police who, upon their arrival, escorted Brown away from the Sheridan Avenue residence. Brown returned to the Sheridan Avenue residence about two hours later. T.F. and D.H. then had a conversation with Brown about "[e]verything that was going on," including the gunshots, his sexual propositions, and his theft of the TV. Brown eventually laid down on the couch and, when everyone was out of the house, T.F. went to sleep in her mother's room. But she was awakened by Brown tapping her foot. Brown told T.F. that he "just wanted to make [her] feel better," which T.F. interpreted as another proposition for sex. T.F. again rejected Brown and then left for work.

After returning from work at about 11:00 p.m. on April 25, T.F. went to bed. But at about 4:00 a.m. on April 26, T.F. was awakened by an argument outside the Sheridan Avenue residence. Brown, D.H., A.F., T.F.'s brother J.J., and T.F.'s friend Alonzo were present.[4] During the argument, J.J. got very angry, prompting D.H. to confront J.J., pull

[4] Alonzo's last name is not readily apparent from the record.

out a firearm, and point it at J.J. A.F. came into the residence and asked T.F. to come outside so she could "clarify what happened" between her and Brown "[b]ecause it was said that [T.F.] was lying." As T.F. walked outside, D.H. got into the driver's seat of the black Impala, Brown got into the passenger seat, and the pair drove away together. There was no evidence at trial that D.H. confronted Brown or that there was any dispute between Brown and D.H.

At 5:07 a.m. on April 26, R.F. called 911 after hearing gunshots. When R.F. looked out her front window, she "saw a man standing by a black vehicle—near the back, on the passenger side—walk around the trunk and do an awkward, high-step kind of motion around the car by the trunk, as if to—he was stepping over something." R.F. testified that the man then got in the driver's seat and drove away. Officers responding to R.F.'s 911 call discovered D.H. lying unresponsive with three shell casings nearby. D.H. was then transported to the hospital, where he was pronounced dead. This location is just over one mile from the Sheridan Avenue residence.

At approximately 7:30 a.m., T.F. heard several gunshots. After the first round of gunshots, T.F. looked out the window and observed Brown driving by the Sheridan Avenue residence in the Impala firing a gun. Both T.F. and her neighbor, who lives across the street from the Sheridan Avenue residence, called 911. The neighbor reported that he observed a dark vehicle "driving with reckless nature—fast," and stated that he "strongly" believed the gunfire was coming from the vehicle. The neighbor also testified that he thought he heard two different guns being fired because one sounded "heavier" and the other sounded "smaller, not as loud." On the road and sidewalk outside the Sheridan

Avenue residence, officers located nine discharged .40 caliber Smith & Wesson shell casings, some 9mm Lugar caliber cartridges, and a .380 shell casing.

J.P. and A.G. also testified at the trial, and they described what they heard and observed. Both lived at a house on Thomas Avenue, which is one block over from Sheridan Avenue. J.P. heard gunshots at about 7:30 a.m., and both witnesses testified that they heard loud music and tires screeching. Both observed a black Impala come to a sudden stop outside their front window and both saw the driver get out of the car, cross the street, say something to a girl standing outside, and then walk away between some nearby houses. Police responded to J.P.'s 911 call and observed the Impala that was still running. Police discovered two guns in the gutter of a detached garage: a .40 caliber Smith & Wesson and a 9mm semi-automatic pistol. A thumb print from the .40 caliber handgun matched Brown's right thumb, and forensics determined that the .40 caliber weapon fired the projectile that caused D.H.'s death. In addition, forensics established that discharged bullet casings found at the Sheridan Avenue residence were from the same .40 caliber weapon. Brown was arrested and transported to Hennepin County Medical Center (HCMC) for a blood draw and buccal swab pursuant to the search warrant obtained by police. Officers executed the warrant and obtained blood and DNA samples from Brown. The results of the blood test showed that Brown had amphetamines in his system.

At 12:08 p.m. on April 26, police responded to a call regarding bloody clothes found at a car wash in Brooklyn Park. An aerial map of the locations of the shootings and the car wash was admitted into evidence, which indicates that the car wash was located 10 miles away from the Sheridan Avenue residence. A pair of pants, a shirt, and shoes were

recovered from a car wash stall, and all were covered in wet blood. DNA analysis from blood collected from the car wash floor showed that the blood was D.H.'s blood and not Brown's. Police obtained surveillance footage taken from a camera at the car wash, which showed D.H.'s Impala at the car wash between 6:41 a.m. and 6:57 a.m. Further investigation of the video by police investigators revealed a single male in the car wash stall at the relevant time. An investigator testified that the male in the still images from the video was "clearly" Brown.

Brown appealed his conviction, challenging the following decisions: (1) the district court's decision to join the offenses; (2) the district court's decision to deny his motion to suppress the blood test results; (3) the district court's decision to deny his motion to suppress the show-up identification evidence; and (4) the district court's decision to admit the relationship evidence. In addition, in his supplemental brief, Brown challenges the sufficiency of the evidence supporting the second-degree murder conviction.

