STATE OF MINNESOTA

IN SUPREME COURT

A19-0695

Scott County — Chutich, J.

State of Minnesota,

Respondent,

vs.

Filed: March 18, 2020
Office of Appellate Courts

Derrick Zechariah Smith,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Ronald B. Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. The district court did not abuse its discretion by concluding that the risk of unfair prejudice did not outweigh the probative value of the *Spreigl* evidence.

2. Assuming without deciding that the admission of business records and photos from appellant's Facebook account was error, it was harmless because no reasonable possibility exists that the evidence significantly affected the verdict.

3. The district court did not abuse its discretion in determining that appellant did not provide sufficient evidence of duress to raise a defense of duress at trial.

4. The district court erred by sentencing appellant for both first-degree murder while committing an aggravated robbery and first-degree aggravated robbery of the same victim.

Affirmed in part, reversed in part, and remanded.

O P I N I O N

CHUTICH, Justice.

Derrick Zechariah Smith and three others broke into James Herron's home, robbed him and his guests, and murdered him. A grand jury indicted Smith on eight crimes relating to these acts, and, after a bench trial, the district court found him guilty on all counts.

Smith argues on appeal that the district court abused its discretion in several instances. Specifically, Smith challenges the district court's determination that the risk of unfair prejudice did not outweigh the probative value of the *Spreigl* evidence admitted at trial. He also asserts that the district court denied him a fair trial by admitting evidence from his Facebook account, including business records and photos. Smith further contends that the district court abused its discretion by finding that he presented insufficient evidence for a duress defense. Finally, he asserts that the district court erred by sentencing him for both first-degree murder while committing an aggravated robbery and first-degree aggravated robbery because Herron was the victim of both crimes.

We conclude that the district court properly admitted the *Spreigl* evidence and acted well within its discretion in denying Smith's proposed defense of duress. Concerning the

introduction of the Facebook evidence, even assuming without deciding that error occurred, it was harmless. But because the first-degree murder while committing an aggravated robbery and first-degree aggravated robbery offenses were committed against the same victim, Smith could not properly be sentenced for both offenses. Accordingly, we affirm the judgment of convictions, reverse the sentence imposed on Smith for the first-degree aggravated robbery of Herron, and remand to the district court to vacate that sentence.

FACTS

In November 2016, Smith along with his co-conspirators Brandy Jaques, Tyrel Patterson, and Jonte Robinson, broke into James Herron's home wearing dark clothing and masks. Smith had handed out the face masks and gloves before the group broke in. The group then encountered three guests and Herron's roommate and girlfriend, S.W. Smith and the co-conspirators forced S.W. and the three guests to lie face-down on the living room floor, and then searched and robbed each guest. Patterson found Herron asleep in his bed. After what the victims described as "a scuffle and yelling from the bedroom," Patterson shot Herron in the wrist, dragged him down the hallway, and forced him to his knees in his living room. There, Patterson demanded to know where they could find drugs and money. When Herron failed to answer quickly enough, Patterson first shot him in the kneecap and then fatally shot him in the head at close range.

Robinson fled without his co-conspirators' knowledge and called 911. Police officers began tracking Smith, Patterson, and Jaques as soon as they left Herron's home, which resulted in a lengthy high-speed chase. After the officers stopped their car, Smith

ran in a separate direction from the others. An officer chased him and ordered him to stop running. Smith did not comply and instead shot at the officer, who returned fire and wounded Smith. When searched, Smith had in his possession a pink handgun taken from one of Herron's guests, another handgun, Herron's cell phone, and four large bags of marijuana. Upon arresting all of the co-conspirators, the officers also recovered the murder weapon, rubber gloves, masks, cash, drugs, and various possessions belonging to Herron and his guests.

The State charged Smith with eight crimes related to the break-in, robbery, and murder at Herron's home.[1] Smith waived his right to a jury trial and proceeded to a bench trial in Scott County. The State offered testimony from two of Smith's co-conspirators, the victims, police officers, and several experts. The testimony showed Smith to be an active co-conspirator in the crimes.

