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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-855**

State of Minnesota,
Respondent,

vs.

Glen Edward Underdahl,
Appellant.

**Filed July 28, 2009
Affirmed
Ross, Judge**

Polk County District Court
File No. 60-KX-04-001342

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Glen Underdahl appeals his conviction of felon in possession of a firearm. He argues that the district court abused its discretion by admitting *Spreigl*, rebuttal, and consciousness-of-guilt evidence; by preventing him from cross-examining a witness about the dismissal of criminal charges that had been filed against the witness; and by refusing to give an accomplice instruction to the jury. Because the district court did not abuse its discretion in its evidentiary rulings or by limiting Underdahl's cross-examination and because the accomplice instruction was unnecessary, we affirm.

FACTS

This case arises from an ill-advised decision to do a burglar a favor. In early 2004, Joshua Bouvette committed a rash of burglaries across Polk and Norman counties. Glen Underdahl was Bouvette's long-time friend. Bouvette stole a rifle during one of his burglaries, and because he suspected that police were investigating him, Bouvette asked Underdahl to hold the rifle for him. But because Underdahl had been convicted of a crime of violence in 1991, he was prohibited from possessing a firearm. Underdahl nevertheless granted Bouvette's request.

The police-evading favor was apparently only a one-way proposition. When Bouvette eventually confessed his crimes to police, he told them that Underdahl had the rifle. Bouvette wanted to retrieve the stolen rifle from Underdahl and surrender it to police to reduce his total restitution costs. So Bouvette got a ride from another friend, Jeremy Benson, to Underdahl's property to collect the rifle. Bouvette left Benson in the

truck and spoke to Underdahl, who directed Bouvette to the rifle about 15 yards away in a ditch. Benson never left the truck or heard what Bouvette and Underdahl were saying to each other. Bouvette retrieved the rifle and returned to Benson's truck, and the two left.

Despite Bouvette's disclosure, the police did not seek to arrest Underdahl until later, after they received reports from his family about other incidents involving weapons in August and September 2004. Underdahl fled. He was arrested in Moorhead for an unrelated offense in September 2004, but he gave police a false name and birth date. The state initially charged him with three counts of felon in possession of a firearm. Minn. Stat. § 624.713, subd. 1 (2004). The state later amended the charges to add two counts of felony possession of a stolen firearm and one count of felony theft of a firearm. Minn. Stat. §§ 609.52, subds. 2(1), 3(1), .53, subd. 1 (2004). Underdahl successfully severed the theft-related charges from the original felon-in-possession charges, for separate trials.

At trial for the spring 2004 incident, the district court admitted evidence regarding Underdahl's weapons possession occurring in late summer 2004 and evidence of Underdahl's flight. Underdahl testified that he had not possessed a firearm since 1991. The prosecutor presented rebuttal evidence that Underdahl did possess firearms after 1991. The district court prevented Underdahl from questioning Bouvette about the number of charges that the state filed against Bouvette, but it allowed him to cross-examine Bouvette about his plea agreement and his convictions.

Underdahl sought an accomplice instruction. The district court gave the accomplice instruction for the count of possession of a stolen firearm but did not give the

instruction for the count of felon in possession of a firearm. The jury convicted Underdahl on the count of felon in possession of a firearm but acquitted him of possession of a stolen firearm. The district court sentenced Underdahl to 60 months in prison. Underdahl appeals his conviction.

DECISION

I

Underdahl argues that the district court abused its discretion by admitting three types of evidence: *Spreigl* evidence, consciousness-of-guilt evidence, and rebuttal evidence. We will not reverse evidentiary rulings absent an abuse of the district court's discretion. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). Underdahl bears the burden to prove that the evidentiary ruling was erroneous and that the error prejudiced the outcome. *Id.*

Spreigl Evidence

Underdahl challenges the district court's admission of evidence of his August 2004 possession of firearms. Evidence of other crimes or bad acts, commonly known as *Spreigl* evidence, is inadmissible to prove that a defendant acted in conformity with his character. Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). But *Spreigl* evidence may be admissible to prove other things, such as motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. Minn. R. Evid. 404(b); *Spreigl*, 272 Minn. at 491, 139 N.W.2d at 169.