D E C I S I O N

I. Joinder

Brown challenges the district court's decision to grant the state's joinder motion. Because the offenses were committed at different times, at different locations, and for different purposes, and because joining the offenses unfairly prejudiced Brown, we reverse the district court's decision and remand for separate proceedings on each of the two court file numbers.

The rules of criminal procedure provide that "[t]he court, on the prosecutor's motion, or on its initiative, may order two or more charging documents to be tried together

if the offenses and the defendants could have been joined in a single charging document." Minn. R. Crim. P. 17.03, subd. 4(a). Offenses may not be joined when they are not related to each other. *See State v. Fitch*, 884 N.W.2d 367, 378 (Minn. 2016) (stating that "[a] district court must sever offenses or charges prior to trial when the offenses or charges are not related or the court determines severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense or charge" (quotations omitted)). "Offenses are 'related,' and severance is not required . . . if the offenses arose out of a single behavioral incident." *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006). This is the same inquiry used to decide whether multiple offenses arose from a single behavioral incident for purposes of Minnesota Statutes, section 609.035 (2018).[5] *Id.* If a district court erroneously joins separate offenses, we remand only when the improper joinder prejudiced the defendant. *See Fitch*, 884 N.W.2d at 379 (stating that "the ultimate question in a severance claim is one of prejudice" (quotation omitted)). The supreme court has "repeatedly and consistently held that joinder is not prejudicial if evidence of each offense would have been admissible *Spreigl* evidence in the trial of the other." *Id.* (quotation and footnote omitted). Therefore, to review the district court's decision in this case, we look

[5] The parties did not address whether the judicially created exception to section 609.035, allowing multiple sentences when the offense involves multiple victims, affects the joinder analysis. *See, e.g.*, *State v. Ferguson*, 808 N.W.2d 586, 589-890 (Minn. 2012) (identifying and applying the multiple victims exception to uphold separate convictions and separate sentences for each occupant of the building that was shot at by the defendant). Because the parties did not argue or address the multiple-victims exception in their briefs, we do not apply the exception to the joinder analysis in this case.

to sentencing jurisprudence to determine whether an error occurred and we look to *Spreigl* jurisprudence to determine prejudice.

A. Error

As noted above, joinder is proper when the state alleges that the defendant committed separate offenses as part of the same behavioral incident. To determine whether multiple offenses arise from the same behavioral incident, the court must consider "whether the offenses (1) arose from a continuous and uninterrupted course of conduct, (2) occurred at substantially the same time and place, and (3) manifested an indivisible state of mind," or were motivated by a single criminal objective. *State v. Johnson*, 653 N.W.2d 646, 651-52 (Minn. App. 2002); *see also Kendell*, 723 N.W.2d at 607-08 ("[C]ourts should evaluate the temporal and geographic proximity of the offenses and assess whether the conduct was motivated by an effort to obtain a single criminal objective"); *State v. Johnson*, 141 N.W.2d 517, 525 (Minn. 1966) (stating that separate offenses "result from a single behavioral incident where they occur at substantially the same time and place and arise out of a continuous and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment").

"The State bears the burden of proving, by a preponderance of the evidence, that a defendant's offenses were not part of a single behavioral incident." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). "The single-behavioral-incident analysis presents a mixed question of law and fact." *Kendell*, 723 N.W.2d at 607; *State v. Jackson*, 615 N.W.2d 391, 394 (Minn. App. 2000) ("The determination of whether offenses arise from a single behavioral incident is dependent upon the particular facts and circumstances of each

case."), *review denied* (Minn. Oct. 17, 2000). "We review the district court's finding of fact under a clearly erroneous standard, and its application of the law to those facts de novo." *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020).

In this case, Brown argues that the second-degree murder offense is unrelated in time and place to the drive-by shooting/second-degree assault offenses because the offenses "involved separate victims, separate locations, . . . happened hours apart," and "[i]n between the alleged murder and drive-by shooting, Brown left the neighborhood altogether and was seen at a car wash in Brooklyn Park." In addition, Brown argues that the second-degree murder offense is unrelated to the drive-by shooting/second-degree assault because the offenses do not share a particular criminal objective. We agree with Brown for three reasons.

First, the distance between the locations of the second-degree murder offense and the drive-by shooting/second-degree assault offenses, the time that lapsed between the commission of the offenses, and the intervening conduct all indicate that the offenses were not part of a single behavioral incident. To have a unity of time, our case law refers to a "continuous and uninterrupted course of conduct." *E.g.*, *Johnson*, 141 N.W.2d at 525. The Minnesota Supreme Court recently determined that two criminal sexual conduct offenses at issue were unrelated, even though they occurred at the same residence and against the same victim. *Barthman*, 938 N.W.2d at 264, 267. Although the state did not introduce any evidence regarding how much time separated the two incidents, the descriptions of the two incidents established that they were not continuous, and were, therefore, separate acts. *Id.* at 266-67 (determining that even though child victim could not recall dates or times,

her descriptions were different enough to establish that the offenses did not occur at substantially the same time); *see also Johnson*, 653 N.W.2d at 651-53 (holding that, absent of any evidence of interruption, the acts of first-degree criminal sexual conduct and second-degree assault were part of a single behavioral incident when both offenses were committed against the same victim, at the same location, during the same "attack").