The State planned to introduce Smith's prior convictions for first-degree murder and aggravated robbery as *Spreigl* evidence, to show, among other things, that Smith was a

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[1] Specifically, these charges—all alleging aiding and abetting liability—were:

- Count I: Murder in the First Degree—With Intent—While Committing Aggravated Robbery
- Count II: Murder in the First Degree—While Committing Burglary
- Count III: Murder in the Second Degree—With Intent—Not Premeditated
- Count IV: First Degree Aggravated Robbery (Herron)
- Count V: First Degree Aggravated Robbery (M.H.)
- Count VI: First Degree Aggravated Robbery (J.R.)
- Count VII: First Degree Aggravated Robbery (M.R.)
- Count VIII: First Degree Burglary of a Dwelling—Occupied —Non-Accomplice Present

willing participant in the Herron burglary-robbery-murder. The Hennepin County District Court had previously convicted Smith of first-degree murder after he, along with Jaques and Patterson, participated in a robbery-murder less than one month before they robbed and killed Herron. Both crimes involved armed robberies of persons that these three knew to be in possession of drugs, and in both instances, the victims were shot in the head in the early morning. The State also sought to introduce evidence of Smith's convictions that resulted from an armed robbery of a Burger King restaurant that he and a co-conspirator committed in December 2007.[2]

The State also introduced evidence from Smith's Facebook account, including photos (depicting marijuana and a "hand holding a black handgun") and business records (documenting basic subscriber information, such as a phone number, messages, and IP logs).

The district court admitted the Facebook evidence during the State's case; it deferred its rulings on the *Spreigl* evidence until the close of the State's case. At that time, it admitted the evidence of Smith's prior first-degree murder conviction and his Burger King robbery convictions.

Smith notified the district court before trial that he planned to present a duress defense to establish that he had acted "at the direction of Brandy Jaques in fear that [she] or Mr. Patterson would kill him" if he failed to cooperate. The district court deferred its ruling on Smith's motion to present a duress defense until the close of evidence. It

[2] Smith pleaded guilty to four counts of aggravated first-degree robbery in connection with the 2007 robbery.

ultimately denied Smith's motion, finding that he failed to meet his burden of production to establish the elements of duress.

In its thorough and well-reasoned findings of fact, conclusions of law, and order, the district court explicitly found that the testimony of each of the victims and Smith's co-conspirators was credible. The district court relied on DNA evidence and witness testimony to determine that Jaques wore a pink mask during the robbery, Robinson wore a green mask, Patterson wore a black half mask, and Smith wore a black full mask. The district court found that Smith planned the robbery through text messages with Patterson, provided transportation to Herron's home, and supplied the "robbery kit," (a backpack with extra shoes, zip ties, gloves, and masks) before breaking into the home. In addition to explicitly finding that nobody had threatened Smith, the district court found that, shortly before the robbery, Smith threatened Jaques and Robinson by telling them that if they failed to cooperate, "they [could] get shot too."

The district court found Smith guilty on all charges. It sentenced him to life with the possibility of release after 360 months for the first-degree aggravated murder conviction, four 57-month sentences for first-degree aggravated robbery (one count for each victim), and 71 months for burglary in the first-degree. The district court imposed these sentences consecutively.

Smith appealed his convictions and sentences.

ANALYSIS

Smith challenges four of the district court's decisions: (1) admitting *Spreigl* evidence, (2) admitting Facebook evidence, (3) denying his motion to assert a duress

defense, and (4) sentencing him for two crimes against the same victim (aggravated robbery and first-degree murder while committing aggravated robbery of Herron). We address each issue in turn.

I.

We review a district court's admission of *Spreigl* evidence for an abuse of discretion. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). Courts generally exclude evidence "connecting a defendant with other crimes." *State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965). The general prohibition against *Spreigl* evidence protects defendants from the possibility that the fact-finder will use this evidence "for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime." *Ness*, 707 N.W.2d at 685. *Spreigl* evidence may still be admitted for limited, specific purposes, such as "showing motive, intent, knowledge, identity, absence of mistake or accident, or a common scheme or plan." *Id.* To introduce *Spreigl* evidence:

> (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 685–86 (emphasis added). A court should exclude *Spreigl* evidence if the balance between probative value and the risk of unfair prejudice is a close call. *Id.* at 685. Finally, even if we conclude that the district court erroneously admitted *Spreigl* evidence, we will only reverse if there "is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id.* at 691.