The district court has broad discretion to determine the admissibility of *Spreigl* evidence. *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988). And we review the district court's admission of *Spreigl* evidence for an abuse of discretion. *Id.* To prevail on his challenge, Underdahl must establish that the district court erred when it admitted the evidence and show that actual prejudice resulted from that error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981). Before admitting *Spreigl* evidence, the district court must determine that (1) the state gave notice of its intent to admit the evidence; (2) the state clearly indicated what the evidence offered would prove; (3) there is clear and convincing evidence that the defendant participated in the prior act; (4) the evidence is relevant and material to the state's case; and (5) the evidence's potential to prejudice the defendant does not outweigh its probative value. *Angus v. State*, 695 N.W.2d 109, 119 (Minn. 2005). *Spreigl* evidence is relevant and material if it is similar to the charged offense "in time, location, or modus operandi." *State v. DeWald*, 464 N.W.2d 500, 503 (Minn. 1991). If the evidence goes toward a common scheme or plan, then it must have "a marked similarity in modus operandi to the charged offense." *State v. Rucker*, 752 N.W.2d 538, 549 (Minn. App. 2008) (quoting *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007)), review denied (Minn. Sept. 23, 2008). To be admissible, the need for similarity between the *Spreigl* conduct and the conduct of the charged offense is greater if the incidents occurred further apart in time. *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005).

The admitted *Spreigl* evidence of Underdahl's weapons possession was relevant. First, the incidents occurred closely in time. The *Spreigl* incident occurred in summer

2004, which was within five months of Underdahl's spring 2004 possession of Bouvette's stolen rifle. *See Kennedy*, 585 N.W.2d at 391 (explaining that prior incident was relevant when it occurred within six months of the charged offense). Second, the location of the possession was almost identical. Underdahl's sister saw Underdahl carry a rifle between his and his mother's property and place it just beside a wooded path on his mother's property. This incident mirrors Bouvette's testimony about the stolen rifle's location in a ditch near the corner of the woods on property belonging to Underdahl's mother. *See id.* (determining relevance when incidents occurred in same place); *Rucker*, 752 N.W.2d at 550 (discussing relevance when most incidents occurred at defendant's apartment). Finally, the modus operandi regarding the incidents was markedly similar. Underdahl attempted to prevent discovery of weapons by concealing them on his mother's property near the woods or the nearby ditch. *See Kennedy*, 585 N.W.2d at 391 (noting that modus operandi was almost identical in both incidents and affirming admission of *Spreigl* evidence); *Rucker*, 752 N.W.2d at 550 (noting that defendant abused minors of similar ages at his apartment after meeting them through social groups). The August 2004 incident was relevant to Underdahl's current charges.

Relevant *Spreigl* evidence can be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403; *State v. Ness*, 707 N.W.2d 676, 690 (Minn. 2006). But here the potential prejudice of the *Spreigl* evidence did not substantially outweigh its probative value. The district court agreed to admit only two *Spreigl* incidents, and the state presented only one of them to the jury. *See Washington*, 693 N.W.2d at 203 (reasoning that district court's limitation of number

of *Spreigl* incidents guarded against possible prejudicial effects); *Rucker*, 752 N.W.2d at 550 (affirming admission of evidence after the district court limited state to elicit certain facts and parties stipulated to *Spreigl* incident to avoid prejudice). The district court balanced the probative value against any prejudicial effect. It noted that the state had no direct evidence besides Bouvette's testimony about Underdahl's possession of the rifle. The state's need to prove common scheme or plan and the incident's marked similarity made the probative value substantial. See *DeWald*, 464 N.W.2d at 504 (affirming admission of *Spreigl* evidence where state had only knife and fingerprint as evidence). The district court issued a cautionary jury instruction concerning the *Spreigl* evidence. Cautionary instructions help to avoid unfair prejudice. See *State v. Courtney*, 696 N.W.2d 73, 84 (Minn. 2005) (affirming *Spreigl* evidence after jury received instruction on use of the evidence); *Kennedy*, 585 N.W.2d at 392–93 (affirming district court's admission of *Spreigl* evidence after jury received cautionary instructions).

Because the *Spreigl* evidence was relevant to Underdahl's modus operandi and because the evidence's probative value outweighed the potential prejudicial effect, the district court did not abuse its discretion by admitting the evidence of Underdahl's prior gun possession.

Consciousness-of-Guilt Evidence

Underdahl next contends that the district court abused its discretion by admitting evidence related to Underdahl's prearrest flight from his home. The district court allowed the evidence of the flight and false identification to law enforcement to show

consciousness of guilt. Underdahl maintains that the flight was irrelevant because he had other reasons to flee.

