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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1567

State of Minnesota,
Respondent,

vs.

Robert Leander Bering,
Appellant.

Filed July 1, 2013
Affirmed
Bjorkman, Judge

Wadena County District Court
File No. 80-CR-11-872

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

Kyra L. Ladd, Wadena County Attorney, Erin C. Stephens, Assistant County Attorney, Wadena, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Willis, Judge.[*]

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[*] 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

BJORKMAN, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that (1) the district court abused its discretion by admitting evidence of four other criminal-sexual-conduct offenses and (2) the district court erred in calculating his jail credit. We affirm.

FACTS

In 1999, appellant Robert Bering was in a romantic relationship with C.C. and moved in with C.C. and her three children. During much of their relationship, C.C. worked outside the home, and Bering stayed home and watched the children. In early 2001, C.C.'s ten-year-old daughter, K.M., told C.C. that Bering had touched her inappropriately. C.C. contacted the social worker at K.M.'s school, who contacted social services. The investigating social worker initially conducted a CornerHouse-style interview of K.M., during which a police officer was present but C.C. was not. K.M. told the social worker that Bering never touched her. The social worker included C.C. in a subsequent interview, during which K.M. disclosed that Bering touched her "[i]n the wrong place." C.C. told the social worker that K.M. had lied in the past and that she was not sure anything happened. Social services recommended that Bering leave the house but took no further action. Bering was not criminally charged. He continued to live with C.C. and the children until he and C.C. ended their relationship in 2004.

In 2007, Bering pleaded guilty to four criminal-sexual-conduct charges based on conduct involving two daughters of his then-significant other and two of the daughters'

friends. Bering was sentenced to prison. In 2011, Bering's corrections agent, Kevin Glass, received information that Bering had sexually abused K.M. Glass relayed the information to social services, which informed law enforcement. Police interviewed K.M., who stated that Bering sexually abused her from age 8 until about age 13, including several instances of sexual intercourse.

Bering was charged with first-degree criminal sexual conduct. The state provided notice that it intended to offer evidence of Bering's 2007 criminal-sexual-conduct offenses to show a common scheme or plan. Over Bering's objection, the district court ruled that the evidence is admissible. Evidence of the 2007 offenses was admitted through the testimony of Glass and a police officer involved in the 2011 investigation and certified copies of the 2007 convictions.

K.M. testified that Bering began abusing her shortly after he moved in with her family, when K.M. was about eight years old. Bering would send her brothers outside to play, remove her clothes, and touch her breasts and vaginal area with his hands and penis. The abuse occurred "almost every day" during the summer months. Then, starting when she was around 12 years old, Bering also engaged in sexual intercourse with her several times. K.M. testified that she was afraid to tell anyone because Bering told her he would kill her if she did. K.M. explained that this fear prompted her to tell social services in 2001 that Bering had not touched her.

Bering presented the testimony of the social worker who interviewed K.M. in 2001. Based largely on the equivocal nature of K.M.'s 2001 report and her mother's disbelief of that report, Bering argued that K.M. fabricated the abuse.

The jury found Bering guilty. The district court sentenced him to 146 months' imprisonment and denied his request for credit for the time he was in custody in connection with the 2007 convictions. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by admitting evidence of the 2007 offenses.

Evidence of a defendant's prior crimes or wrongdoing is not admissible to prove the defendant's character for purposes of showing that the defendant acted in conformity with that character. Minn. R. Evid. 404(b). But this *Spreigl* evidence may be admissible for other purposes, including to show a common scheme or plan, if

> (1) the prosecutor gives notice of its intent to admit the evidence consistent with the Rules of Criminal Procedure; (2) the prosecutor clearly indicates what the evidence will be offered to prove; (3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; (4) the evidence is relevant to the prosecutor's case; and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Id.; *see also State v. Stewart*, 643 N.W.2d 281, 296 (Minn. 2002). We review the admission of *Spreigl* evidence for an abuse of discretion. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). "The appellant challenging the admission of *Spreigl* evidence bears the burden of showing the error and any resulting prejudice." *State v. Clark*, 738 N.W.2d 316, 345 (Minn. 2007).