The state argues that under *Jackson*, separate offenses committed within "two hours and four miles" of each other share a unity of time and place. *See Jackson*, 615 N.W.2d at 393-94.[6] Although we have no bright line rule for determining unity of time and place, the Minnesota Supreme Court has previously held that different acts constituted separate offenses, even when committed against the same victim, when committed less than four miles apart or even in the same place, and when separated by very short periods of time. *E.g.*, *State v. Bookwalter*, 541 N.W.2d 290, 297 (Minn. 1995) (holding that first-degree criminal sexual conduct and attempted murder were separate offenses and not part of a single behavioral incident even though both offenses were committed against the same victim and at locations less than two miles apart); *State v. Stevenson*, 286 N.W.2d 719 (Minn. 1979) (holding that both acts of third-degree criminal sexual conduct were separate offenses and not part of a single behavioral incident even though both offenses were committed against the same victim, occurred in the same place, and separated by five

[6] *Jackson* also illustrates the importance of unity of purpose because in that case, even though this court found a unity of time and place, we reversed the district court's decision to join the offenses because they did not share a unity of purpose. *Jackson*, 615 N.W.2d at 394. Specifically, we determined that the identified criminal objective: a "willingness to react with deadly force when faced with little or no provocation" is too broad to constitute a single criminal objective. *Id.* (quotation omitted).

hours); *State v. Krampotich*, 163 N.W.2d 772, 776 (Minn. 1968) (holding that several crimes were separate offenses and not part of a single behavioral incident even though both offenses were committed against the same victim, occurred in or by the same automobile, and spanned 2.5 hours).

In this case, the murder of D.H. occurred approximately one mile from the Sheridan Avenue residence, and approximately 2.5 hours earlier than the drive-by shooting at the Sheridan Avenue residence.[7] In between the offenses, Brown travelled to a car wash in Brooklyn Park, approximately 10 miles away. Applying *Barthman*, *Bookwalter*, and *Krampotich*, we conclude that the second-degree murder offense and the drive-by shooting/second-degree assault offenses took place at sufficiently different locations, occurred at sufficiently different times, and were interrupted by sufficiently separate intervening acts to preclude characterization as part of a single behavioral incident.

Second, the identified criminal objective does not unify the offense because it lacks specificity and singularity. We initially conclude that the identified purpose is too broad. The Minnesota Supreme Court has previously held that a broad criminal motive cannot unify separate crimes into a single course of conduct. *See State v. Bauer*, 792 N.W.2d 825, 830 (Minn. 2011) (concluding that sharing illegal drugs with friends is too broad to constitute a single criminal objective); *see also State v. Gould*, 562 N.W.2d 518, 521 (Minn. 1997) (concluding that financial hardship is too broad to constitute a single criminal

[7] Although the state did not introduce any evidence to support these facts at the *Rasmussen* hearing, the parties do not contest the time or location of the murder, the drive-by shooting, or the surveillance footage from the car wash. Therefore, we presume these facts to be true for purposes of reviewing the district court's decision.

objective); *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997) (concluding that selling drugs to relieve financial hardship is too broad to constitute a single criminal objective); *State v. Gilbert*, 262 N.W.2d 334, 338 (Minn. 1977) (concluding that "general hatred of women," is too broad to constitute a single criminal objective); *Jackson*, 615 N.W.2d at 394 (concluding that a "willingness to react with deadly force when faced with little or no provocation" is too broad to constitute a single criminal objective). Here, the state identified "retaliation/revenge" as the unifying criminal objective. We cannot discern any difference in the degree of particularity between the undefined revenge motive in this case and the objectives deemed too broad to unify separate acts in *Bauer*, *Gould*, *Soto*, *Gilbert*, and *Jackson*.

In addition to the generality or specificity of a stated criminal objective, we also must analyze the singularity of the stated purpose: the mere fact that a defendant commits "multiple crimes over time for the *same* criminal objective does not mean [the defendant] committed those crimes to attain a *single* criminal objective." *Bakken*, 883 N.W.2d at 271-72 (affirming multiple sentences because the identified criminal objective, satisfying sexual urges, did not constitute a single criminal objective). To be part of a single criminal objective, the offenses in question must share an "indivisible state of mind or coincident errors of judgment." *Johnson*, 141 N.W.2d at 525 (Minn. 1966); *Johnson*, 653 N.W.2d at 651-52 (quoting *State v. Chidester*, 380 N.W.2d 595, 597 (Minn. App. 1986), *review denied* (Minn. March 21, 1986). In this case, the stated criminal objective is to retaliate against two different people. The objective is necessarily divisible, lacking singularity.

