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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1091**

State of Minnesota,
Respondent,

vs.

Liban Khalif Abdirahman,
Appellant.

**Filed June 22, 2020
Affirmed
Worke, Judge**

Ramsey County District Court
File No. 62-CR-18-1082

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

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

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

Considered and decided by Worke, Presiding Judge; Hooten, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his conviction for identity theft, arguing that the district court erred by admitting evidence of a bad act occurring after the charged offense, or

alternatively, that the evidence was insufficient to support his conviction. In his pro se supplemental brief, appellant argues that his jury was racially biased. We affirm.

FACTS

On February 11, 2018, after observing a traffic violation, an officer stopped a vehicle driven by appellant Liban Khalif Abdirahman. The officer smelled marijuana. Officers eventually searched the vehicle. In the glove box, officers found an encoder and two wallets containing fake credit cards in the names of various individuals, along with fake driver's licenses bearing a name from a fake credit card with a photograph resembling Abdirahman. In the back seat, officers found a backpack containing fake credit cards bearing the names of various individuals, including Abdirahman's, Abdirahman's passport and California driver's license, and a fake Maryland driver's license bearing the name from a fake credit card with a photograph resembling Abdirahman.

The state charged Abdirahman with felony identity theft in violation of Minn. Stat. § 609.527, subd. 2 (2016), based on the allegation that there were eight or more direct victims and sought an increased sentence pursuant to Minn. Stat. § 609.527, subd. 3(5) (2016).

On March 20, 2018, officers located Abdirahman at the Minneapolis-St. Paul International Airport. After removing him from a flight he had boarded, an airline manager approached the officers and gave them a credit card encoder that passengers in Abdirahman's row said they observed him shove under his seat. Officers arrested Abdirahman for identity-theft offenses and for possession of the credit card encoder.

Prior to trial, the state gave notice of its intent to offer evidence of the airport incident to prove knowledge, identity, and to rebut any argument or testimony that Abdirahman was not aware that the cloned transaction cards and the encoder were in his possession on February 11, 2018. Abdirahman moved to exclude all evidence. After conducting a hearing outside the presence of the jury midway through Abdirahman's trial, the district court admitted evidence of the airport incident over his objection.¹

The jury found Abdirahman guilty of identity theft involving eight or more direct victims, and the district court sentenced him to 41 months in prison. This appeal followed.

DECISION

Admission of evidence

Abdirahman argues that the district court abused its discretion by admitting evidence that he possessed an encoder on March 20, 2018, at the Minneapolis-St. Paul International Airport. Specifically, he claims that: (1) the state did not prove his involvement by clear and convincing evidence; (2) possession of the encoder was not relevant to a specific disputed fact; and (3) the potential for unfair prejudice outweighed the evidence's probative value.

As a general rule, evidence of other crimes or bad acts, known as *Spreigl* evidence, is not admissible to prove a person's character or that they acted in conformity with that character in committing an offense. Minn. R. Evid. 404(b)(1); *State v. Spreigl*, 139 N.W.2d

¹ The officer's testimony about the airport incident was that the airline manager handed officers an encoder and that none of the passengers claimed it as their own. The testimony did not include information that the passengers in Abdirahman's row observed him shove the encoder under his seat.

167, 169 (Minn. 1965). However, *Spreigl* evidence may be admitted for limited, specific purposes, to demonstrate factors such as “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Minn. R. Evid. 404(b)(1). In order to admit *Spreigl* evidence, the following conditions must be satisfied:

- (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. Ness, 707 N.W.2d 676, 686 (Minn. 2006). When challenging the admission of *Spreigl* evidence, a defendant must prove that the erroneous admission of the evidence resulted in prejudice. *Id.* at 685. In determining whether the erroneous admission of *Spreigl* evidence prejudiced a defendant, an appellate court examines whether there is a reasonable probability that the evidence “significantly affected the verdict.” *Id.* at 691.

To be excluded under rule 404(b), an act need not constitute a crime; rather, it must merely be a “bad” act. *State v. McLeod*, 705 N.W.2d 776, 787-88 (Minn. 2005). Our supreme court has established that evidence of an act is not *Spreigl* evidence if “there is nothing per se wrong” with the act. *Ture v. State*, 681 N.W.2d 9, 17 (Minn. 2004) (concluding that evidence of defendant’s collection of personal information about women was not bad-act evidence because there was nothing per se wrong with the act).

Abdirahman's possession of the encoder did not constitute *Spreigl* evidence. Under Minnesota law, the use or possession of a scanning or re-encoder² device is unlawful only when coupled with the intent to commit, aid, or abet unlawful activity. Minn. Stat. § 609.527, subd. 5b(a)-(b) (2016). There is nothing per se wrong with possessing such a device without the intent to commit unlawful activity. And in this case, the state did not offer facts relating to an unlawful intention.

However, even if we assume that the district court's admission of this evidence was erroneous, it was harmless because there was not "a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Ness*, 707 N.W.2d at 691. When determining whether the evidence significantly affected the verdict, we consider whether: the state presented additional evidence on the issue; the district court issued a limiting instruction; the state dwelled on the evidence in its closing argument; and the evidence of guilt was overwhelming. *See State v. Riddley*, 776 N.W.2d 419, 428 (Minn. 2009).

Here, the district court provided the jury with a limiting instruction when this evidence was introduced. And while the prosecutor briefly mentioned this evidence during closing argument, the evidence was not dwelled upon. Finally, the state presented overwhelming evidence of Abdirahman's guilt. In the vehicle, officers found an encoder, numerous fake credit cards, two fake driver's licenses with photos of Abdirahman's

² While we refer to the devices found in the vehicle and during the airplane incident as encoders, the record indicates that these devices could be used to re-encode the magnetic stripe on a credit card.

likeness corresponding to the names on the fake credits cards, and Abdirahman's passport and California driver's license. There was also evidence that the fake credit cards had been re-encoded with the identities and account information of ten individuals, nine of whom testified at trial that their transaction cards had been used without their authorization. Because evidence of the encoder found on the airplane did not significantly affect the verdict, any error in the admission of this evidence was harmless.