Juries may consider evidence of flight that occurs before a defendant's arrest because it suggests consciousness of guilt. *State v. McTague*, 190 Minn. 449, 453–54, 252 N.W. 446, 448 (1934). Evidence regarding concealment or use of a false name is also admissible to show consciousness of guilt. *Id.* Other motivations for flight do not make the evidence inadmissible; rather, they present alternative theories for the jury's consideration. *State v. Hagen*, 391 N.W.2d 888, 892 (Minn. App. 1986), *review denied* (Minn. Oct. 17, 1986).

The district court reasonably determined that Underdahl's flight to Moorhead and his use of a false name was relevant evidence indicating a guilty conscience. *See McTague*, 190 Minn. at 453, 252 N.W. at 448 (reasoning that “[f]light before apprehension . . . is a circumstance to be considered—not as a presumption of guilt, but as something for the jury—as suggestive of a consciousness of guilt”); *see also State v. Mosby*, 450 N.W.2d 629, 633 (Minn. App. 1990) (quoting the biblical maxim that “[t]he righteous standeth firm while the guilty fleeth”), *review denied* (Minn. Mar. 16, 1990). Underdahl's argument that he was motivated to flee out of fear of law enforcement and of being arrested for another crime may be worthy of the jury's credibility-weighting consideration, but it does not prevent admissibility. *See State v. Givens*, 356 N.W.2d 58, 64 (Minn. App. 1984) (holding that the claimed reason for defendant's flight went only to evidence's weight, not admissibility), *review denied* (Minn. Jan. 2, 1985). The jury was free to believe or disbelieve Underdahl's explanation.

Rebuttal Evidence

Underdahl also contends that the district court abused its discretion by admitting rebuttal evidence for two reasons: (1) it lacked similarity to the charged offenses and (2) without a limiting instruction, the jury may have used it improperly to evaluate his character. Rebuttal evidence may explain, contradict, or refute evidence presented by the defendant. *State v. Swanson*, 498 N.W.2d 435, 440 (Minn. 1993). Defendants should not expect to present exculpatory facts without exposing those facts to scrutiny. *State v. Brown*, 500 N.W.2d 784, 787 (Minn. 1993). And the district court has discretion to determine the scope of rebuttal evidence. *Id.* at 788.

During the trial, Underdahl attempted to portray himself as unwilling to possess firearms. He testified that he did not “allow firearms or shooting” around his home, that a 1989 incident made him “los[e his] stomach for guns,” and that he could “live without [guns].” Underdahl represented that he did not own any firearms, that he kept no “firearms around [his] residence,” that he had not possessed a firearm since 1991, and that he did not even hunt with his family. But Underdahl’s antigun veneer peeled when his sister testified during the state’s rebuttal that Underdahl had hunted with the family after 1991. She told the jury that Underdahl used a rifle and that she also saw him with a pistol around August 2004. This testimony contradicted Underdahl’s claim that he had not possessed a weapon since 1991; and this is precisely what the rebuttal stage is for.

Underdahl argues that the district court should have instructed the jury to limit the application of the rebuttal evidence. But because he did not request a limiting instruction, his tardy claim is subject to a plain-error analysis. *State v. Meyer*, 749 N.W.2d 844, 850

(Minn. App. 2008). Under the plain-error rule, we will not reverse unless (1) an error has occurred, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Underdahl cites no authority to support his argument for a sua sponte limiting instruction. If evidence is admitted for one purpose but not another, then "the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." Minn. R. Evid. 105 (emphasis added). Because rule 105 directs parties to request limiting instructions, the lack of a limiting instruction for the rebuttal evidence fails to constitute prejudicial, plain error. *See generally State v. Forsman*, 260 N.W.2d 160, 169 (Minn. 1977) (concluding that district court should sua sponte issue limiting instruction with evidence of other offenses but without request from defendant, "failure to do so [is] not reversible error").

II

Underdahl argues that the district court abused its discretion by preventing him from cross-examining Bouvette about the details of Bouvette's crime spree. A defendant has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Confrontation's main purpose "is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315–16, 94 S. Ct. 1105, 1110 (1974). The Confrontation Clause guarantees "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *State v. Dobbins*, 725 N.W.2d 492, 505 (Minn. 2006) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S. Ct. 2658, 2664 (1987)). The Confrontation Clause is violated if the defendant is denied the opportunity for cross-examination to reveal a

witness's bias and "expose to the jury the facts from which . . . it could appropriately draw inferences relating to the reliability of the witness." *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S. Ct. 1431, 1436 (1986) (quotation omitted).

