

*This opinion is nonprecedential except as provided by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
A24-1952**

State of Minnesota,
Respondent,

vs.

Raymond Mark Derby,
Appellant.

**Filed September 2, 2025
Affirmed in part, reversed in part, and remanded
Frisch, Chief Judge**

Pipestone County District Court
File No. 59-CR-22-202

Keith Ellison, Attorney General, Lisa Lodin, Assistant Attorney General, St. Paul, Minnesota; and

Damain Sandy, Pipestone County Attorney, Pipestone, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Frisch, Chief Judge; and Jesson, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

FRISCH, Chief Judge

In this direct appeal from his convictions for criminal vehicular homicide, driving after cancelation, careless driving, and fourth-degree driving while impaired (DWI), appellant argues that the district court abused its discretion by permitting the state to introduce a prejudicial photo of the victim and an impermissible opinion from an expert witness during trial. He contends that the cumulative effect of these two errors warrants a new trial. Appellant also argues that he was improperly convicted of and sentenced for two lesser-included offenses and that his gross misdemeanor sentence must be corrected. We affirm in part because, even assuming the district court abused its discretion in its admission of such evidence, appellant has not shown that he was deprived of a fair trial. But we reverse and remand for resentencing.

FACTS

Respondent State of Minnesota charged appellant Raymond Mark Derby with five counts: criminal vehicular homicide—driving in a negligent manner under the influence of alcohol pursuant to Minn. Stat. § 609.2112, subd. 1(a)(2)(i) (2022); criminal vehicular homicide—driving in a grossly negligent manner pursuant to Minn. Stat. § 609.2112, subd. 1(a)(1) (2022); driving after cancelation inimical to public safety (IPS) pursuant to Minn. Stat. § 171.24, subd. 5 (2022); fourth-degree DWI pursuant to Minn. Stat. § 169A.20, subd. 1(1) (2022); and careless driving pursuant to Minn. Stat. § 169.13, subd. 2(a) (2022). The facts below were elicited during Derby’s jury trial.

On May 17, 2022, around 8:30 p.m., Derby and his girlfriend A.H. were driving home from a casino. Derby was driving his truck, and A.H. was in the passenger seat. While traveling at around 60 miles per hour, the truck drifted off the highway. The truck traveled “along the side of the shoulder and the grass” before “curv[ing] back up on the road.” As the truck started going toward the road, “it trip[ped] and roll[ed].” A.H. was ejected from the truck. Police officers and EMS arrived at the crash scene. A.H. was pronounced dead at the scene. Derby was standing near the truck and told an officer that A.H. had “pulled the wheel” while Derby was driving “causing the accident.” This officer did not notice any signs of impairment.

Another officer who later arrived at the scene noted that Derby’s speech “appeared slurred and slow,” and that he had “red bloodshot eyes.” This officer “could smell an odor of an alcoholic beverage” on Derby’s breath. Based on these observations, the officer applied for a search warrant of Derby’s blood, which was later issued. Derby was transported to the hospital. A blood sample was taken at 10:25 p.m. and sent to the Minnesota Bureau of Criminal Apprehension (BCA) for analysis. The sample reflected an alcohol concentration of 0.062. A forensic scientist performed a “retrograde extrapolation,” estimating that, given the alcohol concentration in the sample and a timeline of events after the crash, Derby’s alcohol concentration was between 0.07 to 0.10 at the time of the crash.

During a pretrial hearing, Derby’s counsel objected to the admission of a photograph of A.H. taken at the crash scene. Derby argued that the photo is “meant to inflame the jury to get them even madder” at him and that there is “no dispute here that [A.H.] was dead on

the road.” Derby also noted that the state could have used photos of A.H. on the ground “covered up” but the state instead chose a “more prejudicial” photo depicting “[A.H.] lying on the ground with her shirt pulled up, exposing her bra and her bare mid-section.” The district court overruled the objection.

During Derby’s jury trial, the state offered testimony from responding police officers, a police officer trained in advanced crash reconstruction, the medical provider who drew Derby’s blood sample, and the BCA forensic scientist. During the crash-reconstruction officer’s testimony, the state asked the officer if they recalled “what [Derby’s] driver’s license status was” at the time of the crash. The officer testified that Derby’s license was “canceled IPS” and—over Derby’s objection—opined that this status was a factor that contributed to the crash.

Derby testified in his defense and recounted that the car crash was caused by A.H., who was hitting Derby and grabbed the steering wheel at the time of the crash. Derby testified that A.H. was “irate” about losing money gambling and was intoxicated when the couple left the casino.

The jury found Derby guilty of criminal vehicular homicide—driving under the influence of alcohol, driving after cancelation, DWI, and careless driving. The jury found Derby not guilty of criminal vehicular homicide—driving in a grossly negligent manner. The district court entered convictions for the four guilty verdicts and sentenced Derby to 48 months’ commitment for criminal vehicular homicide. The district court also sentenced Derby to concurrent sentences for the other three convictions, including 365 days for driving after cancelation.

Derby appeals.

DECISION

I. The cumulative effect of any evidentiary errors did not deny Derby a fair trial.

Derby argues that the district court abused its discretion in its evidentiary rulings during trial because it allowed impermissible opinion testimony and admitted a prejudicial photo of A.H. He argues that the cumulative effect of these errors warrants a new trial.

