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Minn. R. Civ. App. P. 136.01, subd.1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1625**

State of Minnesota,
Respondent,

vs.

Davion Lee Jones,
Appellant.

**Filed January 4, 2021
Affirmed
Bratvold, Judge**

Washington County District Court
File No. 82-CR-18-1220

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Reilly, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this appeal following the final judgments of conviction for drive-by shooting and first-degree assault, appellant argues that (1) the district court erred by refusing to instruct

the jury that a witness, Z.S., was an accomplice as a matter of law; (2) the evidence is insufficient to sustain the convictions because the accomplice testimony was uncorroborated; (3) the district court abused its discretion by admitting videos of appellant with firearms as *Spreigl* evidence; and (4) the district court erred by sentencing appellant twice for a single behavioral incident. Because the record evidence conflicted as to whether Z.S. was an accomplice, the district court did not abuse its discretion by instructing the jury on accomplice corroboration. We also determine that the record evidence sufficiently corroborated the accomplice testimony and sustained appellant's conviction, and the district court did not abuse its discretion by admitting the videos as *Spreigl* evidence or imposing two sentences for the drive-by shooting and assault. We therefore affirm.

FACTS

The following summarizes the evidence presented at appellant Davion Lee Jones's jury trial, which we view in a light favorable to the jury verdict.

On March 3, 2018, Jones travelled from Chicago to Minneapolis to attend a ceremony for the recently deceased father of his ex-girlfriend, Courtney.¹ Courtney was upset when some friends, including S.R., did not attend the ceremony. Her social media status stated the ceremony "was a very important day of my life and that for my friends who didn't attend, you know, I don't really have anything to say to them." Using a messaging platform on March 4, S.R. and Courtney argued and threatened each other; S.R.

¹ This opinion refers to Courtney by her first name, as other actors in the case share her initials.

made disparaging remarks about Courtney's father. Around the same time, Courtney's brother called S.R. and told him "I'm going to shoot your dad and kill you."

Courtney decided to go to S.R.'s house in Woodbury and "fight him." Jones, Courtney's brother, Z.S., D.B., and at least three others accompanied Courtney.² Before they left, Courtney told the group "nobody shoot nobody." The group traveled in two vehicles: a pickup truck, and Z.S.'s car. While en route, Courtney's brother asked Z.S. to switch vehicles: Courtney's brother drove Z.S.'s car with Jones as a passenger, while Courtney, Z.S., D.B., and the others drove in the truck.

S.R.'s home is on a corner lot: the front door faces Lake Ridge Drive, and the garage and kitchen window face Addison Way. At around 6 p.m., the pickup truck parked in front of the house on Lake Ridge Drive, while the car parked on Addison Way facing Lake Ridge Drive.

Courtney, Z.S., and the others exited the pickup truck. By text message, Courtney told S.R. to come outside, but he remained inside. S.R.'s father overheard S.R. on the phone with 911. S.R.'s father looked out the front door and saw a group of "five or six Black women." He then went to his kitchen window and saw two Black men sitting in the car parked on Addison Way. S.R.'s father closed the blinds, turned around, and heard gunshots, and one bullet struck him in the back. The bullet fragmented, requiring surgery and a week-long hospital stay.

² We note that Jones testified he did not go to S.R.'s home and discuss his testimony below.

Just before the gunshots, Z.S., who was with Courtney in front of the house, heard a male voice say, “get back into the car.” As Z.S. got back into the pickup truck with Courtney and the others, she heard gunshots. After the gunshots, both groups left S.R.’s home: Courtney’s brother and Jones in the car, and the others in the pickup truck. A neighbor’s security camera recorded the pickup truck leaving the area at 6:16 p.m., followed by the car.

As they drove off, Z.S. panicked because her “car was just basically at a scene with people outside and gunshots just happening and my car was literally dead smack in front of this person’s house” Z.S. decided she wanted her car, and both vehicles pulled over. Z.S. testified that Courtney’s brother was in the driver’s seat and Jones was in the front passenger seat. Z.S. got into her car with D.B., while Courtney’s brother and Jones moved to the pickup truck.