Here, the district court admitted evidence of Smith's prior first-degree murder and Burger King robbery convictions because they were probative of a common scheme, intent, and knowledge.[3] Smith concedes that the State met the first three *Spreigl* requirements. He asserts, however, that the Burger King robbery convictions were irrelevant under the fourth prong, and that the risk of unfair prejudice from each of the admitted *Spreigl* convictions outweighed their probative value under the fifth prong.

Concerning the fourth *Spreigl* prong, the district court properly concluded that the Burger King robbery convictions were relevant. Smith's voluntary participation in the Burger King robbery was relevant to his contention that he was an unwilling participant in the Herron burglary-robbery-murder. *See State v. Hudspeth*, 535 N.W.2d 292, 295 (Minn. 1995) (concluding that evidence of a defendant's intentional participation in a "somewhat similar" crime about two weeks before is "highly relevant" to rebut claims of passive involvement in the current crime).

Turning to the fifth *Spreigl* prong, we first consider the probative value of the admitted evidence. The district court properly concluded that each of Smith's prior convictions were probative of knowledge and intent in light of Smith's assertion of a duress defense.[4] The prior first-degree murder conviction arose from a robbery-murder that he committed with Patterson and Jaques—the same core group of co-conspirators before us

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[3] The district court denied the State's motion to admit *Spreigl* evidence concerning two other crimes or bad acts: Smith's 2007 conviction of aggravated robbery in the first degree and an alleged 2016 second-degree assault.

[4] As an alternative to his duress defense, Smith contended that he did not reasonably foresee that someone would be killed during the burglary and robbery of Herron's home and its occupants.

now. *See State v. Smith*, 932 N.W.2d 257, 262–63 (Minn. 2019). Beyond the district court's observation that armed robbery is generally the type of crime that can turn violent, the prior first-degree murder conviction was probative of whether Smith knew that robberies with *this particular group of people* might be deadly. And, as previously described, the Burger King robbery convictions are probative because his voluntary participation in this crime was relevant to his contention that he was an unwilling participant in the Herron burglary-robbery-murder.

Next, we consider whether the risk of unfair prejudice outweighs the established probative value of the admitted *Spreigl* evidence. Here, the specific risk is that the fact-finder could use these convictions as propensity evidence—namely, that Smith committed these eight crimes because he has committed crimes in the past—instead of using the evidence in a more limited way to prove Smith's intent or knowledge. This risk is reduced because Smith had a bench trial on these offenses. Although district court judges are not "immune from emotional appeals or the temptation to misuse evidence," they have "experience and familiarity with the operation of the rules of evidence" that reduce the risk of unfair prejudice. *State v. Burrell*, 772 N.W.2d 459, 467 (Minn. 2009). "After all, it is the district court judge who is called upon in the first instance to rule on the admissibility of the evidence." *Id.*

We applied this distinction between a bench trial and a jury trial concerning the risk of unfair prejudice in *Burrell*, 772 N.W.2d at 465–67. There, we concluded that evidence of four *Spreigl* incidents—alleged shootings—were relevant to the defendant's motive of "gang retaliation." *Id.* at 466. We also concluded that the *Spreigl* evidence, though

probative of motive, was prejudicial and "could distort the integrity of the fact-finding process." *Id.* at 466–67. But ultimately we affirmed the district court's admission because "the evidence was presented to a [district court judge], and not to a jury." *Id.* at 477. We made this distinction because "there is comparatively less risk that the district court judge, as compared to a jury of laypersons, would use the evidence for an improper purpose" or allow emotion to overcome reason. *Id.*

Here, Smith's first-degree murder conviction involves some of the same core group of co-conspirators engaging in a similar crime less than a month before the crimes at issue in this appeal. Because this conviction has a higher probative value than the conviction in *Burrell*, and a similarly reduced risk of unfair prejudice because both cases involved bench trials, the district court did not abuse its discretion in admitting this evidence. Further, we have previously concluded that Smith's current convictions were not unduly prejudicial when introduced as *Spreigl* evidence in his Hennepin County *jury* trial for first-degree murder. *Smith*, 932 N.W.2d at 267–68. Accordingly, his Hennepin County first-degree murder conviction was not unduly prejudicial when introduced at the bench trial here.