Third, the state's trial evidence[8] does not support the state's stated objective. The state failed to establish that D.H. confronted Brown or that there was any actual animosity between Brown and D.H. For instance, the trial testimony showed that on April 24, 2018, W.F. and Brown were arguing when D.H. and another relative of T.F. defused the argument. D.H. then left the area with Brown. Again on April 26, 2018, Brown was arguing with T.F.'s brothers, A.F. and J.J. A.F. and J.J. had confronted Brown regarding his propositioning of T.F. D.H. and J.J. also argued, and D.H. pointed a gun at J.J. before leaving the area with Brown. T.F. testified that there was no indication of any dispute between Brown and D.H. when they left the Sheridan Avenue residence together in the early morning hours on April 26. Based on this evidence, while Brown may have wanted revenge against T.F., he had no reason to seek revenge or retaliate against D.H., who defused the confrontations. The only animosity that existed was as follows: (1) between Brown on one hand and T.F. and her brothers W.F., A.F., and J.J on the other hand; and (2) between D.H. and J.J. We conclude that, absent evidence of a confrontation or animosity between Brown and D.H., the record cannot support a conclusion that "retaliation/revenge" unified the offenses. On this record, the state has failed to

[8] As noted above, the state did not present any evidence in support of its joinder motion. Instead, the state rested on the allegations in the complaints. The only statements in the complaints regarding Brown's relationship with D.H. assert that T.F.'s male relatives confronted Brown, D.H. intervened to defuse the argument, and that D.H. and Brown left the area together in the black Impala. None of the allegations in either complaint support a conclusion that D.H. confronted Brown, D.H. argued with Brown, or that Brown had any reason to seek revenge or retaliation against D.H. Nevertheless, we analyze the trial evidence to determine what, if any, evidentiary support the state might have had for its conclusion that Brown wanted to exact revenge against both D.H. and T.F.

demonstrate that the murder and the drive-by-shooting/second-degree assault offenses were part of the same behavioral incident for purposes of joinder.

B. Prejudice

When a district court erroneously joins separate offenses, we remand for separate proceedings only when the error is "prejudicially erroneous." *State v. Profit*, 591 N.W.2d 451, 460 (Minn. 1999); *see also State v. Kates*, 610 N.W.2d 629, 630-31 (Minn. 2000) (clarifying that for purposes of joinder, we do not apply the "harmless beyond a reasonable doubt" standard articulated in *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997)). The Minnesota Supreme Court has "repeatedly and consistently held that joinder is not prejudicial if evidence of each offense would have been admissible *Spreigl* evidence in the trial of the other." *Fitch*, 884 N.W.2d at 379 (quotation and footnote omitted).[9] In addition, joinder is not prejudicial when evidence of one offense "would have been admissible as 'immediate episode' evidence at a separate trial" for the other offense. *See Kendell*, 723 N.W.2d at 608. We address each in turn.

1. Admissibility of Hypothetical *Spreigl* Evidence

Evidence of another crime, wrong, or act is generally not admissible to show action in conformity with a person's character. *See* Minn. R. Evid. 404(b). Such evidence, however, "may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," if each of the following conditions are met:

[9] Evidence of other crimes or acts is commonly referred to as "*Spreigl* evidence" after our supreme court's decision in *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

> (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.

State v. Ross, 732 N.W.2d 274, 282 (Minn. 2007) (quotation omitted). In addition, if admissibility of rule 404(b) evidence is a "close call," the district court should exclude the evidence. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006) (citation omitted).[10] When analyzing "whether prejudice resulted from improper joinder, [appellate courts] focus on the third, fourth, and fifth conditions," and need not address the first two conditions that relate to sufficiency of notice.[11] *Ross*, 732 N.W.2d at 282.

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[10] In a typical *Spreigl* review, we consider "prejudice" twice: once when performing the required balancing test for error, and again when determining whether "the wrongfully admitted evidence significantly affected the verdict." *E.g.*, *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995) (quotation omitted). In a joinder analysis, because we are concerned with the hypothetical admissibility of the presumed *Spreigl* evidence as the test for prejudice, we do not also ask whether the erroneous admission of this evidence would have affected the hypothetical verdict. Instead, we examine only whether it would constitute error. Nevertheless, in this case, the strength of the state's evidence is not sufficient to render harmless the erroneous admission of evidence of one offense in the trial for the other. This is not one of the rare cases in which the *Spreigl* evidence is so prejudicial that its admission constitutes error, but not so prejudicial as to require reversal. *See, e.g.*, *Ness*, 707 N.W.2d at 691 (concluding that the "very credible" testimony of two witnesses established the requisite intent beyond any reasonable doubt, rendering harmless the erroneous admission of *Spreigl* evidence).

[11] In this case, the state made a combined motion for admission of *Spreigl* evidence, as well as for admission of the same evidence as intrinsic evidence, and for joinder of the two cases. The district court did not address the sufficiency of the state's notice and only ruled on the joinder motion. In reviewing the state's *Spreigl* notice, we observe that the state failed to identify any particular other crime, wrong, or act and failed to explain how any act related to one of the specified permissible purposes under rule 404(b). For purposes of joinder, however, we do not conclude that these deficiencies prohibit admission of the evidence in question.

