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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1332**

State of Minnesota,
Respondent,

vs.

Irvin Scott Cook,
Appellant.

**Filed August 13, 2012
Affirmed as modified
Schellhas, Judge**

Dakota County District Court
File No. 19HA-CR-08-3358

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Scott A. Hersey, Assistant County
Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and
Chutich, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his convictions of first-degree attempted murder, second-degree attempted murder, first-degree burglary, first-degree arson, and motor-vehicle theft, arguing that the district court (1) abused its discretion by allowing the victim's in-court identification of him; (2) abused its discretion by admitting *Spreigl* evidence of his 2005 second-degree-assault conviction; (3) abused its discretion by conducting part of the trial in his absence; (4) violated his Sixth Amendment right to a public trial by locking the courtroom during final jury instructions; and (5) abused its discretion by imposing a double-upward-durational-departure sentence for his conviction of first-degree arson, consecutive sentences for his convictions of first-degree arson and first-degree attempted murder, and a separate sentence for his conviction of motor-vehicle theft. Appellant also argues that he received ineffective assistance of trial counsel.

We vacate appellant's sentence for his conviction of motor-vehicle theft because the state did not satisfy its burden of proving that the offense did not arise from the same behavioral incident as his other offenses, but we otherwise affirm.

FACTS

In 2008, the victim in this case, P.T., lived in a Burnsville home that was part of a four-plex that shared common walls with three other homes. On the night of May 11, P.T. was asleep in bed and awoke to a banging sound. He observed a flashlight beam in his living room and investigated, finding a male intruder hiding in a bathroom. The intruder pretended to be looking for his mother and asked P.T. what he had done with his mother.

P.T. retreated to his bedroom to call the police, where a second intruder struck him on the side of his head a couple of times, causing him to bleed “quite a lot,” knocked him to the floor, and said, “You are going to die because I just stabbed you in the head.” Noticing a plaque in a bedroom, the intruders asked P.T. if his son was home or coming home and threatened that they would kill his son too.

The intruders asked P.T. to identify his most expensive possession in his home, and P.T. identified his television. The second intruder then told P.T. “that this was going to be like *Saw*, the movie.” He told P.T. that he would have to answer either A or B and, if he answered correctly, he would live, and if he answered incorrectly, he would die. When P.T. answered, “A,” the second intruder said, “Well, that’s a good letter but it’s not the right letter. So will you be able to live or do I kill you?” He then asked P.T., “Well, do you think if you die, do you think you are going to go to Heaven?” P.T. answered yes, because Jesus loved him, and the second intruder said that “he was Jesus and he didn’t die for any white people, he only died for black people.”

Next, the second intruder told the first intruder, “I did what I had to do like a man, you got to finish it, you got to kill him.” When the first intruder did nothing, the second intruder jumped on P.T.’s back and stabbed him 17 times in the back, twice in the head, and once in the cheek, soaking P.T.’s shirt in blood. The intruders then threw mouthwash and sprayed something that sounded like aerosol on P.T.’s face and lit P.T.’s bed on fire. P.T. stood up next to his bed and, by the illumination of the flames, observed the second intruder standing in the doorway, where he said, “[Y]ou are not going anywhere, you have to get back down on the floor.” P.T. obeyed. Before the intruders left, they lit seven

additional fires throughout the home and turned on the gas stove. A responding firefighter found the home filled with thick smoke and substantially damaged by the fire. The intruders had set eight fires in five different rooms and turned on all four burners on the gas stove.

After the intruders left the home in P.T.'s car, P.T. fled through the flames to a neighbor's home. He received medical care consisting of stitches in his cheek and ear and staples in his head. Doctors discovered that the tip of a knife blade had broken off in P.T.'s head but declined to remove it surgically because removing it would "probably cause more harm than good." Police recovered from P.T.'s bedroom a broken knife blade and a broken knife handle and missing tip with a piece of a shirt similar in color to P.T.'s shirt on the broken knife.

P.T. later discovered that bottles of Michael Jordan and Adidas cologne that belonged to his sons and some old coins were missing from his home. The police investigation led to Shaquen Whitfield, whose blood was on a doorknob from P.T.'s home. When police first spoke with Whitfield, he was incarcerated and denied involvement in the crime, but eventually he implicated himself and appellant Irvin Cook.

Respondent State of Minnesota charged Cook with aiding and abetting first-degree attempted murder under Minn. Stat. §§ 609.185(a)(1), 609.17, subds. 1, 4(1), and 609.05, subd. 1 (2006); aiding and abetting second-degree attempted murder under Minn. Stat. §§ 609.19, subd. 1, 609.17, subds. 1, 4(2), and 609.05, subd. 1 (2006); aiding and abetting first-degree arson under Minn. Stat. §§ 609.561, subd. 1, 609.05, subd. 1, and 609.101 (2006); aiding and abetting first-degree burglary under Minn. Stat. §§ 609.582,

subd. 1(a), and 609.101 (2006); and aiding and abetting felony theft of a motor vehicle under Minn. Stat. §§ 609.52, subds. 2(17), 3(2), and 609.101 (2006).

