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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0575

State of Minnesota,
Respondent,

vs.

Robert Arthur Litzau,
Appellant.

Filed April 8, 2013
Affirmed
Halbrooks, Judge

Cass County District Court
File No. 11-CR-10-1104

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Christopher J. Strandlie, Cass County Attorney, Walker, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

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

HALBROOKS, Judge

Appellant challenges his convictions of second-degree burglary and failure to register as a predatory offender, arguing that the district court judge violated the Code of

Judicial Conduct by failing to disqualify himself from presiding over his trial and that the district court abused its discretion by admitting irrelevant and unfairly prejudicial *Spreigl* evidence. We affirm.

FACTS

Appellant Robert Arthur Litzau has been required to register as a predatory offender since 1999. As of April 2010, Litzau's registered address was in Lino Lakes. Later that month, Litzau registered an address owned by I.A. on 24th Avenue in Backus as his primary address. Litzau indicated that he would begin residing there on May 5, 2010. On May 18, 2010, Litzau registered a Hazel Street address, also in Backus, as a secondary address, but did not change his primary address.[1] The Hazel Street address belonged to G.R., and G.R. allowed Litzau to stay with her when he told her that he needed a place to stay.

On May 27, 2010, following an argument, G.R. told Litzau to pack up and leave. Litzau refused to do so and continued to yell at G.R. G.R. decided to leave and locked the front door to her home, but was unable to lock the windows. Following G.R.'s departure, G.R.'s neighbors witnessed Litzau enter G.R.'s home, carry items out, and load those items onto a trailer. A criminal investigator responded and also observed Litzau's behavior. When questioned, Litzau told the investigator that he lived at the Hazel Street address. Another officer, who was familiar with Litzau and his registration requirements, arrived and overheard the conversation with the investigator. The officer

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[1] A predatory offender is required to register any location where he regularly or occasionally stays overnight as a secondary address. Minn. Stat. § 243.166, subds. 1a(i), 4a (2008).

asked Litzau to repeat where he lived, and, again, Litzau responded that he lived at the Hazel Street address. The officer then arrested Litzau for violating the predatory-offender registration law.

Litzau was charged with one count of second-degree burglary in violation of Minn. Stat. § 609.582, subd. 2(a)(1) (2008), and one count of failure to register as a predatory offender in violation of Minn. Stat. § 243.166, subd. 5(a) (2008). Ten days after Litzau was criminally charged, G.R. filed for and obtained an order for protection (OFP) against him.

The state and Litzau each sought and were granted removal of judges assigned to Litzau's criminal case. *See* Minn. R. Crim. P. 26.03, subd. 14(4) (allowing removal pursuant to compliance with timely filing of notice). As a result, the same district court judge who presided at G.R.'s OFP hearing was assigned to preside at Litzau's criminal case. Litzau submitted an informal letter to the district court judge and, that same day, a formal motion to the chief judge of the judicial district, requesting the judge's disqualification. Litzau argued that disqualification was necessary because the judge's impartiality might be reasonably questioned because he had presided at the OFP hearing. The state did not respond, and the chief judge denied Litzau's motion. The chief judge concluded that neither the OFP hearing transcript nor the order granting the OFP suggested that the district court judge demonstrated bias or impartiality against Litzau or that the district court judge bore "any deep seated or unequivocal antagonism towards [Litzau] that would render fair judgment impossible."

In preparation for trial, the state sought to introduce as *Spreigl* evidence Litzau's 2009 failure-to-register conviction, a 2011 charge for failure to register or providing false information to law enforcement, and two criminal-sexual-conduct convictions in order to prove intent, knowledge, and lack of mistake on the current failure-to-register charge. The district court ruled that the state could introduce the 2009 conviction, but denied the state's request to admit the other prior acts.

Following trial, the jury found Litzau guilty of both counts. The district court imposed concurrent sentences of 24 months' imprisonment on the failure-to-register conviction and 23 months' imprisonment on the burglary conviction. This appeal follows.

D E C I S I O N

I.

Litzau contends that the district court judge violated the Code of Judicial Conduct because he failed to disqualify himself from presiding over Litzau's criminal trial after presiding at the OFP hearing. The Sixth Amendment of the United States Constitution provides a criminal defendant the right to a fair trial before an impartial judge. U.S. Const. amend. VI; *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005); *accord* Minn. Const. art. I, § 6. The Minnesota Rules of Criminal Procedure prohibit a judge from presiding over a trial or other proceeding if that judge is disqualified under the Code of Judicial Conduct. Minn. R. Crim. P. 26.03, subd. 14(3). Whether a judge has violated the Code of Judicial Conduct is a question of law reviewed de novo. *Dorsey*, 701 N.W.2d at 246.

Rule 2.11(A)(1) of the code mandates that a judge disqualify himself "in any proceeding in which the judge's impartiality might reasonably be questioned." The code defines "impartiality" as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Minn. Code Jud. Conduct Terminology. A defendant need not show actual bias in order to invoke rule 2.11. *State v. Laughlin*, 508 N.W.2d 545, 548 (Minn. App. 1993). Instead, a judge should disqualify himself under rule 2.11 if, after an objective examination of the facts and circumstances, a reasonable examiner would question the judge's impartiality. *Dorsey*, 701 N.W.2d at 248. The reasonable examiner is "an objective, unbiased layperson with full knowledge of the facts and circumstances." *State v. Pratt*, 813 N.W.2d 868, 876 n.8 (Minn. 2012) (quoting *In re Jacobs*, 802 N.W.2d 748, 753 (Minn. 2011)).

