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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-956**

State of Minnesota,  
Respondent,

vs.

Roger Allen King,  
Appellant.

**Filed June 11, 2012  
Affirmed  
Connolly, Judge**

St. Louis County District Court  
File No. 69VI-CR-10-501

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

Mark S. Rubin, St. Louis County Attorney, Michelle M. Anderson, Assistant County Attorney, Virginia, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Ross, Judge; and Connolly,  
Judge.

## UNPUBLISHED OPINION

CONNOLLY, Judge

On appeal of his conviction of first-degree assault, appellant argues that (1) the district court committed reversible error by admitting inadmissible *Spreigl* evidence in the form of testimony regarding appellant's post-detention actions and the results of his blood test showing that he had traces of illicit drugs in his system; and (2) his Sixth Amendment Confrontation rights under *Crawford* were violated when the district court admitted the testimony of an officer that several unspecified witnesses at the bar had informed him that appellant was the assailant. We affirm.

### FACTS

Appellant Roger A. King was charged with first- and second-degree attempted murder and first-degree assault. At trial, evidence and testimony was presented establishing that at about 6:30 p.m. on April 13, 2010, appellant entered the Office Bar in Virginia where he met C.T., an acquaintance of about ten years. As the two engaged in conversation over a pitcher of beer, they discussed some arrowheads that appellant had given C.T. According to C.T., he informed appellant that he had broken the arrowheads. C.T. testified that appellant became "pretty mad," and then left the bar.

After leaving the Office Bar, appellant went to L.I.'s house where he consumed more alcohol. L.I. testified that while at her house, she gave appellant a fillet knife as a gift. L.I. described the knife as brown and silver with a wooden handle. Appellant then left the house at about 11:00 p.m. and went to Rider's Bar.

One of the patrons of Rider's Bar claimed that as appellant entered the bar, she observed appellant drop a knife and pick it up. Appellant then approached the bar where C.T. and J.K. were located and ordered a beer. G.H., the bartender, testified that as she turned toward the cash register to get appellant's change, she heard appellant, C.T., and J.K. "bickering about some spearheads." According to G.H., she then heard J.K. yell: "what are you doing." G.H. testified that as she turned from the cash register, she observed appellant place what she believed to be a fillet knife into its casing. G.H. also testified that she noticed "blood splatters," and that C.T. had a small cut in his lower chest area. After G.H. called 911, Officer Joshua Hughes was the first officer on the scene. Officer Hughes testified that upon his arrival at the bar, "there was a lot of excitement" and people were "kind of running around frantically." According to Officer Hughes, he identified the victim as C.T., and then asked for the identity of the perpetrator. Over appellant's hearsay objection, Officer Hughes testified that "several people" responded by telling him that appellant was the perpetrator. C.T. was then taken to the hospital where he was treated for "life threatening" injuries.

Appellant was arrested several blocks from Rider's Bar. Lieutenant Daniel Hanson testified that appellant was "defiant" and "argumentative," and engaged in threatening behavior throughout the booking process. Appellant was then taken to the hospital for a blood sample to be drawn. Over appellant's relevancy objection, the district court admitted the results of appellant's blood sample, which showed that appellant had measurable amounts of THC, hydrocodone, Alprazolam, and

methamphetamines in his system. The report also showed that appellant's blood-alcohol level was .17.

Appellant testified that after he arrived at Rider's Bar, C.T. approached him and began discussing the turkeys and arrowheads that appellant had given him. Appellant claimed that when he turned to walk away, C.T. grabbed him. According to appellant, he then noticed that C.T. had a knife and he attempted to disarm C.T. by grabbing his wrist. Appellant testified that a struggle ensued, which ended when C.T. hit his head on the bar. Appellant further testified that he then left the bar unaware that C.T. had been seriously injured.

The jury found appellant guilty of first-degree assault, but not guilty of attempted first or second-degree murder. The district court then sentenced appellant to 110 months in prison. This appeal followed.