The jury convicted Cook of all counts. Cook moved for judgment of acquittal or a new trial, based in part on the district court proceeding with trial during Cook's absence. The court conducted an evidentiary hearing, allowing both parties to call witnesses to testify. On April 20, 2011, the court denied Cook's motions in a written order and memorandum followed by written findings of fact on May 2. Cook waived his right to have a jury determine whether aggravating factors existed for purposes of sentencing. When the court sentenced Cook, it stated, among other things, "based on the experience of this court over the last 44 years . . . [Cook's] conduct is significantly more cruel than conduct typically associated with the offense of Attempted Murder in the First Degree or Burglary of an Occupied Dwelling, Burglary in the First Degree" and this case was "one of the most extreme and egregious attempted murder cases this Court has ever encountered."

On May 3, the district court sentenced Cook to imprisonment of 240 months for first-degree attempted murder, which constituted a 12-month upward-durational departure; 114 months for first-degree arson, which constituted a double-upward-durational departure, consecutive to Cook's sentence for first-degree attempted murder; 27 months stayed for first-degree burglary; and 13 months stayed for motor-vehicle theft.

This appeal follows.

DECISION

I. In-Court Identification

Cook argues that the district court erred by denying his motion in limine to exclude P.T.'s in-court identification of him. Cook argues that the identification was "inherently unreliable and unduly prejudicial" under Minn. R. Evid. 403. He notes that P.T. initially told police that he never saw the assailant who stabbed him; in P.T.'s second statement to police, he said that Cook was black, even though Cook is an American Indian with light skin; and P.T. was not wearing his glasses during the attack and told police and the court that his vision is poor without his glasses.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Carridine*, 812 N.W.2d 130, 141 (Minn. 2012).

The United States Supreme Court recently reaffirmed in *Perry* that pretrial screenings of witness identifications are unwarranted unless "suggestive circumstances were . . . arranged by law enforcement officers," and absent such circumstances,

it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

Perry v. New Hampshire, 132 S. Ct. 716, 720–21 (2012).

Here, Cook concedes that there was no “police conduct” involved in P.T.’s identification of him but argues that Minn. R. Evid. 403 may “filter” it because it is prejudicial and risks misleading the jury. Cook cites no Minnesota case in which an appellate court has ruled that a district court abused its discretion by allowing an in-court identification of a defendant.

We conclude that the district court did not abuse its discretion by allowing P.T.’s in-court identification of Cook.

II. *Spreigl* Evidence of Cook’s Second-Degree-Assault Conviction

After conducting a careful five-step *Spreigl* analysis, the district court allowed the state to offer evidence about Cook’s 2005 second-degree-assault conviction to show identity; modus operandi, i.e., common scheme or plan; and opportunity. The state offered the evidence through four witnesses. C.B. and D.H. testified that when they were both 15 years old, Cook and Whitfield approached them and several friends in a mall parking lot and asked them for one dollar. When they did not give Cook and Whitfield a dollar, one of them struck C.B. in the eye with a gun and one of them struck D.H. between the eyes. C.B.’s injuries required “staples in the back of [his] head, [his] chin, and [his] lip.” A police officer testified to corroborate C.B.’s testimony about his injuries, describing them as “facial injuries, a split lip, swollen lip,” and a three-inch gash on the back of C.B.’s head. The police officer testified that there was “a considerable amount of blood on [C.B.’s] shirt, which [the officer] considered to be soaked with blood.” A police sergeant testified that, during the course of her investigation, Cook “admitted to his involvement with the robbery and also with hitting one of the victims over the head with

the gun.” The police sergeant also testified that several of the witnesses identified Whitfield and Cook as the attackers.

Cook argues that the district court abused its discretion by admitting the *Spreigl* evidence to prove Cook’s identity, common scheme or plan, and opportunity. “[E]vidence of other crimes, wrongs, or bad acts, also called *Spreigl* evidence, may be admitted for limited, specific purposes.” *State v. Fardan*, 773 N.W.2d 303, 315 (Minn. 2009). “Minn. R. Evid. 404(b) allows evidence that is used as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.* at 316 (quotation omitted). “The overarching concern behind excluding such evidence is that it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts.” *Id.* at 315. The admissibility of rule 404(b) evidence is dependent on satisfaction of a five-step process. *State v. Ness*, 707 N.W.2d 676, 685–86 (Minn. 2006). The *Ness* court described the five-step process as follows:

- (1) the state must give notice of its intent to admit the evidence;
- (2) the state must clearly indicate what the evidence will be offered to prove;
- (3) there must be clear and convincing evidence that the defendant participated in the prior act;
- (4) the evidence must be relevant and material to the state’s case; and
- (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

Id. at 686.

