

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1596**

State of Minnesota,
Respondent,

vs.

James Robert Hess,
Appellant.

**Filed December 23, 2024
Affirmed
Reyes, Judge**

Aitkin County District Court
File No. 01-CR-22-431

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Jim Ratz, Aitkin County Attorney, Aitkin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Reyes, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant challenges his conviction of second-degree murder, arguing that the district court erred by (1) not sua sponte giving a cautionary instruction either after the admission of *Spreigl* evidence or in the final jury instructions and (2) instructing the jury

that appellant had a duty to retreat. Appellant also argues that he received ineffective assistance of counsel. We affirm.

FACTS

Respondent State of Minnesota charged appellant James Robert Hess with murder in the second-degree in violation of Minnesota Statutes section 609.19, subdivision 1.(1) (2020). The charge followed an extensive investigation that led law-enforcement officers to consider appellant as a suspect after they found appellant's brother, William "Billy" Hess (Billy), dead inside of Billy's homemade camper located in the woods.

On May 12, 2022, officers received a report of a decomposing body in a homemade camper in the woods. One officer knew the male believed to reside in the camper from previous encounters as Billy. Appellant and Billy had lived on their mother's property in Aitkin County, Minnesota. Appellant had lived in his mother's home, while Billy had lived in his camper which was parked in her driveway.

While looking through an exterior window into the camper, officers saw a deceased male, fully clothed, on the floor of the camper. The male's head and jaw had severely decomposed. The officers did not find a weapon or any other items that would indicate the male had committed suicide. The medical examiner identified the deceased male as Billy and determined his cause of death to be a single gunshot wound to the head, concluding that a bullet had entered through Billy's eye.

During the investigation into Billy's death, officers interviewed appellant, who told officers that he did not know where Billy was, that he believed Billy had stolen his gun, and that he was happy Billy was "gone."

Later, officers met with D.H., who had known appellant and Billy for 30 years. D.H. showed officers a series of text messages appellant had sent him in October 2021 that referenced him wanting to kill Billy. The texts from appellant to D.H. stated in part:

I'm gonna end this once and for all, one way or another. . . .
This gonna end real soon if I have to hunt him down, I will. He
has lost his s--t and apparently trying to make me kill him

If I don't show up Monday, I might have to sit a little time just
so you know buddy, this is ridiculous He's got every
doorknob on the place loose and f----d up. F----r is just stupid
and trying to commit suicide at my expense I need him to
cross a threshold while I'm here to have it done right.

Investigators then met with appellant's friend D.N., who told the officers that appellant and Billy did not get along. D.N. told the officers about an incident during which he saw appellant back Billy out of their mother's garage with a gun. D.N. also told officers about another incident at which appellant shot at Billy with a firearm, which resulted in a bullet hole in Billy's jacket.

While executing a search warrant of appellant's home, officers interviewed appellant a second time. This time, appellant provided a different account of his last interaction with Billy. Appellant told the officers that Billy had aimed his bow and arrow at him, which led appellant to pull his gun and fire a single shot at Billy as he was walking away to get into his camper. Appellant then put Billy in the camper, secured the camper door from the outside, hooked the camper up to his vehicle, and pulled it into the woods. Appellant also told the officers that he picked up the casing from the fired round and hid the gun in his mother's garage; he then showed them where to find the gun.

Prior to trial, the state moved to admit under rule Minn. R. Evid. 404(b) the two prior bad acts when officers had learned from D.N. that involved appellant either threatening to shoot, or shooting, a firearm at Billy. *See State v. Spreigl*, 139 N.W.2d 167 (1965). The district court granted the motion. Appellant did not request that a cautionary instruction be given to the jury.

At appellant's jury trial, the state presented testimony from a series of witnesses, including a DNA forensic scientist who testified that appellant's DNA could not be excluded as the source of DNA on the grip of the gun and the slide of the gun as well as an officer who conducted two separate interviews with appellant during the investigation of Billy's murder. On direct examination, appellant testified that he and Billy had a bad relationship, and that Billy regularly threatened him, their mother, and appellant's girlfriend. Appellant also testified that he shot Billy because Billy pointed a bow and arrow at him and he felt like he was going to die, so he drew his pistol out of his back pocket and fired a shot at Billy. Additionally, appellant testified about two prior incidents in which he alleged Billy tried to stab him with a knife and appellant backed Billy off their mother's property with a gun.

On cross-examination, appellant admitted to lying to police when he first told them that he did not know what happened to the gun and when he later told them that he threw the gun in the lake. Appellant eventually admitted to the officers that he had the gun. Appellant said he did not know if he shot Billy or if Billy was dead. Appellant also admitted that he never reported his confrontation with Billy to the police or his shooting of Billy, which he claimed he did in self-defense.