During the police investigation, S.R. identified Courtney and disclosed their messages. Police arrested Jones and Courtney together as they hid from police at Courtney’s workplace. The state charged Jones with aiding and abetting (1) drive-by shooting, Minn. Stat. § 609.66, subd. 1e(b) (2016); (2) first-degree assault, Minn. Stat. § 609.221, subd. 1 (2016); and (3) second-degree assault, Minn. Stat. § 609.222, subd. 1 (2016). The state also charged Courtney and her brother with aiding and abetting the drive-by shooting and assault.

Before Jones’s jury trial, the state moved to admit seven videos from Jones’s social media account showing that Jones “had access to firearms and [had] the ability and knowledge to use a firearm.” Jones opposed the motion. The district court admitted three

redacted videos on the condition that the state lay sufficient foundation.³ Two of the videos showed Jones with handguns and bullets and the other video showed him firing a handgun at a shooting range. Later, all three videos were received into evidence.

During trial, the state presented evidence of its investigation. Police investigators testified that they found seven bullet holes on the house exterior. They also found two bullet fragments in the front yard and determined that one bullet went through the kitchen window before hitting S.R.'s father. An expert testified that all shots were fired from the side of S.R.'s home where Z.S.'s car was parked with Courtney's brother and Jones. Trajectory analysis showed that three rounds might have been fired from the street or sidewalk area in front of the house, suggesting that the shooter was likely moving. A forensic examination of Z.S.'s car determined that no shots were fired from inside her car.

Police investigators testified that they recovered seven .45-caliber shell casings between Addison Way and S.R.'s home, but they never found the firearm. An expert testified that the .45-caliber casings were all fired from the same firearm. The expert also testified that the firearm used in the shooting was, in his opinion, one of 58 models of firearms.

The state also called Courtney, Z.S., and D.B. to testify. Courtney's brother did not testify. D.B.'s testimony about the shooting was similar to Z.S.'s testimony. Z.S. was the

³ The district court ruled that the state needed to first establish that two videos showing Jones with handguns and bullets were consistent with the firearm and bullets used in the shooting, and the third video of Jones firing at a shooting range involved a handgun that was consistent with the firearm that shot S.R.'s father.

only witness to testify that, after they returned to Courtney's house, Jones told her "everything would be fine. Nothing happened in [her] car."

During Courtney's testimony, her account vacillated on what Jones told her as they hid from police just before their arrest.⁴ As she responded to questions about her recorded police statement, she agreed that she said Jones talked to her about the shooting and she asked Jones whether he thought someone had been shot at S.R.'s home. Courtney also agreed she told police that Jones responded, "I just fired at the first person I seen in the window." Courtney testified, however, that Jones only told her that "he [saw] a man in the window looking at them," and he "didn't know if somebody got hit." Courtney also testified Jones told her that after shots were fired "he jumped in the car" through the window because "the doors couldn't open or they don't know how to use [Z.S.'s] car to open the door."

Jones testified in his own defense that he was not at S.R.'s home in Woodbury, did not shoot a gun "at S.R.'s house," and did not "help anyone else . . . shoot at the house." He also testified that he hid from police because he was scared. Finally, Jones testified that the handguns in two of the state's videos were replicas that he used to make music videos. He also testified that the bag of loose ammunition in one video was 9mm caliber.

At the conclusion of testimony, the district court instructed the jury that Courtney's testimony must be corroborated because she was an accomplice. The district court declined to instruct the jury that Z.S. and D.B. were accomplices, but did instruct that "[i]f you find

⁴ Courtney waived her Fifth Amendment privilege against self-incrimination, and was not granted immunity or a plea offer contingent on her cooperation.

that any person who has testified in this case is a person who could be charged with the same crimes as the Defendant, you cannot find the Defendant guilty of a crime on that testimony unless that testimony is corroborated.”