Cook challenges only the satisfaction of steps four and five, arguing that the evidence was not relevant to or sufficiently probative of identity, common scheme or

plan, or opportunity. “A defendant who claims the trial court erred in admitting evidence bears the burden of showing the error and any resulting prejudice.” *Id.* at 685 (quotation omitted). “If the admission of [*Spreigl*] evidence is a close call, it should be excluded.” *Fardan*, 773 N.W.2d at 316. Appellate courts review “the district court’s decision to admit *Spreigl* evidence for an abuse of discretion.” *Ness*, 707 N.W.2d at 685.

A. Identity

Spreigl evidence may be relevant and material to show identity of the perpetrator if “identity is at issue” and “there is a sufficient time, place, or modus operandi nexus between the charged offense and the *Spreigl* offense,” even if the past crime is not a “signature crime,” as long as the past crime is “sufficiently similar to the incident at issue” and not merely of the charged offense’s “same generic type.” *State v. Wright*, 719 N.W.2d 910, 917–18 (Minn. 2006) (quotations omitted).

Here, as to the time nexus, approximately three years transpired between the 2005 *Spreigl* assault and the attack on P.T, but, according to Cook’s presentence investigation report, Cook spent one of those years in a juvenile-detention facility, beginning in February 2006. When discharged from the facility, Cook was placed on “supervised release” until April 14, 2008, less than one month before the attack on P.T. *See id.* at 918 (“Temporally remote *Spreigl* incidents may be less objectionable if: . . . the defendant spent a significant part of that time incarcerated and was thus incapacitated from committing crimes . . .”).

As to the place nexus, Cook committed the 2005 *Spreigl* assault in Savage and the crimes against P.T. occurred in neighboring Burnsville.

As to the modus operandi nexus, Cook committed the 2005 *Spreigl* assault in concert with Whitfield, who admitted that he participated in the attack on P.T., claiming also that Cook committed the offense with him. *See State v. Lynch*, 590 N.W.2d 75, 81 (Minn. 1999) (supporting admission of *Spreigl* evidence to prove identity where the defendant worked with same accomplice in the *Spreigl* crime and crime at issue); *State v. Kennedy*, 363 N.W.2d 863, 866 (Minn. App. 1985) (same), *review denied* (Minn. May 20, 1985). And, significantly, both the 2005 *Spreigl* assault and the attack on P.T. were committed with spontaneous, gratuitous, unprovoked violence with a weapon against unknown victims and with the motive of theft. *See State v. Lewis*, 547 N.W.2d 360, 363–64 (Minn. 1996) (concluding that district court’s admission of *Spreigl* evidence was not an abuse of discretion because the prior crimes and current crime, among other similarities, were “robberies or attempted robberies”; were “crimes in which a number of accomplices participated”; “involved randomly selected victims not known to the assailants”; and “involved gratuitous infliction or attempted infliction of injury not necessary within the context and logic of the commission of the crime of robbery”). In the 2005 *Spreigl* assault, Cook bludgeoned a 15-year-old boy with a gun, causing serious injuries and hospitalization, apparently to steal just one dollar. The attack against P.T. included at least 20 stabbings and an apparent attempt to incinerate P.T.’s body and home for the purpose of stealing personal property. The only items that P.T. discovered missing were several coins, two bottles of cologne, and his car, which the intruders abandoned the same night as the crime a mile from P.T.’s home.

We conclude that the district court did not abuse its discretion by determining that the 2005 *Spreigl* assault was relevant and material to show Cook's identity.

B. Common Scheme or Plan, i.e. Modus Operandi

Spreigl evidence may be relevant and material to show a common scheme or plan when it has a “*marked similarity* in modus operandi to the charged offense.” *Ness*, 707 N.W.2d at 688 (quotation omitted). For the reasons we have already discussed regarding the nexus between the modus operandi of the 2005 *Spreigl* assault and the crime against P.T., we conclude that the district court did not abuse its discretion by determining that the 2005 *Spreigl* assault was markedly similar to the crime against P.T., and that the *Spreigl* evidence was relevant and material to show a common scheme or plan.