In this case, the added probative value of the other acts evidence is outweighed by its potential for prejudice. A district court would commit error if it admitted the evidence of D.H.'s murder in the trial for the drive-by-shooting/second-degree assault. The evidence of the drive-by-shooting/second-degree assault offenses at the Sheridan Avenue residence includes T.F.'s testimony that she heard gunshots, looked out the window, and observed Brown driving the black Impala and firing a gun. A neighbor's testimony corroborated this, and J.P. and A.G. testified that they saw Brown exit the black Impala and run between some houses nearby. Near J.P. and A.G.'s residence, police officers recovered a .40 caliber handgun that had Brown's right thumb print on it and that fired the discharged cartridge casings outside the Sheridan Avenue residence. In light of this evidence, the evidence of Brown's connection to D.H.'s murder would have almost no probative value for purposes of establishing the essential elements of the drive-by shooting/second-degree assault crimes. This evidence would have tremendous prejudicial effect, however. We conclude that admission of this evidence would likely cause the jury to convict Brown of the drive-by-shooting/second-degree assault offenses, the precise outcome that rule 404(b) seeks to avoid. *See Bolte*, 530 N.W.2d at 197 n.3.

A district court would also commit error if it admitted the evidence of the drive-by-shooting/second-degree assault in the trial for D.H.'s murder. The evidence of D.H.'s murder includes testimony that Brown and D.H. left the Sheridan Avenue residence together in a black Impala shortly before 5:00 a.m. on April 26, 2018. In addition, R.F. testified that after hearing gunshots and looking outside, R.F. saw a man drive off in a black Impala, leaving D.H.'s body behind. The footage from the car wash showed that Brown

was driving the black Impala and was by himself at the car wash from 6:41 to 6:57 a.m. In light of this evidence, T.F.'s testimony that Brown was still driving the black Impala 30 minutes later would be of limited probative value in the second-degree murder trial. In addition, the evidence indicates that the bullet that killed D.H. came from a .40 caliber handgun that also had Brown's thumb print on it. Evidence that T.F. saw Brown firing a hand gun at the Sheridan Avenue residence would not have much additional probative value either, given this forensic evidence. While having almost no probative value to show intent or motive for killing D.H., admitting evidence of the drive-by shooting at the Sheridan Avenue residence is almost certainly going to influence the jury's deliberation—specifically regarding whether Brown or someone else murdered D.H., and whether he did so with the requisite criminal intent. After hearing the drive-by shooting/second-degree assault evidence, the jury is likely to conclude that Brown is the kind of person who could also have the intent to murder D.H. The balancing test in rule 404(b) precludes admission of such evidence.[12]

2. Admissibility of Hypothetical Intrinsic Evidence

The state's hybrid joinder motion before the district court included arguments that, in the alternative to joinder, the evidence of D.H.'s murder and the evidence of the shooting at the Sheridan Avenue residence on April 26, 2018, constituted intrinsic other acts evidence, which is not subject to the strictures of the rule 404(b) balancing test. In addition,

[12] In light of these conclusions we need not address whether the state could establish each other act by clear and convincing evidence or whether each other act is relevant or material to the state's case. *See Ross*, 732 N.W.2d at 282 (listing requirements).

the state requested admission of several other acts on the eve of trial, including allegations that Brown appeared naked and sexually propositioned T.F. in front of her young daughter, that Brown robbed someone, possibly at gunpoint, in the garage of the Sheridan Avenue residence, and that Brown broke into the vehicle of someone who lived at the Sheridan Avenue residence, among several other specific other crimes and acts.

In *State v. Wofford*, 114 N.W.2d 267, 271 (Minn. 1962), the supreme court recognized the admissibility of one type of intrinsic evidence: immediate episode evidence. Since acknowledging this type of other acts evidence, the Minnesota Supreme Court has clarified that to constitute immediate episode evidence, one offense must have caused or facilitated the other offense. *State v. Riddley*, 776 N.W.2d 419, 426-27 (Minn. 2009) (determining that the evidence in question did not constitute immediate episode evidence—even though the acts occurred within a span of 15 minutes and at the same location—because the other acts did not facilitate the charged offenses); *State v. Fardan*, 773 N.W.2d 303, 316-17 (determining that the evidence in question did not constitute immediate episode evidence—even though the acts had a close temporal connection—because the "murder was not committed to facilitate the other offenses, and the other offenses were not committed to facilitate [the] murder").