The jury found Jones guilty on all counts. The district court convicted Jones on two counts and sentenced him to 135 months for the first-degree assault, concurrent with 81 months for the drive-by shooting. The district court did not convict Jones or impose a sentence for the second-degree assault conviction.

Jones appeals.

DECISION

Jones raises four issues on appeal. Because the district court’s determination that Z.S. was not an accomplice as a matter of law relates to our analysis of evidence corroborating Courtney’s accomplice testimony, we address this issue first. Then we turn to the sufficiency of the evidence, followed by the admission of *Spreigl* evidence, and conclude with the sentencing issue.

I. The district court did not abuse its discretion by denying Jones’s request for a jury instruction that Z.S. was an accomplice as a matter of law.

We review a district court’s decision to decline a requested jury instruction for abuse of discretion. *State v. Cox*, 820 N.W.2d 540, 547 (Minn. 2012); *State v. Pendleton*, 759 N.W.2d 900, 907 (Minn. 2009). A district court abuses its discretion when its decision is “based on an erroneous view of the law or is against logic and the facts in the record.” *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted).

“An accomplice instruction ‘must be given in any criminal case in which any witness against the defendant might reasonably be considered an accomplice to the crime.’” *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004) (quoting *State v. Shoop*, 441 N.W.2d 475, 479 (Minn. 1989)). “If the question of whether a witness is an accomplice is disputed or subject to differing interpretations, then the issue is one of fact for the jury.” *Pendleton*, 759 N.W.2d at 907. “The test for determining if a witness is an accomplice is whether the witness could have been indicted and convicted for the crime with which the defendant is charged.” *Id.* (quotation omitted).

Here, the district court ruled that Courtney and her brother were accomplices as a matter of law. Jones’s attorney argued that the district court should also determine that Z.S. and D.B. were accomplices as a matter of law and asked for a jury instruction that their testimony must be corroborated. The state argued that neither Z.S. nor D.B. were accomplices as a matter of law. The district court denied Jones’s request and instructed the jury:

You cannot find the Defendant guilty of a crime on the testimony of a person who could be charged with that crime, unless that testimony is corroborated by other evidence that tends to convict the Defendant of the crime. Such a person who could be charged for the same crime is called an accomplice. In this case, Courtney [] and [her brother] are persons who can be charged with the same crime as the Defendant. Same crimes. You cannot find the Defendant guilty of a crime on the testimony of these accomplices unless the testimony is corroborated.

The district court also instructed that if the jury found any other witness was an accomplice, that accomplice's testimony must be corroborated.⁵

A. Record evidence of Z.S. as an accomplice is conflicting and subject to different inferences.

“A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05, subd. 1 (2016). In considering whether Z.S. was an accomplice as a matter of law, the district court reasoned:

I don't think that any reasonable prosecutor looking at these facts, number one, would charge either [Z.S.] or [D.B.] with conspiring with any of these other folks to shoot or discharge a firearm at the crime scene. I also think, even if a reasonable prosecutor made that decision, they would still have to struggle with their obligation to only charge people that they believe can be convicted of the offense to which they're charged.

Jones argues that Z.S. intentionally aided the commission of the crime because she gave Courtney's brother and Jones her car when they asked for it, and therefore aided them in committing the drive-by shooting. Jones points to evidence that Z.S. “saw the [social media] video, read the comments, knew that Courtney was threatening [S.R.], observed Courtney was upset, and decided to go with Courtney knowing there was going to be a confrontation.” Jones also argues that Z.S. was present when Courtney said, “nobody shoot nobody.” From this, Jones contends that it was reasonably foreseeable that in aiding Courtney, her brother, and Jones, a crime involving a firearm or serious harm might result.

⁵ On appeal, Jones does not raise the issue of whether D.B. was an accomplice as a matter of law.

The state responds that Z.S. “went to [S.R.’s] home in Woodbury, knew there might be a confrontation, and allowed [Courtney’s brother] and [Jones] to use her vehicle once at the scene. But that is not the end of the analysis.” The state argues that other record evidence negates Z.S.’s accomplice liability, therefore, the district court did not abuse its discretion by instructing the jury to decide the issue.