C. Opportunity

Spreigl evidence may be relevant and material to show opportunity to commit a charged offense when it is relevant and material to show how the defendant had the means to commit the charged offense. *See State v. Campbell*, 367 N.W.2d 454, 459–60 (Minn. 1985) (concluding that *Spreigl* evidence demonstrated opportunity where it showed that defendant used mace to disable an individual five days before the murder at issue, where mace had been used in the commission of the murder). Our review of the record does not reveal how evidence of Cook's 2005 *Spreigl* assault was relevant and material to show that Cook had the opportunity to attack P.T. We conclude that the district court abused its discretion by relying on this ground as a ground for admitting the evidence of the 2005 *Spreigl* assault, but we further conclude that the error was harmless

because the evidence was relevant and material to show Cook's identity and common scheme or plan.

D. Probative Value vs. Prejudice

Cook argues that even if the *Spreigl* evidence of Cook's 2005 assault was relevant and material, its probative value was outweighed by its potential prejudice to him. We disagree. "When balancing the probative value against the potential prejudice, unfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted). Here, the *Spreigl* evidence was probative of Cook's identity and common scheme or plan. Moreover, the district court gave the jury a cautionary instruction before the jury heard the *Spreigl* evidence and before the jury deliberated, which mitigated any potential for unfair prejudice. *See State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008) (stating that "any potential unfair prejudice [resulting from admission of *Spreigl* evidence] was mitigated by the cautionary instructions").

We conclude that the district court did not abuse its discretion by allowing admission of the 2005 *Spreigl* assault as relevant and material to show Cook's identity and common scheme or plan.

III. Trial Conducted During Cook's Absence on May 4 and 5, 2011

Cook argues that the district court abused its discretion by conducting trial without his presence on the afternoon of May 4 and the entire day of May 5, 2011.

On the morning of May 4, Cook's counsel asked for a trial continuance to permit her to further investigate an evidentiary matter and because Cook had a "cold" and a "sore throat." Cook's counsel commented that she was "starting to get sick just sitting next to him." The district court denied that motion. On the afternoon of May 4, while Cook was present in the courtroom, his counsel asked the district court to excuse him "for the remainder of the day" because he was "ill," had been "struggling with illness for a couple of days," and was "doing much worse this afternoon." Cook's counsel offered nothing more specific about Cook's illness or its severity. The court stated, "Mr. Cook, you have an absolute right to be present at all proceedings," and asked, "You wish to give up that right this afternoon?" Cook replied, "Yes," and the court excused his presence and proceeded with the trial for the remainder of the day.

On the morning of May 5, Cook's counsel informed the district court that she had spoken with Cook, that he had the stomach flu, that he had arrived at the courthouse but had a hard time getting there, and that she did not think that Cook could sit in the courtroom through the day. Counsel also informed the court that Cook would not be coming to court and stated that she understood that his absence from the courtroom was with the approval of the court. The prosecutor asked to clarify the circumstances and noted that the previous day Cook had affirmatively personally waived his appearance and that, based on the representations of Cook's counsel, the prosecutor assumed that Cook was continuing his personal waiver by his choice. Cook's counsel confirmed that to be the circumstance, and the court said that Cook's waiver was "noted of record." Upon the request of Cook's counsel, the court allowed her to make a record about Cook's absence

in front of the jury. When the jurors were seated, Cook's counsel stated that Cook continued to be ill with a stomach flu and asked that the court excuse his absence. The court responded, "Okay. He gave his personal waiver and that's accepted. So he is excused for today." The state called witnesses to testify that day, and Cook's counsel cross-examined them. Cook claims that when he returned to court on May 6, he was "surprised that the trial proceeded without him."

At the hearing on Cook's motion for judgment of acquittal or a new trial, Cook's trial counsel testified that Cook was "not physically able to continue sitting at the trial [on May 4]." Cook, his father, and an attorney independent of trial counsel submitted affidavits stating that Cook was too sick to attend court on the afternoon of May 4 and the day of May 5. The district court disregarded the statements as not credible. The court noted that after it excused Cook's absence on the afternoon of May 4, it instructed the state to call its next witness before Cook left the courtroom, and Cook did not object. The court found that Cook's trial counsel was "credible" when she told the court on May 5 that she spoke with Cook that morning; that Cook waived his right to be present through her; that Cook's "voluntary waiver of his [right to be present] on May 5th was for his own comfort, but did not constitute a genuine medical emergency"; and that Cook "failed" to "produce facts that his absence was involuntary."

"The Confrontation Clause of the Sixth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment, guarantees criminal defendants a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *State v. Worthy*, 583 N.W.2d

270, 277 (Minn. 1998) (quotation omitted). “[T]he court must indulge every reasonable presumption against the loss of constitutional rights.” *State v. Finnegan*, 784 N.W.2d 243, 247 (Minn. 2010). But “like any constitutional right, the right to be present at trial may be waived by the accused.” *State v. Martin*, 723 N.W.2d 613, 619 (Minn. 2006) (quotation omitted). “This court reviews a decision to proceed with trial with the defendant absent under an abuse-of-discretion standard, and this court will not disturb the trial court’s factual findings unless clearly erroneous.” *Id.* at 620 (quotation omitted).