In this case, we conclude that the evidence does not show that Brown committed the murder of D.H. because of or to facilitate the shooting at the Sheridan Avenue residence. Similarly, we conclude that the evidence does not show that Brown committed the shooting at the Sheridan Avenue residence because of or to facilitate the murder of D.H. The evidence also does not show a causal connection between the various other acts in the

state's 17-paragraph proffer and the murder of D.H. Therefore, a district court would commit error if it admitted the evidence of one offense as intrinsic immediate episode evidence in the trial for the other offense, and it would commit error if it admitted the various other acts listed in the state's proffer in the trial for the murder of D.H. Unlike in *Kendall*, joinder of the two offenses in this case was prejudicial because the other acts evidence does not constitute immediate episode evidence.

Finally, in addition to immediate episode evidence, we have acknowledged a second type of intrinsic evidence: evidence of an act that is inextricably intertwined with the charged offense. Other crimes or acts are inextricably intertwined with the charged offense when (1) the other act arose out of the same transaction or series of transactions as the charged crime; and (2) either (a) the other act is relevant to an element of the charged crime, or (b) excluding evidence of the other act would present an incoherent or incomplete story of the charged crime. *State v. Hollins*, 765 N.W.2d 125, 131-32 (Minn. App. 2009). There is some doubt, however, as to the admissibility of this type of intrinsic evidence.[13] Because neither party addressed this issue, we decline to consider whether this alternative basis for admitting other acts evidence renders harmless the erroneous joinder.

[13] In *Diriye v. State*, No. A15-0869, 2016 WL 208414, at *5 (Minn. App. Jan. 19, 2016), this court questioned whether *Hollins* actually adopted the inextricably intertwined evidence doctrine, because the evidence at issue in *Hollins* was immediate episode evidence. We pointed out that no published case applied *Hollins* outside of the immediate episode evidence circumstance. *Id*. Since that time, and in another unpublished opinion, this court reiterated that *Hollins* adopted the inextricably intertwined doctrine. *State v. Hirman*, No. A16-0928, 2017 WL 1833245, at *5 n. 2 (Minn. App. May 8, 2017), *review denied* (Minn. July 18, 2017). The evidence at issue in *Hirman*, however, was also immediate episode evidence.

On remand, should the state seek to introduce any evidence under this exception, the factors in *Hollins* require identification of specific other acts and individualized analysis of the evidence of each identified act. In addition, such evidence is still subject to the balancing test required by rule 403 of the Minnesota Rules of Evidence. *E.g., State v. Townsend*, 546 N.W.2d 292, 296 (Minn. 1996). As noted above, when balancing probative value and unfairly prejudicial effect, district courts should analyze each identified, separate other act in light of the permissible evidence. We recognize that the district court may exclude some prejudicial other acts evidence, while admitting other, less prejudicial evidence. For example, as noted above, evidence of Brown shooting at the Sheridan Avenue address would have very little added probative value, but carries a high risk of unfair prejudice in the murder trial. The district court could admit evidence that Brown drove the black Impala and came to a sudden stop in front of J.P. and A.G.'s residence without admitting evidence that he discharged a firearm. Similarly, the district court could decide to admit evidence regarding the location of the weapon and regarding the location of Brown's arrest without admitting prejudicial evidence of a separate violent crime.

II. Admission of the Blood Test Results

Brown argues that the district court erred by concluding that the affidavit contained sufficient probable cause to justify the warrant for Brown's blood sample. Because the application did not contain any basis for concluding that Brown was under the influence, we reverse the district court's denial of Brown's suppression motion.

The United States and Minnesota Constitutions require that warrants be supported by probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. When determining

whether a search warrant is supported by probable cause, we consider whether the issuing judge had a substantial basis for concluding that probable cause existed. *State v. Rochefort*, 631 N.W.2d 802, 804-05 (Minn. 2001). In doing so, we review the district court's factual findings for clear error and the district court's legal determinations de novo. *State v. Jenkins*, 782 N.W.2d 211, 223 (Minn. 2010) (citing *State v. Buckingham*, 772 N.W.2d 64, 70 (Minn. 2009)). A search warrant is supported by probable cause, if, considering the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Fort*, 768 N.W.2d 335, 342 (Minn. 2009). Elements that bear on a probable-cause determination include "information establishing a nexus between the crime, objects to be seized and the place to be searched," but this court considers the warrant application as a whole, rather than individual components "in isolation." *Jenkins*, 782 N.W.2d at 223 (quotation omitted). We will uphold the warrant in marginal cases. *State v. Papadakis*, 643 N.W.2d 349, 355 (Minn. App. 2002) (stating that "doubtful cases should be resolved by the preference for warrants").

In this case, the search warrant affidavit only includes one statement regarding drugs, controlled substances, or alcohol: Brown "was believed to have been under the influence of narcotics at the time of his arrest." The affidavit does not explain what observations or indicia were present, if any, and it does not provide any basis for the affiant's conclusory belief. In addition, the application does not explain why the requested evidence would likely result in evidence of the criminal activities described in the affidavit. The single statement of belief in this case, without more, does not provide the issuing judge with any basis to conclude probable cause existed. Because the warrant lacked probable

cause, the blood sample must be excluded from the trial. We need not address whether Brown was prejudiced by the erroneous admission of the results of Brown's blood test because the erroneous joinder of the charges in this case requires us to reverse and remand for separate proceedings on the murder charge and drive-by-shooting/second-degree assault charges.