We agree with the state, based on four aspects of Z.S.’s testimony. First, Z.S. testified that she was not sure if the confrontation between Courtney and S.R. would be verbal or physical: “I don’t know what the full intentions was of, like, is it just going to be a talk out, are they going to be arguing, is there going to be a fight, like, I didn’t really know exactly what the details was.” Second, when the two groups arrived at S.R.’s home and S.R. did not come outside, Z.S. testified that she told Courtney “come on. This is pointless,” and “drift[ed] towards the truck.” Third, Z.S. testified that she “wouldn’t even have had my car in a situation like that if I knew that was going to happen like that.” Z.S.’s credibility was thus important to whether the jury found her to be an accomplice. Fourth, Z.S. did not admit, and no record evidence establishes, that she heard Courtney say, “nobody shoot nobody.” Because “the question of whether [Z.S.] is an accomplice [was] disputed or subject to differing interpretations, then the issue [was] one of fact for the jury.” *See Pendleton*, 759 N.W.2d at 907.

In *Pendleton*, the state at first charged a witness with the same murder charge as the defendant. *Id.* Record evidence showed the witness stayed with the group the entire night of the murder, opened the house door while the defendant and others carried the victim to a car, and initially lied to police about what happened. *Id.* But no record evidence connected

the witness to the defendant's conversation planning the killing. *Id.* at 908. The supreme court held that the district court did not err in giving a general-accomplice jury instruction when "a variety of inferences can be drawn from the facts, some of which support the conclusion that [the witness] was an accomplice and some of which negate such a conclusion." *Id.* at 907. For example, the witness's action of holding open the door is just as consistent with fear as it is with intentionally aiding the crime. *Id.* at 908.

Based on *Pendleton*, we conclude that the district court properly instructed the jury that if it believed any witness could be charged with the same crimes as Jones, it must consider that witness an accomplice whose testimony must be corroborated. This instruction, like the one approved of in *Pendleton*, permitted conflicting inferences about the evidence connecting Z.S. to the crime and appropriately left the issue to the jury's determination.

B. Any error was harmless.

Even if the district court abused its discretion by refusing to instruct the jury that Z.S. was an accomplice as a matter of law, we conclude the district court's error was harmless. Jones contends Z.S.'s testimony that Jones told her "you're fine. Nothing happened in your car," was the only significant, corroborating evidence tying Jones to the crime. We disagree.

We consider "several factors in determining whether a failure to instruct on corroboration of accomplice testimony constitutes reversible error, including whether the accomplice testified in exchange for leniency, whether the accomplice's testimony was emphasized in the prosecution's closing argument, and whether the accomplice's

testimony was corroborated by significant evidence.” *State v. Jackson*, 726 N.W.2d 454, 461 (Minn. 2007) (citing *State v. Gail*, 713 N.W.2d 851, 864 (Minn. 2006)).

Addressing these factors in turn, Z.S. did not receive leniency in exchange for her testimony. The record establishes that she hoped that she would not have to testify, and was “not at all” happy to be at Jones’s trial.

Second, the state’s closing argument spans slightly more than 34 pages of trial transcript, and the prosecuting attorney mentioned Z.S. many times, but the argument usually referred to Z.S. along with the testimony of other witnesses. Jones is correct that the state’s closing argument repeated Z.S.’s testimony that Jones told her nothing happened in her car. But the closing argument must be viewed in context. The only long discussion of Z.S.’s testimony was the prosecuting attorney’s argument that Z.S. and D.B. were *not* accomplices. The prosecuting attorney pointed out that “based on the evidence, you have to decide whether or not they could be charged at an equal level with everybody else.” We conclude that the state’s closing argument centered on Courtney’s testimony and Jones’s actions and did not overly emphasize Z.S.’s testimony.