Similarly, concerning the Burger King robbery convictions, the risk of unfair prejudice is so low that it does not outweigh the probative value of those convictions. The district court, therefore, did not abuse its discretion in admitting Smith's prior first-degree murder conviction and his Burger King robbery convictions.

II.

We turn next to the district court's admission of the evidence from Smith's Facebook account, which included photos depicting marijuana and a "hand holding a black

handgun," as well as business records documenting basic subscriber information. Smith argues that this evidence is inadmissible hearsay because the State failed to meet the exception for business records under Minnesota Rule of Evidence 803(6).[5] We need not decide here whether any error occurred because any alleged error was harmless beyond a reasonable doubt. *See State v. Lilienthal*, 889 N.W.2d 780, 787 (Minn. 2017) (concluding that "we need not determine whether the district court violated [appellant's] Fifth Amendment rights . . . because we conclude that the alleged error was harmless beyond a reasonable doubt").

We review a district court's evidentiary determinations for an abuse of discretion, *Ness*, 707 N.W.2d at 685, governed by the harmless error standard, *State v. Matthews*, 800 N.W.2d 629, 633 (Minn. 2011). "Under the harmless error standard, a defendant who alleges an error that does not implicate a constitutional right must prove there is a 'reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.' " *Id.* (quoting *State v. Holliday*, 745 N.W.2d 556, 568 (Minn. 2008)).

Some of the factors that help us determine whether this reasonable possibility exists include: (1) the manner in which the party presented the evidence, (2) whether the evidence was highly persuasive, (3) whether the party who offered the evidence used it in

[5] Although Smith now asserts that the Facebook photos are unduly prejudicial, he neither raised this argument at trial nor objected under Minnesota Rule of Evidence 403. Ordinarily, we would review his new Rule 403 objection for plain error. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). Because Smith is unable to establish prejudice under the more favorable harmless error standard, we apply that standard to all of his Facebook claims in an effort to simplify our analysis. *See State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011) (noting that "the third prong of the plain error test is the equivalent of . . . harmless error analysis").

closing argument, and (4) whether the defense effectively countered the evidence. *State v. Ferguson*, 581 N.W.2d 824, 833 (Minn. 1998). Strong evidence of guilt undermines the persuasive value of wrongly admitted evidence. *See Matthews*, 800 N.W.2d at 634 (noting that the wrongfully admitted testimony was brief, was not persuasive on the question of the defendant's guilt, and other strong evidence of guilt overshadowed that testimony).

Applying these principles here, we conclude that no reasonable possibility exists that the Facebook evidence significantly affected the district court's verdict. First, the Facebook evidence was only a small part of the State's presentation. The records were introduced through an expert witness—one of thirty-five witnesses—whose testimony accounts for just 35 pages of the 1,380 page trial transcript. Second, the evidence was relevant in part because it included subscriber information that linked Smith to a particular phone number and Facebook page, and it showed connections among the co-conspirators. But Jaques, who the district court expressly found to be credible, independently testified to Smith's phone number, making the records evidence less important. Concerning the third and fourth factors, the State did not mention the Facebook evidence in its closing argument, and Smith had the opportunity to cross-examine the expert witness who testified about that evidence.