“An appellant may be entitled to a new trial in rare cases where the errors, when taken cumulatively, have the effect of denying the appellant a fair trial.” *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017) (quotation omitted). In considering a claim of cumulative error we “look to the egregiousness of the errors and the strength of the State’s case.” *Id.* “Where the evidence of guilt is strong, and the case is not close factually, we are less inclined to order a new trial for cumulative error.” *State v. Williams*, 908 N.W.2d 362, 366 (Minn. 2018) (quotation omitted). We assume without deciding that the district court’s evidentiary rulings were erroneous and turn our attention to “strength of the State’s case.” *Fraga*, 898 N.W.2d at 278.

To prove criminal vehicular homicide—under the influence of alcohol, the state was required to prove beyond a reasonable doubt that (1) Derby caused the death of A.H., (2) “as a result of operating a motor vehicle,” (3) in a negligent manner, (4) while under the influence of alcohol. Minn. Stat. § 609.2112, subd. 1(a)(2)(i). Derby did not allege that A.H.’s death was caused by anything other than the crash, and he did not deny that he was driving the truck at the time of her death. And the state presented strong evidence as to the remaining elements of the offense. The officer who reconstructed the crash opined

that the truck gradually veered off the road, that the “driver failed to negotiate the curve and went off the road . . . and then at some point . . . steered back onto the road and that’s when the [truck] tripped and began to roll,” and that “distraction” or “impairment” was typical in these kinds of situations. The state also offered strong evidence that Derby was under the influence of alcohol based on his 0.062 alcohol concentration from a sample taken several hours after the crash and the expert’s extrapolation indicating that Derby’s alcohol concentration was between 0.07 and 0.10 at the time of the crash.

We cannot conclude that, even assuming the district court abused its discretion in admitting the challenged evidence, the admission of the photo and the opinion about Derby’s license status affected the jury’s verdict. The state’s case was strong and was not factually close. *See Fraga*, 898 N.W.2d at 278-79. We note that Derby does not assert that either of the asserted evidentiary errors individually entitles him to relief or explain how these alleged errors taken together impacted his right to a fair trial. We conclude that the admission of a single crime scene photograph and limited testimony about Derby’s driving status, when taken together, were not egregious and did not “tip the scales” toward producing an unfair result. *See id.* Because Derby has not shown cumulative error that affected his right to a fair trial, he is not entitled to a new trial. *Id.*

II. Derby is entitled to resentencing to correct sentencing errors.

Derby argues, and the state concedes, that the district court erred by (1) entering convictions for two lesser-included offenses and (2) sentencing him to 365 days for a gross misdemeanor. We agree.

First, the district court impermissibly convicted Derby of two lesser-included offenses. A defendant “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2022). A lesser-included offense includes “a crime necessarily proved if the [greater offense] were proved.” *Id.*, subd. 1(4). And a crime is necessarily proved “if it is impossible to commit the greater offense without committing the lesser offense.” *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006).

The jury found Derby guilty of criminal vehicular homicide—driving under the influence of alcohol, driving after cancelation, fourth-degree DWI, and careless driving. We agree that the latter two charges are included offenses in his criminal-vehicular-homicide offense. The state was required to prove that Derby negligently operated a vehicle while under the influence of alcohol for the criminal-vehicular-homicide offense, which necessarily proved that Derby was driving while under the influence of alcohol and was operating a vehicle in a manner that endangered others. *See* Minn. Stat. §§ 169A.20, subd. 1(1) (DWI), 169.13, subd. 2(a) (careless driving).

Second, the district court sentenced Derby to 365 days for gross-misdemeanor driving after cancelation. The district court erred because the maximum sentence authorized by law for a gross misdemeanor is 364 days. Minn. Stat. § 609.0342(a) (2024).

We therefore remand to the district court for resentencing. On remand, the district court must vacate Derby’s convictions and sentences for DWI and careless driving while leaving the jury’s guilty verdicts in place, and correct Derby’s gross-misdemeanor sentence. *See State v. Woods*, 961 N.W.2d 238, 248 (Minn. 2021).

III. Derby's arguments in his pro se supplemental brief are waived.

Derby asserts in a pro se supplemental brief that the district court violated his civil and constitutional rights including by being biased and discriminating against him.

A pro se appellant's assertions are waived if they "contain[] no argument or citation to legal authorities" to support the arguments. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002). Such arguments are waived and need not be considered on appeal "unless prejudicial error is obvious on mere inspection." *Id.* at 719-20 (quotation omitted). And factual assertions must also be supported by citation to the record. *Hecker v. Hecker*, 543 N.W.2d 678, 681 n.2 (Minn. App. 1996), *aff'd*, 568 N.W.2d 705 (Minn. 1997); *see State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (refusing to consider portions of a pro se brief that contained only argument and that was unsupported by the facts in the record). Derby's brief contains neither citations to the record nor legal authority, nor specific allegations of improper behavior by the district court. Thus, his assertions are waived. And because we discern no obvious prejudicial error following our careful inspection of the record, we do not consider these arguments. *Krosch*, 642 N.W.2d at 719-20 (quotation omitted).

Affirmed in part, reversed in part, and remanded.