During its closing argument, the state said, “ This isn’t even the first time [appellant] shot at him. Right? We know that from [D.N.’s] testimony. We know that [appellant] shot at him, shot through his jacket. . . . He came back a few years later and made sure the job got done.” The state also referenced D.N.’s testimony that appellant backed Billy out of the garage with a gun.

In his closing, appellant’s trial counsel challenged the state’s discussion of the evidence presented and discussed how appellant feared for his life because Billy tried to kill or injure appellant in the past. Appellant’s counsel further stated, “ [appellant] talked about a low rent apartment where he had to back [Billy] out. . . . He had to do that to make sure he doesn’t get killed.” Appellant’s counsel also argued that appellant was “trying to retreat and [sic] get killed or do what any rational human being would do.”

At the end of the trial, the district court also instructed the jury on the self-defense instruction, stating in part that “the [d]efendant has a duty to retreat or avoid the danger if reasonably possible.” Appellant objected and argued that he did not have a duty to retreat because he was on the driveway, which was curtilage of his home. The district court rejected appellant’s argument, noting appellant’s testimony that he shot Billy outside and instructed the jury that appellant had a duty to retreat. Finally, appellant never asked the district court to provide a cautionary jury instruction regarding the *Spriegl* evidence.

The jury found appellant guilty of second-degree intentional murder. The district court sentenced appellant to 450 months in prison. This appeal follows.

DECISION

I. The district court’s decision not to issue a cautionary instruction or provide a jury instruction sua sponte regarding the admission of *Spriegl* evidence is not plain error.

Appellant argues that the district court should have given a cautionary jury instruction on its own, despite appellant’s failure to request one. We are not persuaded.

“The purpose of a cautionary instruction is to ensure that the jury uses the other-crimes evidence solely for the permissible purpose and not to convict the defendant due to the prior bad acts.” *State v. Meldrum*, 724 N.W.2d 15, 21 (Minn. App. 2006), *rev. denied* (Minn. Jan. 24, 2007). While a district court should generally provide an instruction sua sponte to ensure that the prior bad-acts evidence is not used for an improper purpose, the failure to provide one absent a request is not reversible error. *State v. Frisinger*, 484 N.W.2d 27, 31 (Minn. 1992). “[A]n appellate court will not consider an alleged error in jury instructions unless the instructions have been objected to at trial.” *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). “Failure to request specific jury instructions or to object to instructions given generally results in forfeiture of the issue on appeal.” *State v. Goodloe*, 718 N.W.2d 413, 422 (Minn. 2006). “But we have discretion to consider a district court’s failure to give a jury instruction if the failure constitutes plain error affecting substantial rights.” *Id.*; *see also* Minn. R. Crim. P. 31.02.

Under the plain-error test, an appellant must show (1) an error, (2) that is plain, and (3) that the error affects appellant’s substantial rights. *State v. Matthews*, 779 N.W.2d 543, 548-49 (Minn. 2010). “An error is plain if it was ‘clear’ or ‘obvious.’” *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quoting *U.S. v. Olano*, 507 U.S. 725, 734 (1993)). An

error affects a defendant's substantial rights if it was prejudicial and affected the outcome of the case. *State v. Griller*, 583 N.W.2d, 736, 741 (Minn. 1998). Among the factors to consider include whether the state presented overwhelming evidence of guilt. *See State v. Peltier*, 874 N.W.2d 792, 800 (Minn. 2016). Other factors to consider 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 closing argument, and (4) whether the defense effectively countered the evidence.” *State v. Bigbear*, 10 N.W.3d 48, 54 (Minn. 2024) (quoting *State v. Smith*, 940 N.W.2d 497, 505 (Minn. 2020). [A] new trial is required only if the error “substantially influenced the jury’s verdict.” *State v. Expose*, 872 N.W.2d 252, 260 (Minn. 2015).

The supreme court has stated that district courts are hesitant to give a cautionary instruction sua sponte “because [it] may draw additional attention to potentially prejudicial issues” and because “a defendant may choose not to request an instruction for strategic reasons.” *State v. Vance*, 714 N.W.2d 428, 442-43 (Minn. 2006) (holding that it is not ordinarily plain error for district court to fail to give cautionary instruction sua sponte).

Based on the supreme court’s guidance in *Bigbear*, we consider the four nonexclusive factors to determine whether the district court’s admission of the *Spreigl* incidents substantially influenced the jury’s decision.

