STATE OF MINNESOTA
IN COURT OF APPEALS
A11-404

State of Minnesota,
Respondent,

vs.

Patrick Wayne Moody,
Appellant.

Filed March 12, 2012
Affirmed
Huspeni, Judge[*]

Ramsey County District Court
File No. 62-CR-09-16554

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

John J. Choi, Ramsey County Attorney, Mark N. Lystig, Thomas R. Ragatz, Assistant County Attorneys, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Hudson, Judge; and Huspeni, Judge.

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

U N P U B L I S H E D O P I N I O N

HUSPENI, Judge

Appellant challenges his conviction of third-degree criminal sexual conduct, arguing that the district court committed reversible error by (1) admitting *Spreigl* evidence, and (2) denying his request for a jury instruction that specified the purposes for which the *Spreigl* evidence was admitted. Because the district court did not err by admitting the *Spreigl* evidence, and because its failure to give a purpose-specific jury instruction was harmless error, we affirm.

FACTS

In the fall of 2008, appellant Patrick Wayne Moody's 14-year-old son began to bring two female classmates, H.L. and K.M., home to the Moody family apartment on a regular basis.[1] Approximately one year later, police received a report indicating that appellant was providing marijuana to, and having sex with, one of these teenage girls. An investigation ensued and, in October 2009, appellant was charged with one count of third-degree criminal sexual conduct, based on alleged conduct with H.L., and one count of fourth-degree criminal sexual conduct, based on alleged conduct with K.M. Appellant moved to sever the two charges and the district court granted the motion.

At appellant's trial for the charge of third-degree criminal sexual conduct involving H.L., both H.L. and K.M. testified that, at the Moody family apartment, appellant provided them with marijuana and pills. Both H.L. and K.M. also testified that

[1] At that time, appellant was 47 years old; H.L. was 14 years old and K.M. was 13 years old.

there was a sexual, romantic relationship between appellant and H.L. Appellant and his children testified to the contrary, regarding both the drugs and appellant's sexual conduct.

K.M. testified that appellant and H.L. would kiss and act "[a]ffectionate" towards one another, tell each other they were in love, and retreat to a bedroom together. H.L. testified that appellant had sex with her three times. The first time, appellant supplied her with marijuana and a pill called Klonopin, and she "felt special." Eventually, however, H.L. felt uncomfortable about their age difference and attempted to return to being "friends" with appellant. In response, appellant threatened to kill himself and, despite her discomfort, H.L. permitted their sexual relationship to continue.

H.L. testified that she felt as if appellant "had some plan all along." She testified that appellant initially singled her out for special attention while he smoked and spent time with the teenagers. She testified that appellant questioned her about her sexual turn-ons and turn-offs, whether she ever touched herself, and if she had been sexually active. Appellant told H.L. that she was special and, eventually, that he loved her and that he would marry her when she became of age. H.L. testified that she and appellant would hug, kiss on the lips, and sit near one another; appellant would place his arm around her waist or his hand on her leg or under her shirt. H.L. testified that K.M. and appellant's children observed these physical interactions and that appellant's son did not care and his 14-year-old daughter "thought it was cute."

There was also testimony, admitted over appellant's objection, regarding appellant's conduct with K.M. First, K.M. testified that when she met appellant he asked her what turned her on and, as K.M. began spending more time at the Moody family

apartment, appellant touched her vagina over her clothing, multiple times, and tried to kiss her. Second, a police officer testified that during the 2009 investigation of appellant's conduct with H.L., K.M. reported that appellant had touched her vagina, outside of her clothing. Immediately before receiving this *Spreigl* evidence, the district court provided the jury with cautionary instructions, limiting the purpose for which the evidence was to be used.[2]

Appellant moved the district court for a final jury instruction that specified the purposes for which the *Spreigl* evidence was admitted. The district court denied appellant's motion and used a modified version of Minnesota criminal jury instruction guides, 10 *Minnesota Practice*, CRIMJIG 3.16 (2008), which is not purpose-specific, for the final instruction. The jury found appellant guilty of the charged offense and the district court sentenced him to 60 months' incarceration followed by ten years' conditional release and mandatory registration as a predatory offender.[3] This appeal followed.

D E C I S I O N

I.

Appellant challenges the district court's decision to allow testimony regarding his alleged sexual conduct with K.M. "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

[2] These instructions were a modified version of Minnesota's criminal jury instruction guides, 20 *Minnesota Practice*, CRIMJIG 2.01 (2006).

[3] At sentencing, the state dismissed the second charge against appellant.

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, the state gave appellant notice of its intent to offer the *Spreigl* evidence to prove a common scheme or plan, opportunity, and preparation. Appellant argues that the district court's admission of this evidence constitutes reversible error because (a) the evidence was not proven by clear-and-convincing evidence, (b) the evidence is not relevant to the purposes for which it was offered, and (c) any probative value the

evidence has is outweighed by its potential for unfair prejudice. We address each of appellant's arguments in turn.

Clear-and-Convincing Evidence

"[A] *Spreigl* incident may be considered clear and convincing when it is highly probable that the facts sought to be admitted are truthful." *Ness*, 707 N.W.2d at 686. This standard "requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (quotation omitted). The testimony of the *Spreigl* victim can be sufficient to meet the clear-and-convincing standard and it is possible to make a sufficient offer of proof without a hearing to take testimony from the *Spreigl* victim. *Id.* at 389-90.