Bering argues that the district court abused its discretion by admitting evidence of the 2007 sexual-misconduct offenses because they are not sufficiently relevant to the

charged offense and because the potential for unfair prejudice from the evidence outweighs any probative value. We address each argument in turn.

Relevance

When, as here, a defendant charged with a sexual-misconduct offense contends that the charged conduct was fabricated, *Spreigl* evidence may be admitted "to establish, by showing a common scheme or plan—that a sexual act occurred." *See id.* at 346. The *Spreigl* evidence need not be identical to the charged offense but must be substantially similar to the charged offense in terms of time, place, and modus operandi. *Ness*, 707 N.W.2d at 687-88. While the supreme court has required a "marked similarity in modus operandi," *id.* at 688, the closer the relationship between the other misconduct and the charged offense with respect to all three factors, the greater the relevance and probative value of the *Spreigl* evidence. *Clark*, 738 N.W.2d at 346.

Bering contends that his 2007 offenses were not sufficiently similar to the charged offense to establish a common scheme or plan. We disagree. As to time, the charged offense was based on a course of conduct extending into 2004, while the *Spreigl* offenses occurred in January 2007. This gap of no more than three years is relatively short, especially considering the fact that the offenses involved known victims and therefore required a period of acquaintance. As to place, both the 2007 offenses and the charged offense occurred in the same county and in the same physical setting (Bering's home). And as to modus operandi, all of the offenses involved Bering targeting young girls (6 to 12 years old), whom he knew through his significant others, for sexual contact and penetration while he was serving as their caretaker.

Bering relies on *Clark* for the proposition that his 2007 offenses are not markedly similar to the charged offense involving K.M. We are not persuaded. Not only do the offenses here share most of the similarities noted in *Clark*—similar location of the offenses and similar types of assaults—but the victims also are markedly similar both in their age and the nature of their relationship to Bering. *See Clark*, 738 N.W.2d at 346-47 (comparing limited similarities between *Spreigl* and charged offenses to cases with same types of similarities, plus same or notably similar victims or similar relationship to victims). Moreover, Bering's 2007 offenses and the charged offense are far closer in time than the offenses at issue in *Clark*, making the *Spreigl* evidence here significantly more relevant than in that case. *See id.* at 346 ("[A]s the time span increases between the past misconduct and the crime charged, the similarity between the acts in terms of modus operandi must likewise increase in order for the past misconduct to be relevant.").

In sum, Bering's 2007 offenses occurred in the same county and type of physical setting as the charged offense, less than three years after his prolonged abuse of K.M. ended, and under markedly similar circumstances. On this record, we conclude the district court did not abuse its discretion by determining that the 2007 offenses are relevant to establish a common scheme or plan.

Probative value versus potential prejudice

Bering next argues that any probative value of the *Spreigl* evidence is outweighed by the danger of unfair prejudice. Whether the probative value of *Spreigl* evidence outweighs its potential for unfair prejudice to a defendant depends on the relevance of the other acts and the state's need to strengthen weak or inadequate proof, weighed against

the risk of the evidence being used as propensity evidence. *State v. Scruggs*, 822 N.W.2d 631, 644 (Minn. 2012); *see also Ness*, 707 N.W.2d at 690 (requiring consideration of the state's need for *Spreigl* evidence "in the context of balancing the probative value of the evidence against its potential for unfair prejudice").