## **D E C I S I O N**

### **I.**

Appellant challenges the district court's decision to allow (1) evidence of the results of the blood sample taken from appellant on the night of the alleged assault; and (2) testimony by the police officers regarding appellant's post-detention acts. Appellant contends that this evidence and testimony constitutes inadmissible *Spreigl* evidence, and that the admission of this evidence violated his right to a fair trial.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was

thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Under Minnesota law, 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 for other purposes, such as to prove 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.

Before a district court may admit *Spreigl* evidence, five elements must be met: “(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) the defendant’s involvement in the act must be proven by clear-and-convincing evidence; “(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 for unfair prejudice to the defendant. Minn. R. Evid. 404(b); *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006).

Here, appellant failed to object to the officer’s testimony regarding appellant’s post-detention acts. And although he objected to the admission of his blood-test results on relevancy grounds, he failed to object to its admission on *Spreigl* grounds. “Failure to object to *Spreigl* evidence at trial constitutes a waiver of the right to claim this as error on appeal.” *State v. Larson*, 520 N.W.2d 456, 461 (Minn. App. 1994) (quotation omitted), *review denied* (Minn. Oct. 14, 1994). And a defendant does not preserve an objection for

appeal if he objects at trial on grounds different from those argued on appeal. *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). Because appellant did not specifically raise the *Spreigl* objection in the district court, he has waived his challenge to the admissibility of the blood-test results and the testimony regarding his post-detention acts on *Spreigl* grounds.

Even if we were to address the issue on the merits, we agree with the state that the challenged evidence is not *Spreigl* evidence. *Spreigl* evidence is evidence of other crimes or bad acts. *Spreigl*, 272 Minn. at 490, 139 N.W.2d at 169; *see State v. McLeod*, 705 N.W.2d 776, 787-88 (Minn. 2005) (stating that a *Spreigl* act need not be a crime, but it must be a bad act). Evidence that is merely unfavorable is not necessarily *Spreigl* evidence.

Here, the challenged evidence consisted of a report indicating that appellant had a blood-alcohol level of .17. A blood-alcohol level of .17 is not in-and-of-itself a crime, nor is there anything inherently wrong with having a high level of alcohol in one's system as long as the individual is not performing certain tasks such as driving a motor vehicle. *See* Minn. Stat. § 169A.20, subd. 1 (2010) (stating that it is a crime for any person to drive, operate, or be in physical control of any motor vehicle when the person is under the influence of alcohol). Similarly, although it is a crime to sell or possess a controlled substance, or to operate a motor vehicle while under the influence of a controlled substance, the presence of a controlled substance in one's blood is not in-and-of-itself a crime. *See State v. Lewis*, 394 N.W.2d 212, 217 (Minn. App. 1986) (holding that the mere presence of a controlled substance in defendant's urine sample does not

establish “possession” of the controlled substance), *review denied* (Minn. Dec. 12, 1986). And, although the use of controlled substances is generally not considered acceptable by society, it does not constitute a *Spreigl* “bad act.” See *Ture v. State*, 681 N.W.2d 9, 16-17 (Minn. 2004) (holding that evidence that defendant collected information about women was not *Spreigl* evidence because there is nothing inherently wrong with collecting information about women). Moreover, the testimony regarding appellant’s post-detention acts is substantive evidence of the alleged offense. This evidence assists in establishing appellant’s state-of-mind shortly after the assault occurred. Therefore, we conclude that the district court did not abuse its discretion by admitting the challenged evidence.

## II.

Appellant challenges the admission of Officer Hughes’ testimony that several unspecified witnesses at Rider’s Bar identified appellant as the assailant. Appellant argues that this testimony was testimonial hearsay and that its admission violated his Sixth Amendment Confrontation rights under *Crawford*.