The district court's limitation of Underdahl's cross-examination of Bouvette did not violate the Confrontation Clause and was not an abuse of discretion. The district court did not bar Underdahl from asking about Bouvette's plea agreement. Underdahl asked Bouvette about each of his guilty pleas, emphasized that the crimes were felonies, and implied through questioning that Bouvette may be shaping his testimony to gain favor with the state. So the groundwork for a claim of bias was laid. And there is little concern about any prejudice resulting from cutting off the inquiry because Bouvette had no apparent reason to gain favor with the state. When the trial occurred, Bouvette had already served his sentence. He also made no promises to cooperate against Underdahl in obtaining his guilty plea, did not apparently benefit from his testimony, and was under subpoena to testify.

We understand that further questioning may have continued the theme of Bouvette's purported bias. But the district court perceived that the questions about dismissal of counts was only marginally useful. The district court observed that Underdahl's questioning was "get[ting] off the beaten track" and, it was becoming cumulative because Bouvette had already testified that he was promised nothing and that testimonial cooperation was not a condition of his plea agreement. Although additional questioning may have further highlighted that Bouvette entered a plea arrangement that was favorable to him, the questioning would have prolonged the trial and the information

was essentially repetitive. The jury already had a good idea that Bouvette received a favorable plea agreement; it knew that he pleaded guilty to 13 felonies and received only a 44-month prison sentence. The district court's decision to exclude the questioning on Bouvette's dismissed counts was not an abuse of discretion.

III

Underdahl finally argues that the district court abused its discretion by refusing to give the accomplice instruction on the count of felon in possession of a firearm. A defendant may not be convicted on accomplice testimony unless that testimony is corroborated by other evidence that goes beyond merely showing the offense's commission. Minn. Stat. § 634.04 (2008). The district court must give an accomplice instruction if "any witness against the defendant might reasonably be considered an accomplice to the crime" because an accomplice's credibility is inherently suspect. *State v. Shoop*, 441 N.W.2d 475, 479 (Minn. 1989). Underdahl, however, does not establish that Bouvette was an accomplice. "A witness who is alleged to have committed the crime *instead* of the defendant is, as a matter of law, not an accomplice under section 634.04." *State v. Swanson*, 707 N.W.2d 645, 653 (Minn. 2006) (emphasis in original). At trial, if the defendant argues that the witness rather than the defendant committed the alleged crime, and the state does not seek to prove that the witness was an accomplice to the offense, the defendant's version of the facts renders the witness an alternative perpetrator, not an accomplice. *State v. Evans*, 756 N.W.2d 854, 877 (Minn. 2008).

In this case, Underdahl contended that Bouvette fabricated his testimony because his recorded statement was inconsistent with his trial testimony. Underdahl also denied

receiving from or returning a rifle to Bouvette and testified that Bouvette had been to his property on previous occasions with friends. None of the witnesses saw Bouvette giving the rifle to or retrieving it from Underdahl. According to Underdahl, Bouvette was the person who possessed the rifle, who hid the rifle between his property and his mother's property, and who retrieved the rifle. Underdahl therefore presented Bouvette as an alternative perpetrator, not an accomplice. Because Bouvette was not an accomplice, the district court had no duty to give an accomplice instruction, and the failure to give the instruction was not error. *See Swanson*, 707 N.W.2d at 653 (determining that district court did not err in refusing to give accomplice instruction when defendant's version of the facts made witness an alternative perpetrator not an accomplice).

But even if Bouvette could be characterized as an accomplice, the district court's failure to give the accomplice instruction was harmless. Accomplice or not, Bouvette offered testimony that was corroborated by the testimony of Underdahl's sister, Benson, and Polk County police. It also was corroborated by the *Spreigl* evidence demonstrating Underdahl's common scheme or plan in the manner he possessed weapons and hid them in a specific location. And although the prosecutor mentioned Bouvette's testimony in closing arguments, he largely focused on the corroborating evidence and on the evidence flatly contradicting Underdahl's testimony. These facts tend to show that even if the district court should have issued the accomplice instruction, failure to do so did not affect the jury's verdict. While an accomplice instruction might have been warranted, we are satisfied that any error in refusing to give the instruction was harmless.

Affirmed.