Third, significant evidence corroborates Z.S.’s testimony. We acknowledge that no evidence corroborates Z.S.’s statement that Jones told her nothing happened in her car. But this testimony tracks the investigator and expert testimony that shots were likely fired from outside the kitchen window near Addison Way and forensic evidence that no shots were fired from inside Z.S.’s car. All eyewitnesses placed Jones as the passenger in the car parked on Addison Way. Jones’s testimony that he was never at S.R.’s home, provides more corroboration because the jury rejected it and implicitly found he was in Z.S.’s car.

See State v. Pederson, 614 N.W.2d 724, 732 (Minn. 2000) (stating that “corroborating evidence may consist of . . . inadequacies and admissions in a defendant’s testimony”). Given this record evidence, even if the district court erred in failing to instruct the jury that Z.S. was an accomplice as a matter of law, the error was not prejudicial.

II. Sufficient evidence supports Jones’s conviction because the record evidence corroborates Courtney’s accomplice testimony.

Jones argues that the state failed to adequately corroborate Courtney’s accomplice testimony and that, without her testimony, the record evidence is insufficient to sustain Jones’s convictions. Because we have determined that Z.S. was not an accomplice as a matter of law, we consider this issue in light of Z.S.’s testimony, as well as the other corroborating evidence.

“Accomplice testimony is inherently untrustworthy and must be supported by independent evidence.” *Pederson*, 614 N.W.2d at 732 (quotation omitted). “A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.” Minn. Stat. § 634.04 (2016). “In a practical sense, the legislation embodies the common law’s long-standing mistrust of the testimony of the accomplice.” *Shoop*, 441 N.W.2d at 479. While the “quantum of corroborating evidence required in any case depends on the circumstances of the crime. . . . [i]t is sufficient if it reinforces the truth of the accomplice’s testimony and points to the defendant’s guilt in some substantial degree.” *Pederson*, 614 N.W.2d at 732 (quotations omitted).

A. Standard of review

The parties generally agree that “in reviewing the sufficiency of the corroborating evidence of an accomplice’s testimony, we review the evidence just as we would on a sufficiency challenge—in the light most favorable to the prosecution, and with all conflicts in the evidence resolved in favor of the verdict.” *State v. Nelson*, 632 N.W.2d 193, 202 (Minn. 2001).

Jones cites *State v. McAllister*, 862 N.W.2d 49, 53 (Minn. 2015), and argues that because the “intentionally aids” element of accomplice liability is a state of mind, it is “generally proven through circumstantial evidence . . . [and therefore] a higher level of scrutiny is warranted.” Jones is correct that a person is guilty of aiding and abetting a crime if she “*intended* that [her] presence or actions aid the commission of that crime.” 10 *Minnesota Practice*, CRIMJIG 4.01 (2016) (emphasis added). Intent is usually proven through circumstantial evidence. *See, e.g., McAllister*, 862 N.W.2d at 53; *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997).

Jones contends that the circumstantial evidence standard allows this court to defer to the fact-finder’s acceptance of circumstances proven, but requires this court to examine the reasonableness of all inferences that might be drawn from those circumstances without deference to the fact-finder’s choice between reasonable inferences. *See State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013); *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010). The state counters that even if the evidence corroborating an accomplice’s testimony is circumstantial, the direct-evidence standard should be used. *See Nelson*, 632 N.W.2d at 202. Because the state also contends that “regardless of which standard the

Court employs, the evidence supports [Jones's] conviction," we apply the heightened standard of review applicable to circumstantial evidence.

B. Analysis of record evidence

The state relied on Courtney's testimony in its case-in-chief. Jones reasons that "a guilty verdict required proof either that [Jones] was the person who shot the gun, or he intentionally aided [Courtney's brother] in doing so." Jones maintains, "there must be independent evidence connecting the defendant with the crime, which under a principal liability theory means evidence showing [Jones] to be the person who fired the gun." Jones argues the state's strongest evidence was Courtney's testimony that she told police Jones told her that he shot at the first person he saw in the window, and also argues this testimony was not corroborated by other, independent evidence connecting Jones to the crime.