Cook argues that the district court abused its discretion by conducting trial in his absence because his waiver of his right to be present was “involuntary when he was sick and the [district] court denied his request for a continuance,” and, even if his May 4 waiver was valid, the district court erred by extending the waiver through May 5 without hearing personally from Cook. Cook’s argument is unpersuasive.

“While it is plainly the preferred practice, we have not required . . . a defendant to explicitly affirm to the district court his personal waiver of his right to be present.” *Id.* at 619. A defendant bears a “heavy” burden to show that his absence from trial was involuntary. *Id.* at 620 (quotation omitted). “Once a jury was impaneled in the presence of the defendant, he had clear and unequivocal notice of the commencement of trial. Voluntary absence thereafter is a knowing waiver of constitutional rights. To hold otherwise would countenance flight and impose unnecessary costs and burdens on the criminal justice system.” *State v. Johnson*, 483 N.W.2d 109, 110–11 (Minn. App. 1992) (discussed with approval in *Carse v. State*, 778 N.W.2d 361, 370 (Minn. App. 2010), *review denied* (Minn. Apr. 20, 2010)), *review denied* (Minn. June 10, 1992); *see also*

Finnegan, 784 N.W.2d at 248 (“[O]ur judicial system could not function if defendants were allowed to pick and choose when to show up for trial.”). In light of *Martin*, *Johnson*, and *Carse*, the material inquiry is not whether Cook gave an oral waiver voluntarily or personally; the material inquiry is whether Cook was absent from trial voluntarily.

“[W]hether a defendant is voluntarily absent from trial . . . is a factual determination” that we will not disturb unless clearly erroneous, and “[w]e will not reverse findings of fact as clearly erroneous if there is reasonable evidence to support them.” *Finnegan*, 784 N.W.2d at 249, 251 (quotations omitted).

[A] district court that makes a finding on the voluntariness of the defendant’s absence without an adequate investigation creates substantial risk of retrial. Clearly, the better practice is to pause the proceedings for as long as is reasonably necessary for the court to ascertain that the defendant’s absence is truly voluntary.

Id. at 251.

On the facts in this case, we conclude that the district court did not clearly err by determining that Cook failed to satisfy his heavy burden to prove that his absence from trial on the afternoon of May 4 and the day of May 5 was involuntary. Even if the district court clearly erred in its determination, Cook did not object to the district court conducting trial during his absence on the afternoon of May 4 and day of May 5, and his failure to object constituted “acquiescence.” *See Martin*, 723 N.W.2d at 619, 621 (holding that defendant waived his right to be present when district court communicated with deliberating jury without defendant’s presence because “a defendant’s failure to

object” constitutes “acquiescence”); *State v. Hannon*, 703 N.W.2d 498, 505 (Minn. 2005) (holding that defendant “waived any right he had to attend the [in-chambers] conference” where a summary of a defense witness’s testimony was prepared because “[n]either [defendant] nor his attorney objected to the creation or use of the summary nor was any objection raised at trial to [defendant’s] exclusion from the conference”).

IV. Right to Public Trial and Jury Instructions

Cook argues that the district court violated his right to a public trial by ordering the courtroom door closed during the final jury charge. Appellate courts review de novo whether a defendant’s right to a public trial has been violated. *State v. Brown*, ___ N.W.2d ___, ___, 2012 WL 2529435, at *5 (Minn. July 3, 2012). “In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial” U.S. Const. amend VI; *see* Minn. Const. art. I, § 6 (same). But a district court does not implicate a defendant’s right to a public trial when the court locks the courtroom doors during jury instructions; the court never clears the courtroom of all spectators; the court tells the people in the courtroom that they are welcome to stay; the court keeps the trial open to the public and press already in the courtroom; the court does not order the removal of any member of the public, the press, or the defendant’s family; and the jury instructions do not comprise a proportionately large portion of the trial proceedings. *Brown*, 2012 WL 2529435, at *6 (footnote omitted).

In this case, the district court instructed the court’s spectators as follows:

You are welcome to stay as long as you like or leave whenever you feel like it. But once the court begins the jury instructions, no one is allowed to enter or leave the courtroom

during the instructions. There must not be any interruptions. The bailiff will be standing at the main door to the courtroom. If anyone wants to leave before I start or stay until after I am concluded, you are welcome to do that but you can't leave halfway through or partway through.

The record reflects that the district court never ordered the removal of any member of the public, press, or Cook's family, and the jury instructions comprised less than 40 pages of a transcript consisting of more than 2,000 pages.

In light of *Brown*, we conclude that the district court's closing of the courtroom door during its final charge to the jury did not implicate Cook's right to a public trial.