Here, the same police reports contain information on both the charged offense and the *Spreigl* incidents. These reports show that K.M. gave consistent statements to the police, never wavering or recanting. Under these circumstances, the district court did not abuse its discretion by finding that the state established that K.M.'s statements are true, satisfying the clear-and-convincing standard for *Spreigl* evidence.

Relevant to the Purposes for Which it was Offered

The district court, in determining the relevance of *Spreigl* evidence, should consider whether there is a sufficiently close relationship between the *Spreigl* incident and the charged offense. *Id.* at 390. The incident "need not be identical in every way to the charged crime, but must instead be sufficiently or substantially similar to the charged offense—determined by time, place and modus operandi." *Id.* at 391. Specifically, a *Spreigl* incident "must have a marked similarity in modus operandi to the charged

offense." *Ness*, 707 N.W.2d at 688. The district court should not take the state's purported purpose "at face value. Instead, the court should follow the clear wording of Rule 404(b) and look to the real purpose for which the evidence is offered, and ensure that that purpose is one of the permitted exceptions to the rule's general exclusion of other-acts evidence." *Id.* at 686 (quotation omitted).

Appellant argues that "any similarity between the *Spreigl* incidents and the charged offense begins and ends with the general category of the crime." We disagree. The *Spreigl* incidents and those underlying the charged offense took place back-to-back in the same setting. Both victims were friends of appellant's 14-year-old son, and in each situation appellant, as the state argued to the district court, did "many things to gain [their] trust, to try to establish some type of relationship with them, or to have some type of bond." In the presence of his children, appellant gave his victims marijuana and pills, conversed with them about sexual topics, and made physical advances. On this record, the district court did not abuse its discretion by finding the *Spreigl* evidence relevant to the charged offense.

Weight Probative Value Against Potential for Unfair Prejudice

The district court must "weigh the probative value of the evidence on disputed issues in the case against its potential for unfair prejudice." *Id.* at 690. "[U]nfair 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). The closer the relationship between the *Spreigl* incidents and the charged offense, "in

terms of time, place, or modus operandi, the greater the relevance and probative value of the [*Spreigl*] evidence and the lesser the likelihood that the evidence will be used for an improper purpose." *Ness*, 707 N.W.2d at 688.

Here, the *Spreigl* incidents are highly probative of appellant's opportunity, preparation, and plan to commit the charged offense because they closely mirror appellant's initial steps towards commission of the charged offense. The district court lessened the probability of the jury giving undue weight to the *Spreigl* evidence by giving standard cautionary instructions both prior to the introduction of the *Spreigl* evidence and in its final instructions. *See Kennedy*, 585 N.W.2d at 392. Additionally, the *Spreigl* evidence was admitted through two brief pieces of testimony; in a trial transcript totaling over 300 pages, approximately eight pages contain *Spreigl* evidence. Under these circumstances, the district court did not err by determining that the probative value of the *Spreigl* evidence was not outweighed by its potential for unfair prejudice.

Because the five elements necessary for admission of *Spreigl* evidence were met, appellant is not entitled to relief on this ground.

II.

Appellant next argues that the district court committed reversible error by denying his request for a jury instruction that specified the purposes for which the *Spreigl* evidence was admitted. The parties agree that the district court's failure to give such an instruction, upon request, was error, but disagree whether such error entitles appellant to a new trial. "When faced with an erroneous refusal to give jury instructions, [this court] must examine all relevant factors to determine whether, beyond a reasonable doubt, the

error did not have a significant impact on the verdict." *State v. DeYoung*, 672 N.W.2d 208, 212 (Minn. App. 2003) (quotation omitted).

In arguing that the district court's error requires reversal, appellant cites *State v. Babcock*, 685 N.W.2d 36 (Minn. App. 2004), *review denied* (Minn. Oct. 20, 2004). In *Babcock*, we found the district court's denial of a purpose-specific jury instruction was not harmless error.[4] *Id.* at 42-43. We reached this conclusion after considering the questionable strength of the evidence of guilt; the lack of comment, in closing arguments, on the limited purpose for which the *Spreigl* evidence was admitted; and two arguments made by the prosecutor which came "far too close" to suggesting that the *Spreigl* evidence should be used as impermissible character evidence. *Id.* at 43.

We believe the circumstances of this case are demonstrably closer to *DeYoung* than to *Babcock*. In *DeYoung*, we found the district court's failure to give the proper jury instruction harmless error when the evidence against the appellant was strong, the district court instructed the jury that the *Spreigl* evidence could only be considered for the limited purpose of determining whether the appellant committed the charged offense, and counsel for both parties explained the limited purpose of the *Spreigl* evidence in their closing arguments. 672 N.W.2d at 212-13. Here, like *DeYoung*, the evidence of appellant's guilt was strong and the district court instructed the jury in accordance with standard jury instructions. Although neither party's counsel explained to the jury the specific purposes for which the *Spreigl* evidence was admitted, the state requested and

[4] We note that, at the time of Babcock's trial, the district court did not have the benefit of our decision in *DeYoung*. *See Babcock*, 685 N.W.2d at 41.

received a cautionary instruction prior to introducing each piece of *Spreigl* evidence. And, although appellant contends that the state suggested, in closing arguments, that the jury may use the *Spreigl* evidence as impermissible character evidence, this is not the case. The state merely alluded to the *Spreigl* evidence in terms of appellant's common scheme or plan, opportunity, and preparation—the purposes for which it was admitted.

Under these circumstances, we find the district court's failure to give the requested jury instruction constitutes harmless error. Therefore, appellant is not entitled to relief on this ground.

Affirmed.