Having concluded that the 2007 offenses are relevant to show a common scheme or plan, we consider the state's need for the evidence. As in many child sexual-abuse cases, there is no physical evidence of Bering's conduct or corroborating witnesses, and Bering asserts K.M. fabricated the incidents of abuse. *See State v. Wermerskirchen*, 497 N.W.2d 235, 240-41 (Minn. 1993) (highlighting credibility concerns because of the secrecy in which child sexual abuse takes place, the vulnerability of the victims, and the absence of physical proof of the crime). These evidentiary challenges are compounded by several factors weighing against K.M.'s credibility: her first account was equivocal, her mother did not believe her, she delayed making a more assertive report, and she failed to report the abuse until police approached her about it. *Cf. Ness*, 707 N.W.2d at 688 (noting that district court found victim "very credible" and witness corroborated victim's testimony). Given these circumstances, Bering's pattern of sexually abusing the young children of his significant others while they are in his care is highly probative of whether the abuse occurred. *See State v. Duncan*, 608 N.W.2d 551, 557 (Minn. App. 2000) (recognizing probative value of common-scheme-or-plan evidence when defendant claims victim fabricated sexual misconduct), *review denied* (Minn. May 16, 2000).

By contrast, the risk of unfair prejudice was relatively minimal. The state did not present the evidence through extensive or inflammatory testimony but offered only brief,

general testimony and certified copies of Bering's convictions. *See Clark*, 738 N.W.2d at 347 (stating that potential prejudice was slight when jury learned "relatively few details surrounding the past incident"). Because Bering was convicted of the *Spreigl* incidents, he did not face the prejudice of having to defend himself regarding those offenses. *See Ness*, 707 N.W.2d at 689 (noting that the danger of prejudice is lessened when the defendant was convicted of a crime based on the prior offense). And the district court instructed the jury as to the limited purpose of the evidence each of the two times the evidence was discussed at trial, which lessens the probability of undue weight being given to the evidence. *See State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008).

On this record, the district court did not abuse its discretion in determining that the potential for unfair prejudice from the evidence of the 2007 offenses does not outweigh the significant probative value of the evidence.

II. The district court properly denied Bering custody credit for his time in prison on the 2007 convictions.

A defendant is entitled to custody credit for all time spent "in custody in connection with the offense or behavioral incident being sentenced." Minn. R. Crim. P. 27.03, subd. 4(B). "A district court's decision whether to award credit is a mixed question of fact and law; the [district] court must determine the circumstances of the custody the defendant seeks credit for, and then apply the rules to those circumstances." *State v. Johnson*, 744 N.W.2d 376, 379 (Minn. 2008). We review the district court's factual findings for clear error and the application of the legal standard to those findings de novo. *Id.*

A defendant may receive custody credit for time spent in jail or prison on another offense before being charged with the instant offense. *See State v. Clarkin*, 817 N.W.2d 678, 689-90 (Minn. 2012). But a defendant is only entitled to custody credit after the date when the state has completed its investigation and "has probable cause and sufficient evidence to prosecute its case against the defendant with a reasonable likelihood of actually convicting the defendant of the offense for which he is charged." *Id.* at 689. Probable cause to support a criminal charge exists when "'the evidence worthy of consideration . . . brings the charge against the [defendant] within reasonable probability.'" *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003) (quoting *State v. Florence*, 306 Minn. 442, 446, 239 N.W.2d 892, 896 (1976)).

Bering argues that he is entitled to custody credit for the time he spent in custody on his 2007 convictions. We disagree. Bering was charged with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(h)(iii) (2004), which involves multiple acts of sexual penetration against a child with whom the actor has a significant relationship. In 2001, ten-year-old K.M. stated that Bering touched her "[i]n the wrong place," but also denied any touching occurred, and never mentioned penetration. In fact, K.M.'s 2001 report predated the instances of sexual intercourse she described at trial. Moreover, K.M.'s mother told social services that she did not believe K.M., there was no formal police investigation, and no additional evidence became available until K.M.'s police interview in 2011. We conclude that the evidence available for consideration before 2011 was insufficient to establish a reasonable probability that Bering committed first-degree criminal sexual conduct. Because *Clarkin* requires not only probable cause

but a likelihood of success in prosecuting the offense before time in custody must be credited against an uncharged offense, we conclude the district court properly denied Bering custody credit for time he served before 2011.

Affirmed.