V. Ineffective Assistance of Trial Counsel

Cook argues that his trial counsel provided ineffective assistance because she "fail[ed] to follow up in trying to contact" a possible alibi witness who "could have exonerated Cook." Although his counsel called the possible alibi witness on one occasion and left a voicemail message, Cook argues that she should have "made additional phone calls," "assigned an investigator to locate and interview" the possible alibi witness, or "asked Cook for more identifying information." We are not persuaded.

"Claims of ineffective assistance of counsel involve mixed questions of law and fact, which we review de novo." *Vance v. State*, 752 N.W.2d 509, 513 (Minn. 2008).

The Sixth Amendment guarantees a defendant the effective assistance of counsel. To demonstrate that he did not receive effective assistance of counsel, [an appellant] must show that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for his counsel's unprofessional errors, the result of the proceedings would have been different. We need not address both the performance and prejudice prongs if one is determinative.

State v. Nissalke, 801 N.W.2d 82, 111 (Minn. 2011) (quotations and citations omitted).

An attorney's performance does not fall below an objective standard of reasonableness when she

exercise[s] the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances. But decisions to present certain evidence and call certain witnesses at trial are tactical decisions properly left to the discretion of trial counsel, and such decisions do not prove that counsel's performance fell below an objective standard of reasonableness.

Id. (quotations and citation omitted). We "presume[] that the lawyer is competent to provide the guiding hand that the defendant needs," *State v. Dalbec*, 800 N.W.2d 624, 628 (Minn. 2011) (quotation omitted), and "strong[ly] presum[e] that, under the circumstances, the challenged action might be considered sound trial strategy," *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003) (quotations omitted).

In this case, the district court found that Cook's trial counsel "demonstrated a thorough knowledge of the case," "conducted effective, detailed, and probing cross-examinations of State's witnesses," "effectively advanced [Cook's] theory of the case," and gave Cook "a vigorous and thorough defense." Counsel testified that she called Cook's alleged alibi witness and left a recorded message with her number and identification as Cook's attorney, and she requested that the alleged alibi witness call her back. She further testified that the witness did not return her call, that Cook asked her "several times" about the witness, and that she told him, "You know where I am every day. I'm here and I'm with you. If you have this witness, bring her in," but that the

witness never came. Cook identifies no record evidence, nor could we locate any, that would overcome the presumptions that his trial counsel acted competently and had a sound trial strategy.

We conclude that Cook fails to satisfy his burden of showing that his trial counsel's performance fell below an objective standard of reasonableness and we therefore are not persuaded that she provided ineffective assistance to Cook.

VI. Sentencing

A. Double-Upward-Durational Departure for First-Degree Arson and Consecutive Sentences for First-Degree Arson and First-Degree Attempted Murder

Cook argues that the district court abused its discretion by imposing a double-upward-durational departure for his first-degree-arson sentence and consecutive sentences for his first-degree-arson and first-degree-attempted-murder sentences. He claims that the sentences are not justified by severe aggravating factors. We disagree.

We review the district court's decision to depart from a presumptive sentence for an abuse of discretion. *Tucker v. State*, 799 N.W.2d 583, 585–86 (Minn. 2011). We conduct a de novo assessment of the district court's decision as to “whether a valid departure ground exists, relying on the factual findings that support the decision,” *State v. Weaver*, 796 N.W.2d 561, 567 (Minn. App. 2011), and “whether the valid departure reasons are severe, so as to justify a sentence that runs longer than twice the presumptive sentence,” *Dillon v. State*, 781 N.W.2d 588, 598 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

“Departures are warranted only when substantial and compelling circumstances are present,” which are circumstances “demonstrating that the defendant’s conduct in the offense of conviction was *significantly* more or less serious than that typically involved in the commission of the crime in question” and include the “nonexclusive list of aggravating factors” found in the sentencing guidelines. *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008) (quotation omitted). District courts must justify double-upward-durational departures with aggravating factors, *State v. Spain*, 590 N.W.2d 85, 88–89 (Minn. 1999), but “[t]he presence of a single aggravating factor is sufficient to uphold an upward departure,” *Weaver*, 796 N.W.2d at 571 (quotation omitted).

Although concurrent sentencing is presumptive, consecutive sentences for first-degree attempted murder and first-degree arson are permissive and therefore do not constitute a departure that requires the existence of aggravating factors. Minn. Sent. Guidelines II.F, VI. (Supp. 2007). But district courts must not impose felony sentences consecutively if the convictions involved only a single victim and a single course of conduct when one sentence has already been subject to an upward-durational departure, unless “additional aggravating factors . . . justify the consecutive sentence,” Minn. Sent. Guidelines cmt. II.F.04 (2006), or “severe [aggravating factors] . . . support both a double durational departure and a departure as to consecutive sentencing,” *State v. Williams*, 608 N.W.2d 837, 840 (Minn. 2000).