The state counters that physical evidence and other testimony corroborated Courtney's testimony. "Corroborating evidence may consist of: physical evidence associated with the crime; the testimony of eyewitnesses and experts at trial; inadequacies and admissions in a defendant's testimony; and suspicious and unexplained conduct of an accused before or after the crime." *Pederson*, 614 N.W.2d at 732.

We agree with the state that the physical evidence and expert testimony about the location of the shooter provide corroborating evidence that Jones was the shooter. The circumstances proved are:

First, a forensic analysis of the bullet trajectory showed that the shots that hit S.R.'s father and the house exterior came from where the car was parked on Addison Way, and

witnesses corroborated that Jones was the passenger. Investigators found seven shell casings next to the sidewalk, directly in front of the kitchen window.

Second, Courtney's brother and Jones were the only people in the car parked outside the kitchen window at the time of the shooting. S.R.'s father also testified that he saw two Black men in the car outside his kitchen window just before he was shot. Thus, either Courtney's brother or Jones, or both, were involved in the shooting.

Third, evidence establishes that the car was parked facing Lake Ridge Drive. Seven shell casings were found close to the sidewalk area and near the passenger side of the car. The location of the casings also shows that the car passenger was likely the shooter. Before and after the shooting, Courtney's brother was driving the car and Jones was in the passenger's seat.

Fourth, Jones told Z.S., who panicked after the shooting, that nothing happened inside her car. This statement implies that he was the shooter.

Fifth, a security camera captured the pickup truck leaving first, followed by the car. A neighbor testified that he saw the car leaving the scene immediately after the gunshots. D.B. and Z.S. testified that they heard the gunshots just as they got back into the pickup truck. Given how quickly the car left the scene after the shooting stopped, this evidence points to the car passenger, Jones, as the likely shooter.

Sixth, record evidence establishes that Jones attempted to evade arrest and lied to police and the jury. Jones hid when police came to arrest him and Courtney, which implies consciousness of guilt. *See State v. McDaniel*, 777 N.W.2d 739, 747 (Minn. 2010). Jones told police and testified to the jury that he did not go to S.R.'s residence, shoot a gun at the

house, or help anyone else do so. “If the accused testified, the inadequacies and admissions in his testimony may be corroborative of the accomplice’s testimony.” *State v. Adams*, 295 N.W.2d 527, 533 (Minn. 1980). The jury rejected Jones’s account when it found him guilty of all three counts. Every other eyewitness testified that Jones was at the scene and was with Courtney’s brother when the shooting occurred. “The defendant’s entire conduct may be looked to for corroborating circumstances. If his connection to the crime may be fairly inferred from those circumstances, the corroboration is sufficient.” *Id.* Thus, Jones’s guilty conduct and testimony, which the jury found to be false, also corroborates Courtney’s testimony.

In short, Jones was in the location from which the bullet that hit S.R.’s father was fired. Taking all of this evidence together—testimony that Jones was the car passenger, physical evidence that no shooting occurred inside the car, and that shots were fired in the area outside the kitchen window where the car was parked—the state’s case tends to prove Jones was the shooter. The immediate departure of the car after the shooting ended also tends to prove that Jones was the shooter because he was on the passenger side closest to the house and he told Z.S. that nothing happened inside the car. The inadequacies of Jones’s testimony—that he was nowhere near the shooting despite the testimony of every other eyewitness—are further corroborating circumstances.

Finally, the circumstantial evidence is sufficient because the inference that Jones was an innocent bystander is unreasonable given the corroborating evidence. Because Jones’s “connection to the crime may be fairly inferred from those circumstances, the corroboration is sufficient.” *See Adams*, 295 N.W.2d at 533. Thus, even if we set aside

Courtney's testimony, Jones's conviction is supported by sufficient, corroborating evidence.

III. The district court did not abuse its discretion by allowing the state to introduce *Spreigl* evidence of Jones handling firearms and .45-caliber bullets.