Sufficiency of the evidence

Alternatively, Abdirahman argues that the evidence was insufficient to prove that he knowingly possessed the identifying information of eight or more victims and that he intended to commit identity theft. When evaluating a claim of insufficient evidence, this court "carefully examine[s] the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Boldman*, 813 N.W.2d 102, 106 (Minn. 2012). We view the evidence in the light most favorable to the verdict and will not overturn the verdict if the jury could reasonably have found the defendant guilty of the charged offense, consistent with the presumption of innocence and the state's burden of proof beyond a reasonable doubt. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

When the jury considered circumstantial evidence, this court applies a two-step test to determine whether the state presented sufficient evidence. *State v. Griffin*, 887 N.W.2d 257, 264 (Minn. 2016). First, this court identifies the circumstances proved, "deferring to the jury's acceptance of the proof of these circumstances and rejection of evidence in the

record that conflicted with the circumstances proved by the [s]tate.” *Id.* Second, this court “examine[s] the reasonable inferences that might be drawn from the circumstances proved, giving no deference to the fact-finder’s choice between reasonable inferences.” *Id.* The “[c]ircumstantial 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. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010).

A person is guilty of identity theft where they transfer, possess, or use an identity that was not his own, with the intent to commit unlawful activity. Minn. Stat. § 609.527, subd. 2. For cases involving the possession of contraband, this court will uphold a conviction based on circumstantial evidence only when there is “evidence tying a defendant directly to the illegal items.” *State v. Sam*, 859 N.W.2d 825, 835 (Minn. App. 2015). We now address each of the challenged elements.

Possession

First, Abdirahman argues that the state failed to adequately prove that he constructively possessed the items found in the vehicle. The doctrine of constructive possession allows for the state to establish possession where “the inference is strong that the defendant physically possessed the item at one time and did not abandon his possessory interest in it.” *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). When an item is found in a place where others have access to it, the state must “show a strong probability, inferable from other evidence, that [the defendant] consciously exercised dominion and control over the . . . item[.]” *State v. Zgodava*, 384

N.W.2d 522, 524 (Minn. App. 1986), *review denied* (Minn. May 16, 1986). “Proximity is an important consideration in assessing constructive possession,” and constructive possession may be shared. *Smith*, 619 N.W.2d at 770.

With respect to Abdirahman’s constructive possession of the items found in the vehicle, these are the circumstances proved. Officers stopped a vehicle driven by Abdirahman and occupied by a passenger in the front seat. Officers found an encoder and two wallets in the vehicle’s glovebox. The first wallet contained two credit cards bearing Abdirahman’s name and a Pennsylvania driver’s license bearing a photo resembling Abdirahman but with the name of a different individual. The second wallet contained a fake Maryland driver’s license bearing a photo resembling Abdirahman but with the name of another individual and a valid social security card bearing the name of the vehicle’s passenger. Officers also found a backpack in the back seat containing Abdirahman’s passport and his California driver’s license and a credit card bearing Abdirahman’s name. These circumstances proved are consistent with guilt and inconsistent with the hypothesis that Abdirahman did not constructively or jointly possess the items found in the vehicle. Based on this record, the evidence sufficiently supports the possession element of Abdirahman’s identity-theft conviction.

Intent

Second, Abdirahman argues that the state failed to adequately prove that he intended to commit identity theft. Abdirahman claims that “[t]here was no direct testimony as to who altered those cards,” and that “possession of altered transaction cards should not be

accepted as proof of knowledge of personal identifying information as to all of the cards or a general assumption of intent to steal.”

With respect to intent, these are the circumstances proved. Officers found an encoder in the glove box and various fake credit cards throughout the vehicle. Officers also found fake identification cards—with photographs resembling Abdirahman—that matched names on the fake credit cards. An officer, through a demonstration as part of his testimony, used a card reader to show that the numbers on the front of 11 of the credit cards found in the vehicle did not match with numbers encoded onto the cards’ magnetic stripes.³ As part of their investigation, officers traced the numbers scanned onto the cards as belonging to accounts at three banking institutions. Representatives from two of these institutions then identified the numbers as belonging to the accounts of ten individuals. Nine of those individuals then testified that their accounts—the numbers of which matched the encoded digits of the fake credit cards—had been compromised and they did not authorize Abdirahman to use their account numbers. Therefore, the evidence sufficiently supports the intent element of Abdirahman’s identity-theft conviction because the circumstances proved are consistent with guilt and inconsistent with the hypothesis that Abdirahman did not intend to use the cards in an unlawful manner.

³ As indicated by the record, the numbers on the magnetic stripe of cloned cards are different from the numbers on the front of the card. Law enforcement is able to identify cloned cards by using a card reader, such as the one used by the officer at trial, to identify the digits encoded onto the magnetic stripe. If the encoded digits do not match those embossed on a transaction card, law enforcement can use the first six encoded digits to identify the institution where the account is held and then contact the institution to identify an account’s owner.

Pro se claim

In his pro se supplemental brief, Abdirahman argues that we should reverse his conviction because the jury was racially biased. However, Abdirahman did not raise this issue before the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (noting appellate courts “generally will not decide issues which were not raised before the district court”). Further, because Abdirahman has not provided citations to the record or legal authority in support of his claim, it is forfeited. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (refusing to consider arguments raised in a pro se supplemental brief because it contained “no argument or citation to legal authority”).

Affirmed.