Here, the district court sentenced Cook on the record and issued a nine-page sentencing order. The court found that Cook treated P.T. with “particular cruelty,” subjected him to a “particularly gratuitous infliction of pain,” and degraded him. The

court also found that Cook’s “particularly cruel conduct is a severe aggravating circumstance” and that this case is “one of the extremely rare cases” when a “greater than double departure is not only justified but warranted.” The court noted that

after leaving [P.T.] lying in a pool of blood, with his T-shirt soaked with blood, while lying there defenseless, and preventing [P.T.] from getting up, [Cook] . . . turned on the gas on all four burners on the kitchen stove, without igniting the burners, and set eight separate fires in five rooms of the dwelling, including the bedroom where [P.T.] lay helpless.

The court further found that Cook did so “to conceal or get rid of [P.T.’s] body, separately and distinctly different from attempting to cause his death by stabbing him”; that “arson to cover up the intended homicide and the exacerbation of the severity of the fire by turning on all the gas on the stove is another aggravating factor, over and above the cruelty to [P.T.]”; and that turning on the gas “posed a significant danger to firefighters and rescue personnel who would be expected to respond to the report of a fire at [P.T.’s] residence, as well—another aggravating factor.” The court further found that P.T.’s home was “a quad home, attached to three others,” which “caused a greater than normal danger to others, namely the other occupants of the quad home and their places of abode,” and “expos[ed] neighboring residents in the quad home units to imminent personal peril.” The court concluded that its findings and “the resulting aggravating factors” are “more than a sufficient basis to depart durationally on the presumptive sentences.”

The district court’s identified aggravating factors relevant to the departures at issue are threefold: (1) attempting to conceal P.T.’s body through arson; (2) endangering

P.T.'s neighbors by setting eight fires in five separate rooms of P.T.'s home and turning on the gas; and (3) endangering firefighters and rescue personnel by turning on the gas. We must determine first "whether the reasons provided [for the departures] are legally permissible and factually supported by the record" and second "whether the stated reasons justify the departure[s]." *Weaver*, 796 N.W.2d at 567.

B. Legally Permissible and Factually Supported Factors

Cook argues that using the fire to conceal Cook's attempted murder is not a permissible aggravating factor "because it was conduct underlying the attempted-murder conviction"—"[t]he fire was part of the attempt to kill [P.T.] because the perpetrators knew he was not dead when they left." This argument is unavailing. This court recently permitted as an aggravating factor attempting to conceal a body by arson because the crime of concealment was not charged and first-degree arson is an exception to the statutory prohibition against cumulative punishment. *Id.* at 571. Here, the district court found that lighting the fires and turning on the gas burners was Cook's "attempt to conceal or get rid of [P.T.'s] body, separately and distinctly different from attempting to cause his death by stabbing him multiple times while defenseless in his own pool of blood." The court's finding is factually supported by a medical examiner's testimony regarding how incredibly unlikely it was that Cook survived his stab wounds, noting that if the stab wounds to P.T.'s head had been "a few inches" in a different direction they could "absolutely . . . have gone into his brain" and killed him. We conclude therefore that this aggravating factor was legally permissible and factually supported.

Cook concedes on appeal that “putting other people in danger living in a quad townhome might be an aggravating factor.” In *State v. Lewis*, we held that aggravating factors warranting an upward-durational departure in a first-degree-arson sentence may include “utter disregard for the safety of others in [an] apartment building” where “the damage resulting from the fire was extensive.” 385 N.W.2d 352, 356–57 (Minn. App. 1986), *review denied* (Minn. May 29, 1986). Here, the district court found that Cook’s fire-setting “caused a greater than normal danger to others, namely the other occupants of the quad home and their places of abode” and “expos[ed] neighboring residents in the quad home units to imminent personal peril.” The court’s findings are supported by the record and its conclusion is supported by the findings. We conclude that this aggravating factor was legally permissible.

Cook argues that turning on the gas is not an aggravating factor because it was part of the commission of arson. We disagree. In *State v. Morris*, we affirmed the district court’s conclusion that a defendant’s conduct yielded a severe aggravating factor where the defendant caused a standoff situation that was, among other things, “fraught with the risk of serious physical injury to police officers.” 609 N.W.2d 242, 244, 247 (Minn. App. 2000), *review denied* (Minn. May 23, 2000). Cook is correct that it is legally impermissible for a district court to justify departures based on elements of an underlying crime. *Jones*, 745 N.W.2d at 849. But the aggravating factor of turning on the gas was legally permissible in this case because the eight fires, not the gas, constituted the arson. A deputy fire marshal testified that “on the oven top . . . there were unburned materials, including napkins, other paper material on the counter, had absolutely no damage to it

whatsoever. So [the fire is] not a continuation of the oven burners being on Can't happen that way.” We conclude therefore that this aggravating factor was legally permissible and factually supported.