This court reviews evidentiary rulings, including objected-to *Spreigl* evidence, for abuse of discretion. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). “A defendant who claims the trial court erred in admitting evidence bears the burden of showing the error and any resulting prejudice.” *Kennedy*, 585 N.W.2d at 389. The state concedes that if the district court erred by admitting *Spreigl* evidence, the error was not harmless.

As a general rule, “[e]vidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Minn. R. Evid. 404(b)(1). In a criminal trial, evidence of other wrongs or acts may be admitted only if it “is relevant to an identified material issue other than conduct conforming with a character trait,” and “the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.” Minn. R. Evid. 404(b)(2)(a), (b)(2)(c).⁶

⁶ Evidence of other wrongs may be admitted only if the five *Spreigl* conditions are met:

- (1) notice is given that the state intends to use the evidence;
- (2) the state clearly indicates what the evidence is being offered to prove; (3) the evidence is clear and convincing that the defendant participated in the other offense; (4) the *Spreigl* evidence is relevant and material to the state's case; and (5) the

On appeal, Jones challenges the admission of the three videos showing Jones with firearms on only two grounds—the videos were not relevant to any proper purpose, and that even if they were minimally relevant, the probative value was outweighed by the prejudicial effect. We consider each argument in turn.

A. Relevance

Jones first points out that the district court did not explicitly identify the purpose for which the evidence was admissible. While this is accurate, the state argues that the context of the district court’s decision makes the purpose clear. The record supports the state’s position. The state provided notice of its intent to offer videos from Jones’s social media account to establish that he had access to firearms and has the ability and knowledge to use a firearm. Jones agrees that “[t]he prosecutor was very specific” at the pretrial hearing on this evidence; the prosecutor noted that “the purpose of showing these videos is to show that [Jones] had access to firearms and that he knows how to use the firearms and, specifically, the firearms that could shoot a bullet that was used *in this case*.” (Emphasis added.)

The district court reviewed the evidence and allowed three redacted videos, subject to the state laying foundation that (1) the social media account belonged to Jones and (2) the firearms in the videos were capable of firing .45-caliber ammunition. The district

probative value of the *Spreigl* evidence is not outweighed by its potential for unfair prejudice.

State v. Gomez, 721 N.W.2d 871, 877 (Minn. 2006). Here, Jones challenges only the relevance and potential for unfairness of the other wrongs evidence, thus we do not address the other conditions.

court, therefore, narrowed the purpose of the videos to prove access to the type of weapon and bullet used to shoot S.R.'s father. The district court reviewed the redacted videos and then allowed the state to play the videos for the jury. Thus, we agree with the state that, in context, the purpose for which the evidence was admitted is clear: the district court admitted the videos to show that Jones knew how to use the type of firearm that was used to shoot S.R.'s father, and Jones had access to the type of firearm and ammunition that was used to shoot S.R.'s father.

Still, Jones contends that “there was no consequential fact—other than guilt or innocence—in dispute that might have made the *Spreigl* evidence relevant.” Jones argues he had two defenses, not guilty and alibi, and that neither defense was disproved by showing that Jones possessed a firearm. The state counters that the evidence of Jones's access to the type of firearm used to shoot S.R.'s father was highly relevant.

We agree with the state. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. Here, evidence that Jones had access to and knowledge of how to use a firearm of the same type used by the shooter makes it more probable that Jones was the shooter. The evidence is thus relevant, particularly the video showing Jones at the shooting range firing a firearm like the type used by the shooter. It shows Jones knew how to shoot a firearm like the one used in the shooting, and had access to a firearm like the one used in the shooting, which goes to identity and opportunity. *See* Minn. R. Evid. 404(b)(1) (stating knowledge, identity, and opportunity are proper purposes).

B. Probative value/prejudicial effect

Whether the video evidence was more probative than unfairly prejudicial is a closer question, particularly on the two “music videos” showing Jones handling weapons. Jones argues that the video evidence “was hardly probative of any disputed facts in this case,” and that “[a]t best, this evidence proved that [Jones], more than a year before the offense in this case, had access to guns.” The state counters that “there were only two people in the [car], near which the bullets were fired and the shells found, only those two people could have been the shooter. Whether [Jones] or someone else was the shooter was perhaps *the* most important issue at trial.”