First, the state presented the *Spreigl* evidence through the testimony of appellant’s friend, D.N. But appellant also testified about “several incidents” between him and Billy during which appellant “backed [Billy] off and removed him from the property with a gun” because Billy tried to stab him on another occasion. Moreover, out of appellant’s trial

record of over 900 pages, the testimony about the *Spreigl* incidents from D.N. amounted to one-and-a-half pages.

Second, the *Spreigl* evidence was not highly persuasive of appellant's intent to kill victim. Rather, the *Spreigl* evidence provided insight and context to the nature of appellant's relationship with this brother. Specifically, the *Spreigl* evidence suggested that Billy had an ongoing pattern of violent behavior toward appellant.

Third, while the state referenced the *Spreigl* evidence regarding circumstantial evidence of appellant's intent to kill Billy during its closing argument, it amounted to less than half of one page. In contrast, the state's discussion about the direct evidence of appellant's intent to kill Billy comprised more than ten pages. Finally, the state did not reference the *Spreigl* incidents during its rebuttal.

Fourth, during his closing argument, appellant's counsel stated that "he had to back [Billy] out . . . to make sure he doesn't get killed." Appellant further argued that "It's not his first attempt at, you know, [Billy] tried to kill his brother or injure him" and that "he had to do what he had to do to get him to back off." Appellant not only effectively countered the *Spreigl* evidence throughout the trial, but the *Spreigl* evidence served an integral role in his self-defense claim that he feared for his life. Had the district court issued a cautionary instruction sua sponte, it could have hindered appellant's self-defense claim. We therefore discern no error by the district court.

Based on this record, we are not convinced that the testimony of the *Spreigl* incidents affected appellant's substantial rights and impacted the outcome of the case. The state presented additional evidence of appellant's intent and consciousness of guilt,

including his eventual admission to the officers that he shot and killed Billy and drove him in his camper into the woods. Appellant testified that he was happy his brother was “gone” from the property. The state additionally presented evidence about appellant’s inculpatory statements, including the text messages appellant sent to D.H., in which he mentioned wanting to kill Billy and having to go to prison for it. The admission of the *Spreigl* incidents had a minimal impact, if any, on the outcome of the case. We conclude that the district court did not commit plain error by not issuing any cautionary instructions.

II. The district court did not err by instructing the jury that appellant had a duty to retreat if reasonably possible.

Appellant appears to ask us to extend “the castle doctrine” to include the driveway of the residence where appellant resided and therefore conclude that the district court erred when it instructed the jury that appellant had a duty to retreat if reasonable. We decline the invitation to do so here.

A person may act in self-defense if they reasonably believe that force is necessary and use only the level of force reasonably necessary to prevent the bodily harm feared. *State v. Glowacki*, 630 N.W.2d 392, 399 (Minn. 2001). “The elements of self-defense are (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant’s actual and honest belief that [they were] in imminent danger of death or great bodily harm; (3) the defendant’s belief is reasonable; and (4) the defendant does not have reasonable possibility to retreat to avoid the danger.” *State v. Basting*, 572 N.W.2d 281, 285 (Minn. 1997). Under the “castle doctrine,” a person need not retreat from their home before acting in self-defense. *State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014) [T]he

castle doctrine extends to “a house, an apartment or part of a structure where defendant lives and where others are ordinarily excluded—the antithesis of which is routine access to or use of an area by strangers.” *Devens*, 852 N.W.2d 255 at 259 (citing *People v. Aiken*, 4 N.Y.3d 324, 795 (2005)). A principal consideration of whether a particular location is a part of the defendant’s dwelling when self-defense has been raised is the extent to which the defendant . . . “exercises exclusive possession and control of the area in question.” *Id.* If a person is outside their home and can safely retreat, then the person’s use of force is unreasonable as a matter of law. *Glowacki*, 630 N.W.2d at 399-400.

Whether the duty to retreat applies is a question of law that appellate courts review de novo. *Devens*, 852 N.W.2d at 257. Though appellate courts afford district courts “significant discretion” in crafting jury instructions, a jury instruction is erroneous if it materially misstates the law. *Id.* “[I]n all situations in which a party claims self-defense, even absent a duty to retreat, the key inquiry will still be into the reasonableness of the use of force and the level of force under the specific circumstances of each case.” *Glowacki*, 630 N.W.2d at 402.