The record reflects that appellant objected to the admission of Officer Hughes’ testimony on hearsay grounds, but did not object on the basis that the admission of his testimony violated the Confrontation Clause. As stated above, a defendant does not preserve an objection for appeal if he objects at trial on grounds different from those argued on appeal. *Rodriguez*, 505 N.W.2d at 376. Generally, failure to object to evidence at trial constitutes waiver of those issues on appeal. *State v. Beard*, 288 N.W.2d 717, 718 (Minn. 1980); see also *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989)

(stating that appellate courts generally will not decide issues raised for the first time on appeal). Nonetheless, an unobjected-to error may be reviewed for plain error. *State v. Tschou*, 758 N.W.2d 849, 863 (Minn. 2008). This court reviews de novo whether the admission of evidence violates a criminal defendant's right under the Confrontation Clause. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006). If it does, then its admission is plain error. *State v. McClenton*, 781 N.W.2d 181, 193 (Minn. App. 2010).

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. In *Crawford v. Washington*, the Supreme Court interpreted the Confrontation Clause as barring the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination.” 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004). The critical question under *Crawford* is whether the statement at issue is testimonial. *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273 (2006) (holding that nontestimonial out-of-court statements are subject to hearsay limitations but are not subject to the Confrontation Clause); *Tschou*, 758 N.W.2d at 864.

In *Davis*, the Supreme Court explained that whether a statement is testimonial turns on the primary purpose served by the statement. 547 U.S. at 822, 126 S. Ct. at 2273-74. The Court elaborated:

Statements are nontestimonial . . . under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing

emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.*; see also *Caulfield*, 722 N.W.2d at 309 (“[T]he critical determinative factor in assessing whether a statement is testimonial is whether it was prepared for litigation.”). The *Crawford* Court distinguished formal statements to law enforcement officials from casual statements, explaining that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364. If a statement is not testimonial, then the Confrontation Clause is not violated. *State v. Ahmed*, 782 N.W.2d 253, 259 (Minn. App. 2010).

Appellant argues that the challenged testimony constitutes testimonial hearsay because the assault had ended and Officer Hughes had been advised of the applicable information through the 911 call from G.H. Appellant argues that because he had been identified in the 911 call as a possible suspect, Officer Hughes’ inquiry to the bar patrons as to the perpetrator of the assault “could not have assisted in addressing an ongoing emergency.” Thus, appellant argues that Officer Hughes’ interrogation was simply a method of gathering information and, therefore, the admission of the statements the witnesses at the bar made to Officer Hughes regarding the suspect’s identity violated the Confrontation Clause under *Crawford*.

We disagree. Despite his claim to the contrary, the record indicates that the emergency had not ended when Officer Hughes arrived at the scene. Officer Hughes

testified that he was the first officer at the scene, and that upon his arrival at the bar, “there was a lot of excitement” and people were “kind of running around frantically.” According to Officer Hughes, he immediately attempted to identify who was involved in the incident, and his impromptu inquiry resulted in several people responding that appellant was the assailant. The nature of the inquiry indicates that Officer Hughes’ primary purpose was to assist in an ongoing emergency rather than a formal interrogation. Moreover, the fact that Officer Hughes’ statement was a general question asked to everyone at the scene rather than a formal interview with one individual further indicates that the nature of the inquiry was to gather information to assist in an emergency situation. And finally, despite appellant’s claim to the contrary, there is no indication from the record that Officer Hughes listened to the 911 call before arriving at the scene. Officer Hughes testified that he was apprised of the assault from dispatch, and there is nothing in the record to indicate that Officer Hughes was informed of the identity of the assailant before he arrived at the scene. Therefore, the challenged testimony does not constitute testimonial hearsay.

Even if we were to conclude that the testimony is testimonial hearsay and its admission violated appellant’s rights under the Confrontation Clause, appellant cannot establish that the error affected his substantial rights. *See Tscheu*, 758 N.W.2d at 863 (applying plain-error analysis to a Confrontation Clause challenge not raised to the district court); *see also State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (stating that for an appellate court to grant relief for an unobjected-to error, the error must affect substantial rights). The record reflects that the jury was presented with ample evidence

implicating appellant as the assailant. Moreover, appellant admitted at trial that he stabbed C.T.—appellant simply claimed that his actions were in self-defense. Consequently, the identity of the perpetrator was not a central issue at trial. Because the identity of the assailant was not an issue at trial, and there was ample evidence implicating appellant as the assailant, appellant is not entitled to a new trial.

**Affirmed.**