III. Admission of the Show-Up Identification

Brown argues that the district court erred when it admitted the identification evidence provided by J.P. and A.G. Because the totality of the circumstances surrounding the show-up identification did not cause a very substantial likelihood of irreparable misidentification, we affirm the admission of this evidence.

We follow a two-part process in addressing the admissibility of identification testimony. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, we determine whether the procedure used to elicit the identification was unnecessarily suggestive. *Id.* In doing so, we look to "whether the defendant was unfairly singled out for identification." *Id.* (citing *Simmons v. United States*, 390 U.S. 377, 383, 88 S. Ct. 967, 970–71 (1968)). If the identification process is unnecessarily suggestive, we determine whether the totality of the circumstances surrounding the identification created "a very substantial likelihood of irreparable misidentification." *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (quotation omitted). If not, then the identification is considered reliable despite any suggestive procedure. *Ostrem*, 535 N.W.2d at 921. Whether an identification procedure is so suggestive as to violate due process is an issue reviewed de novo. *State v. Hooks*, 752 N.W.2d 79, 83-84 (Minn. App. 2008).

We need not decide whether the identification process was impermissibly suggestive because we conclude that the identification was reliable under the totality of the circumstances. In considering the totality of the circumstances, this court must assess the following five factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the show-up; and (5) the time between the crime and the confrontation. *Ostrem*, 535 N.W.2d at 921.

In this case, even though neither J.P. nor A.G. testified at the *Rasmussen* hearing, the testimony from the officer established that the reliability factors weigh in favor of admission. First, the video recording shows where the black Impala stopped in the street. From that point to the front window of J.P. and A.G.'s residence is not very far, and this vantage point provided a good opportunity to view Brown. In addition, both J.P. and A.G. told the officer that they observed the driver of the black Impala as he exited the vehicle and for a long enough time that they could determine what he was wearing. Thus, this factor strongly supports admission. Second, both J.P. and A.G. stated that they were certain that the person they observed exiting the Impala was the same person that police showed to them. J.P. stated on the video recording that he was "100 percent" certain of this. This factor also weighs strongly in favor of admission. Third, relatively little time passed between the observation and the identification. The identification occurred on the same morning as the observation, far less time than the 48-hour period of time that supported the

admission of the identification in *Ostrem*. *See* 535 N.W.2d at 922. This factor also weighs strongly in favor of admission.

The remaining two factors do not strongly support admission, but they also do not strongly weigh against it. For example, although the officer did not testify regarding the degree of attention that J.P. and A.G. paid when making their observation, these events are unusual ones that would tend to attract a witness's attention. Similarly, although neither J.P. nor A.G. provided a detailed description of the person they observed, according to the testimony of the officer, both J.P. and A.G. provided descriptions of the type and color of the clothing that Brown was wearing. Taken together, these factors favor admission and we affirm the district court's decision to admit the identification testimony.

IV. Admission of Relationship Evidence

As noted above, the state requested the admission of several other acts as relationship evidence.[14] Brown argues that the district court erred in granting the state's request and categorizing the requested evidence as relationship evidence. Because we anticipate that these issues would recur upon retrial, we address the decision to admit this evidence. *See State v. Clark*, 755 N.W.2d 241, 258-59 (Minn. 2008). We agree with Brown and conclude that this evidence should not have been admitted.

[14] The state did not seek to admit the evidence under Minnesota Statutes, section 634.20 (2018), which allows admission of a prior act of domestic abuse in a trial for domestic abuse. *State v. McCurry*, 770 N.W.2d 553, 561 (Minn. App. 2009), *review denied* (Minn. Oct. 28, 2009). Our analysis relates to general relationship evidence, not evidence of a prior act of domestic abuse under section 634.20.

Relationship evidence, or more precisely, evidence of other acts or crimes that show a strained relationship between the accused offender and the victim, is admissible character evidence because it can indicate motive for the charged conduct. *E.g.*, *State v. Mills*, 562 N.W.2d 276, 285 (Minn. 1997). To be admissible, the state must establish the other act or crime by clear and convincing evidence and the district court must apply the balancing test set forth in rule 404(b). *State v. Bauer*, 598 N.W.2d 352, 364 (Minn. 1999);[15] *see also State v. Mayhorn*, 720 N.W.2d 776, 784-85 (Minn. 2006) (determining that the district court erred in admitting strained relationship evidence because the state failed to prove the prior conflict between the relevant parties by clear and convincing evidence); *State v. Hormann*, 805 N.W.2d 883, 890-91 (Minn. App. 2011) (applying requirement of clear and convincing evidence and the 404(b) balancing test), *review denied* (Minn. Jan. 17, 2012). The admission of strained relationship evidence, like *Spreigl* evidence, lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996).