Finally, even if wrongly admitted, any persuasive impact of the Facebook evidence is dwarfed by the overwhelming evidence of Smith's guilt. The State presented witness testimony from victims and co-conspirators that characterized Smith as an active planner and participant in the crimes, and the district court specifically found that these witnesses were credible. The State presented expert testimony involving DNA evidence that

connected Smith to one of the masks worn by an active participant, as described by the witnesses. And after the police chase ended and the officers captured Smith, an officer found belongings of the victims—a gun, Herron's cellphone, and four large bags of marijuana—on Smith.

In sum, even assuming without deciding that the Facebook evidence was erroneously admitted, no reasonable possibility exists that it significantly affected the district court's verdict.

III.

Turning next to Smith's request to present a duress defense at trial, we review the district court's denial of this motion for an abuse of discretion. *State v. Yang*, 644 N.W.2d 808, 818 (Minn. 2002). To raise a duress defense, a defendant bears the burden of production. *Id.* Specifically, a defendant must produce evidence showing that "(1) he was under a present reasonable apprehension of instant death, due to threats, should he refuse to participate in the crime; (2) fear of instant death continued throughout the commission of the crime; and (3) he could not safely withdraw." *Id.* Threats made to the defendant "must be of immediate death for noncooperation." *Id.*

Smith asserts that he met his burden of production because his co-conspirators' testimony supports an inference that Patterson was their leader and was someone to be feared.[6] We disagree.

[6] At oral argument, Smith's counsel also suggested that the district court did not consider Smith's duress defense. But as the State's counsel noted, the district court concluded—after reviewing the evidence—that Smith had not met the burden of production required to warrant this defense. Only after this review of the evidence and the proposed defense, did the district court reject Smith's proposed defense.

Even taken as true, Smith's theory does not meet the elements of a duress defense. No evidence presented at trial showed that Smith—because of threats—was under a reasonable apprehension of instant death should he refuse to participate in the break-in and robbery. Neither the co-conspirators nor the victim witnesses testified that they heard Patterson or Jaques threaten Smith. And the district court specifically found that Smith did not receive any threats. Certainly, nothing in the record suggested that Smith participated in the offense under a fear of *imminent* death. *Yang*, 644 N.W.2d at 819 (concluding that defendant did not succeed on a duress defense after testifying that he feared retaliatory gang violence if he failed to cooperate because the threat was not "imminent . . . at the time of the shooting itself"). Moreover, no evidence suggested that Smith could not withdraw from the crime—particularly when Robinson did so.[7] The district court, therefore, did not abuse its discretion by denying Smith's request to present a duress defense.

IV.

Finally, we consider whether the district court erred in sentencing Smith for first-degree murder while committing an aggravated robbery and first-degree aggravated robbery when Herron was the victim of both crimes. Whether Minnesota Statutes section 609.035 prevents imposing two sentences under these circumstances is a question of law that we review de novo. *In re Custody of M.J.H.*, 913 N.W.2d 437, 440

[7] After the car chase ended and Smith was fleeing separately from his co-conspirators, he chose to shoot at the police officer who was pursuing him. Although we affirm the district court's denial of Smith's duress defense because Smith failed to meet his burden of production, we note that Smith's decision to fire his gun appears inconsistent with a duress defense.

(Minn. 2018) ("Determination of the applicable statutory standard and the interpretation of statutes are questions of law that we review de novo.").

A burglary conviction "is not a bar to conviction of or punishment for any other crime committed on entering or while in the building entered." Minn. Stat. § 609.585 (2018). But if a defendant commits multiple crimes during the burglary against the same victim, the district court can only sentence the defendant for one additional crime. *State v. Hodges*, 386 N.W.2d 709, 710–11 (Minn. 1986).

We conclude that, under *Hodges*, the district court erred by sentencing Smith for more than one of the additional crimes committed against Herron after the initial burglary (aggravated robbery and first-degree murder when committing aggravated robbery). We therefore reverse the sentence imposed for the first-degree aggravated robbery of Herron and remand to the district court to vacate that sentence.

CONCLUSION

For the foregoing reasons, we affirm the judgment of convictions, reverse the sentence imposed for the first-degree aggravated robbery of Herron, and remand to the district court to vacate that sentence.

Affirmed in part, reversed in part, and remanded.