C. Justification for Departure

The remaining issue is whether the aggravating factors justify the double-upward-durational departure for Cook's first-degree-arson sentence and the consecutive sentences for first-degree arson and first-degree murder. No dispute exists that all three of these factors may justify the double-upward-durational departure for Cook's first-degree-arson sentence because double-upward-durational departures require only aggravating factors. *See Spain*, 590 N.W.2d at 88–89. And we do not observe any additional aggravating factors that could independently justify the consecutive sentences. Minn. Sent. Guidelines cmt. II.F.04 (noting that “additional aggravating factors” may “justify the consecutive sentence”). We therefore must determine whether any of the three aggravating factors is “severe” and thus legally sufficient to justify both the double-upward-durational departure and consecutive sentences. *See Williams*, 608 N.W.2d at 840 (noting that “severe” aggravating factors may “support both a double durational departure and a departure as to consecutive sentencing”).

The district court did not label these aggravating factors as “severe aggravating factors” but concluded that they were “more than a sufficient basis to depart durationally” and that this case is “one of the extremely rare cases” where a “greater than double departure is not only justified but warranted.” “There remains ‘no easy-to-apply test’ of severity,” “the inquiry is unstructured,” and “the outcome can depend on alternative

factors.” *Dillon*, 781 N.W.2d at 597. In *State v. Stanke*, 764 N.W.2d 824, 826, 828–29 (Minn. 2009), the supreme court held that the defendant’s conduct was “atypical and particularly egregious” and supported the more-than-double-upward-durational departure when the defendant “admitted that he was not only driving at high speeds, he was doing so during rush hour while talking on his cell phone, injecting himself with methamphetamine, and steering with his knee,” and “[h]e had also not slept for approximately two weeks due to drug use.” *Stanke*, 764 N.W.2d at 828–29. And this court held in *Morris* that it is a severe aggravating factor to “create[] an immediate risk of physical harm to police officers and residents of the surrounding neighborhood,” “forc[ing] the evacuation of residences in the surrounding neighborhood.” 609 N.W.2d at 247.

In this case, after Cook taunted P.T., degraded him, and threatened his son’s life, Cook not only lit one fire in P.T.’s bedroom in P.T.’s presence while P.T. laid helpless in his own blood with at least 20 stab wounds, but also lit seven other fires throughout P.T.’s home, endangering the safety of P.T.’s neighbors, and turned on the stove’s gas, endangering the safety of P.T.’s neighbors, firefighters, and rescue personnel. Cook argues that setting fire to P.T.’s home is not a severe aggravating factor because no person was injured by the fire and the fire was limited to P.T.’s home and quickly extinguished. But these facts do not diminish the atypical and egregious nature of Cook’s conduct or render our holding in *Morris* inapplicable. In light of *Stanke* and *Morris*, we conclude that the aggravating factors of endangering P.T.’s neighbors, firefighters, and rescue personnel were severe and justify both the double-upward-durational departure for

Cook's first-degree-arson sentence and consecutive sentences for first-degree arson and first-degree attempted murder.

Moreover, “[a]lthough the district court did not consider whether the . . . aggravating factors constituted severe aggravating factors, we conclude that the facts of this case are atypical and particularly egregious,” and we are “convinced beyond a reasonable doubt that if we were to remand to the district court, the court would determine that at least one if not more of the . . . factors was a severe aggravating factor warranting the imposition of a sentence that exceeded the double-durational-departure limit.” *Stanke*, 764 N.W.2d at 828–29.

D. Motor-Vehicle-Theft Sentence

Cook argues that the district court abused its discretion by sentencing him for his motor-vehicle-theft conviction because the offense arose out of the same behavioral incident as the offenses underlying his other convictions. Cook's argument is persuasive. “[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 and a conviction or acquittal of any one of them is a bar to prosecution for any other of them.” Minn. Stat. § 609.035, subd. 1 (2006). “The state has the burden to establish by a preponderance of the evidence that the conduct underlying the offenses did not occur as part of a single behavioral incident.” *Williams*, 608 N.W.2d at 841. But neither at sentencing nor on appeal has the state made any argument regarding the single behavioral incident as it relates to the theft offense. We therefore vacate Cook's motor-vehicle-theft sentence because the state has not satisfied its burden of establishing by a preponderance of the evidence that the conduct

underlying Cook's motor-vehicle-theft offense did not occur as part of the same behavioral incident as the other offenses.

Affirmed as modified.