In this case, the district court abused its discretion by admitting this evidence. The state's written "offer of proof" filed on the eve of trial consisted of 17 separate paragraphs and included allegations that Brown committed a variety of other acts on April 24, 25, and

[15] In *State v. McCoy*, the Minnesota Supreme Court adopted section 634.20 "as a rule of evidence," and observed that to admit evidence under section 634.20, the state need only prove the prior act of domestic abuse by a preponderance of evidence. 682 N.W.2d 153, 160 n.6, 161 (Minn. 2004). In this way, *McCoy* limited *Bauer*, clarifying that *Bauer* did not apply to evidence of a prior act of domestic abuse under section 634.20. *Id.* at 160 n.6. *McCoy* did not, however, abrogate the rule of law set forth in *Bauer* requiring clear and convincing evidence and application of the 404(b) balancing test for admission of general relationship evidence.

26, 2018, including recklessly discharging a weapon at 4:12 a.m. on April 24, appearing naked and vaguely sexually propositioning T.F. in front of her young daughter in the early morning hours of April 24, possibly robbing someone at gunpoint in the garage of the Sheridan Avenue residence on April 24, breaking into the vehicle of someone who lived at the Sheridan Avenue residence on April 25, and possibly propositioning T.F. a second time on April 25, among others. The state did not make any attempt to present evidence of these acts or explain how evidence of these other acts do not present quintessential inadmissible character evidence: the evidence shows Brown's character for dangerousness and a propensity to act in conformity with that character. The district court did not balance the probative value of admitting evidence of any specific act against the unfairly prejudicial effect of admitting such evidence. Therefore, the district court abused its discretion when it admitted evidence of other acts and crimes as evidence of the relationship between Brown and T.F. and as evidence of the relationship between Brown and D.H. Finally, the district abused its discretion when it admitted evidence of other acts and crimes as evidence regarding the relationship between Brown and D.H. for a separate, independent reason. Because the state did not present any evidence of animosity or evidence of a dispute or confrontation between Brown and D.H., evidence of their relationship would not indicate motive for the second-degree murder offense.

On remand, should the state seek to introduce evidence of other acts in the second-degree murder trial or in the drive-by shooting/second-degree assault trial, it must make clear what specific other acts it seeks to introduce and under what specific legal basis. In addition, for each other act, the state must satisfy the respective standards of proof and the

applicable balancing tests for *Spreigl* evidence, relationship evidence, or evidence of a prior act of domestic abuse under section 634.20.

V. Arguments made in Brown's pro se supplemental brief

Brown filed a pro se supplemental brief in which he raises the following issues: insufficient evidence to support the second-degree murder conviction, prosecutorial misconduct, ineffective assistance of counsel, and violations of his constitutional rights. Brown also contends that the district court abused its discretion in several regards. For the reasons stated above and in light of our decision regarding joinder, we need not address most of these arguments. However, because Brown's sufficiency-of-the-evidence argument implicates double jeopardy, we will briefly discuss that argument. *See Clark*, 755 N.W.2d at 256 (requiring an appellate court to address a sufficiency-of-evidence argument, even when a conviction must be reversed on other grounds, to determine whether retrial would violate the Double Jeopardy Clause). If the record here contains insufficient evidence of guilt, then the Double Jeopardy Clause requires us to remand the case for judgement of acquittal. *See id.*

When evaluating the sufficiency of the evidence, this court carefully examines the record "to determine whether the facts and the legitimate inferences drawn from them would permit the factfinder to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). We view the evidence "in the light most favorable to the verdict" and assume that the jury "disbelieved any evidence that conflicted with the verdict." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). The verdict will

not be overturned if the jury, "upon application of the presumption of innocence and the State's burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense." *Id.*

In cases such as this one, where the state presents circumstantial evidence, we apply the circumstantial evidence standard of review. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). This standard requires a "review [of] the sufficiency of the evidence using a two-step analysis." *State v. Barshaw*, 879 N.W.2d 356, 363 (Minn. 2016). The first step is to "identify the circumstances proved, deferring to the fact-finder's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id.* (quotation omitted). Under the second step, the reviewing court must "independently examine the reasonableness of all inferences that might be drawn from the circumstances proved to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted). "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). In this step, no deference is given to the jury's verdict. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017).

In this case, Brown argues that the evidence does not support a guilty verdict on the second-degree murder charge because the state relied on circumstantial evidence. As noted above, and contrary to Brown's argument, circumstantial evidence can support a guilty verdict. *E.g.*, *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013) (finding

circumstantial evidence sufficient to support first-degree premeditated murder conviction). For purposes of deciding whether the Double Jeopardy Clause precludes remand for trial and requires remand for entry of judgment of acquittal, we conclude that the state presented sufficient evidence of Brown's guilt, including ballistics and forensic evidence connecting Brown to the weapon that was used to kill D.H., video recordings from the car wash, and the recovery of clothes from the car wash that contained D.H.'s DNA. This incriminating evidence establishes that the appropriate remedy in this case is to remand for separate proceedings on the two case files.

Affirmed in part, reversed in part, and remanded.