Our analysis is guided by *Ness*, where the supreme court reviewed *Spreigl* evidence by analyzing the probative value versus the potential for unfair prejudice. The supreme court observed that *Spreigl* evidence was “not needed to strengthen otherwise weak or inadequate proof of an element of the charged offense or the state’s case as a whole.” *Ness*, 707 N.W.2d at 689. As a result, the supreme court determined the district court abused its discretion by admitting the disputed evidence. *Id.*

Here, the state was required to corroborate Courtney’s testimony and the testimony of any other witness the jury determined was an accomplice—potentially both Z.S. and D.B. Thus, the shooting-range video, which showed Jones discharging firearms and ammunition of the same type and caliber used in the shooting, was highly probative of whether he or Courtney’s brother was the shooter. Jones claims that the shooting-range video was “dissimilar in nature, location, and activity” to the charged conduct. To the

contrary, discharging a .45-caliber firearm, the same caliber used in the shooting, is very similar to the charged conduct.

We are troubled by the admission of the two music videos, given they are dated a year before the offense and the state's expert conceded that the weapons depicted could be replicas. Still, the district court only allowed three of the seven videos the state sought to introduce, and ordered the redaction of the videos received so that only possession and use of .45-caliber firearms was shown. The district court excluded, for example, a video of Jones using what appeared to be an AR-15 long gun at the shooting range, which was not used in the shooting. The district court also ordered redaction of potentially prejudicial lyrics and audio from the music videos, even though the audio was largely unintelligible.

The question before us is not whether the evidence prejudiced Jones's case, but rather whether it "persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted). We conclude that the video evidence did not persuade by illegitimate means. Instead, it showed that Jones had access to and knowledge of how to use .45-caliber firearms and ammunition, the same type of firearm and ammunition used by the shooter. This evidence also corroborated the testimony of Courtney, an accomplice. We see no abuse of discretion based on this record. Therefore, we do not consider whether any error in the admission of the video evidence was harmless.

IV. The district court did not err in sentencing Jones.

Jones argues that the district court imposed two sentences for one behavioral incident, in violation of Minn. Stat. § 609.035 (2016). The state argues, and Jones agreed

at oral argument, that this issue is governed by the supreme court’s recent decision in *State v. Branch*, 942 N.W.2d 711 (Minn. 2020), which was published the day after Jones submitted his brief. We review Jones’s sentence de novo. *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012).

“[I]f a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses” Minn. Stat. § 609.035, subd. 1. In *State v. Ferguson*, the supreme court concluded that section 609.035 does not prohibit multiple sentences for a drive-by shooting when the same conduct also constitutes assault. 808 N.W.2d at 592. The court reasoned, “for purposes of the rule that a district court may not sentence a defendant for more than one crime for each victim, a single count of drive-by shooting at an occupied building does not constitute a crime against each building occupant.” *Id.* at 591. The supreme court held that multiple sentences were warranted because of the multiple victims in the drive-by shooting. *Id.*

In *Branch*, the supreme court affirmed two sentences, one for drive-by shooting and one for assault, from a single behavioral incident when the defendant fired a single shot toward an occupied vehicle. 942 N.W.2d at 712. The supreme court reasoned “[t]he sentences comply with our holding in *Ferguson* that a single count of drive-by shooting is effectively a victimless crime: Branch received one sentence for his victimless conduct, plus one sentence for his offense against a victim [.]” *Id.* at 715.

Here, too, Jones received one sentence for the drive-by-shooting count, and one sentence for the more serious of his two assault counts. This court “is bound by supreme court precedent” *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review*

denied (Minn. Sept. 21, 2010). We therefore determine that Jones's two sentences for the same behavioral incident are controlled by *Branch*, and do not violate section 609.035.

Affirmed.