To advance his argument that the castle doctrine extends to the driveway, appellant cites a series of cases, including *Beard v. United States*, 158 U.S. 550 (1895), in which the Supreme Court found that the jury had been improperly instructed that the defendant had a duty to retreat when a fight occurred 50-60 yards from his home. *Id.* at 522, 559-60. Appellant also cites *State v. Penkaty*, 708 N.W.2d 185, 207 (Minn. 2006) (concluding that front deck was part of Penkaty’s dwelling in defense-of-dwelling claim); *State v. Gardner*, 104 N.W. 971, 972, 976 (Minn. 1905) (concluding that individual does not have duty to

retreat when threatened with imminent harm); *Devens*, 852 N.W.2d at 257 (declining to extend castle doctrine to hallway of apartment building); and *State v. McCuiston*, 514 N.W.2d 802, 804 (Minn. 1994) (concluding district court erred by excluding statutory language for self-defense instruction when defendant requested jury instruction that combined defense-of-dwelling language from statute and jury instruction with conditions for self-defense).

Here, unlike in *Penkaty* or *McCuiston*, there is no defense-of-dwelling claim. Nor is there any dispute that appellant was outside the home at the time he shot Billy and not on a structure attached to the home. And in *Devens*, the supreme court concluded that the castle doctrine did not extend to the hallway of Devens's apartment complex because he did not have exclusive possession or control of the apartment hallway. *Devens*, 852 N.W.2d at 259. That same analysis leads to the same conclusion here. Appellant did not have exclusive possession or control of the driveway at his mother's home, nor was he inside of the home when he shot Billy. Moreover, a driveway is an area in which others have routine access or use. *Id.* Therefore, appellant had a duty to retreat.

Indeed, none of the cases cited by appellant contain any discussion of the supreme court's expansion of the castle doctrine to include the driveway. While we acknowledge the Supreme Court's decision in *Beard*, the castle doctrine is a matter of state law and is therefore subject to state law. As the United States Supreme Court stated, "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its

Legislature in a statute *or by its highest court in a decision* is not a matter of federal concern. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added).

Appellant also argues that this court’s nonprecedential decisions in *State v. Johnson*, No. A20-0321, 2021 WL 1167039, at *5 (Minn. App. 2021), *rev. denied* (Minn. June 29, 2021) (declining to extend castle doctrine to Johnson’s driveway), and *State v. Mayo*, No. A15-0511, 2016 WL 952501, at *4 (Minn. App. 2016), *rev. denied* (Minn. May, 31, 2016) (declining to extend castle doctrine to front yard), were incorrectly decided. However, the incidents in *Mayo* and *Johnson*, like the incident here, occurred in places outside of the physical structure in which they lived and in an area that was not under the exclusive possession and control of the defendant. But appellant points to no legal authority in which the supreme court has expanded the castle doctrine to include the driveway. And as an error-correcting court, we must “apply the best law available to us.” *State v. Kelley*, 832 N.W.2d 447, 456 (Minn. App. 2013), *aff’d*, 855 N.W.2d 269 (Minn. 2014).

Because the Minnesota Supreme Court has not expanded the castle doctrine to include the driveway of a residence and because we are bound by supreme court precedent, we cannot do so here. We conclude that the district court did not err when it instructed the jury that appellant had a duty to retreat if reasonably possible.

III. Appellant did not receive ineffective assistance of counsel.

In a supplemental brief, appellant contends that he received ineffective assistance of counsel during his trial. We are not convinced.

Appellate courts review claims of ineffective assistance of counsel de novo because they involve mixed questions of fact and law. *Dobbins v. State*, 788 N.W.2d 719, 728

(Minn. 2010). To prove ineffective assistance of counsel, appellant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See Lussier v. State*, 853 N.W.2d 149, 154 (Minn. 2014). There is "a strong presumption that a counsel's performance falls within the wide range of 'reasonable professional assistance.'" *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Finally, we generally do not review ineffective-assistance-of-counsel claims based on trial strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004).

Appellant's ineffective-assistance-of-counsel claim is based largely on his trial counsel's decision not to call certain witnesses at trial. Appellant's speculations about what the witnesses might have testified to do not establish that his trial counsel's performance fell below an objective standard of reasonableness. Moreover, appellant's trial counsel's decision not to present certain witnesses during trial is trial strategy, which this court generally does not review. Appellant further contends that two of the state's witnesses who testified about the *Spreigl* incidents provided false testimony to receive lighter sentences because they had drug charges pending. But witness credibility determinations are made exclusively by the factfinder, *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006), and are not reflective of an attorney's performance. Moreover, considering the substantial evidence of appellant's guilt that the state presented at trial, there is no reasonable probability that the outcome of the trial would have been any different if the witnesses had testified.

In sum, appellant has not established that his trial counsel's performance fell below an objective standard of reasonableness or that, but for his trial counsel's alleged deficient performance, the outcome of the trial would have been different. Appellant's claim of ineffective assistance of counsel fails.

Affirmed.