At the OFP hearing, G.R. testified that the most recent event of Litzau's alleged domestic abuse occurred on May 27—the day of their argument and Litzau's arrest. The district court asked G.R. whether she and Litzau lived together between May 10 and May 27. She acknowledged that they did and testified that she and Litzau argued "8 or 9 times" during that period. The district court also asked Litzau if he and G.R. lived together. Litzau responded that he was not sure about the dates and clarified that he "just stayed there. I didn't really live there." At the conclusion of the OFP hearing, the district court judge stated:

> I have completely different stories here on what happened. . . . I do believe that there were at least one or multiple incidences where there was an argument and you

> [Litzau] . . . threatened [G.R.]. So I do find that there was domestic abuse that you threatened physical violence on her and at least more than one time. She is claiming eight times. You can't remember how many arguments you had with her. . . . In fact you said that you weren't even arguing. I don't find that believable. I find what she says believable and that I will issue the order for two years.

Litzau argues that the district court judge should have been disqualified in the subsequent criminal proceeding because G.R. was the alleged victim in the burglary charge and the judge had heard details about the parties' relationship. In *State v. Yeager*, the appellant claimed that a district court judge who had heard statements in an earlier action that inculpated him in the instant case should be disqualified. 399 N.W.2d 648, 652 (Minn. App. 1987). We determined that "[t]he fact that a judge is familiar with a defendant is not an affirmative showing of prejudice." *Id.* Here, the district court judge was familiar with both Litzau and G.R. He understood that Litzau was either living with or staying with G.R., but did not make any findings at the OFP hearing on the parties' relationship or Litzau's residence.[2] Instead, the district court's findings were limited specifically to those related to issuing an OFP—whether domestic abuse existed.

Litzau argues that the allegations that G.R. made at the OFP hearing appear in the criminal complaint and that consent for Litzau to be in G.R.'s residence was at issue in the burglary charge. A reviewing court presumes that a district court judge has

[2] The record does not contain a copy of the OFP and Litzau does not include a copy in his appendix. As a general rule, Litzau bears the burden of providing an adequate record. *See Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995) (holding that that burden rests with an appellant). Without these documents, we are limited to reviewing the OFP hearing transcript to determine whether the district court judge violated the Code of Judicial Conduct.

discharged his or her judicial duties properly and has the ability to make decisions based solely on the merits of a case by taking a neutral and objective approach. *Dorsey*, 701 N.W.2d at 248-49; *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). Nothing in the pretrial, trial, or sentencing transcripts suggests that the district court judge wrongfully considered or was influenced by the testimony elicited at the OFP hearing.

Litzau contends that the district court judge made the adverse finding in the OFP proceeding that G.R. was credible, and Litzau was not, and noted that G.R. is likely to testify to support the burglary charge. "A judge's prior adverse ruling in a case is not sufficient to show prejudice which would disqualify the judge." *State v. Kramer*, 441 N.W.2d 502, 505 (Minn. App. 1989), *review denied* (Minn. Aug. 9, 1989). In determining whose testimony to accept, the district court noted G.R.'s ability to recall the number of arguments the couple had, while Litzau was unable to remember anything specific. The district court's statement that G.R. was credible, and Litzau was not, occurred in the context of the OFP hearing. But Litzau's criminal charges were tried to a jury, and nothing in the record suggests that this finding in an unrelated proceeding affected the jury's credibility determinations.

In addition, we note that Litzau's contention that the district court judge was biased is belied by the fact that the district court judge made important rulings favorable to Litzau. *See State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006) (holding that appellant was not denied the right to a fair trial before an impartial judge where the record reflected that the district court carefully considered motions made by both sides and ruled in favor of appellant on important motions). Here, the district court judge denied the state's

request to admit three additional *Spreigl* incidents, denied the state's motion to impeach Litzau based on his prior convictions, required redaction of the phrases "predatory offender" and "sex offender" in exhibits submitted at trial, and granted Litzau's motion for a jury instruction on the lesser-included offense of trespassing. Based on our examination of all the facts and circumstances, we conclude that no reasonable examiner would have questioned the district court judge's impartiality.

II.

Litzau challenges the district court's ruling that allowed the state to enter into evidence his 2009 failure-to-register conviction. The decision to admit evidence of other crimes or prior bad acts, often referred to as *Spreigl* evidence, is within the sound discretion of the district court. *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988); *see also State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). A defendant who claims that the district court erred in admitting such evidence has the burden of showing both abuse of discretion and prejudice. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

Spreigl evidence is not admissible to prove action in conformity with a person's character, but may be admitted for other purposes, such as proof of motive, intent, absence of mistake, identity, or plan. Minn. R. Evid. 404(b). *Spreigl* evidence is not admissible unless (1) the state gives notice of its intent to admit the evidence, (2) the state clearly indicates what the evidence will be offered to prove, (3) the defendant's involvement in the act is proven by clear and convincing evidence, (4) the evidence is relevant and material to the state's case, and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant. *State v. Ness*, 707

N.W.2d 676, 685-86 (Minn. 2006). Here, the state sought to use the 2009 conviction in order to prove Litzau's intent, knowledge, and lack of mistake. The district court determined that the 2009 conviction was relevant to the state's case because it showed knowledge, absence of mistake or accident, and intent, and that the probative value of the conviction was not outweighed by the potential for unfair prejudice.

A. Relevance and materiality

Litzau argues that his 2009 failure-to-register conviction was not relevant and material to the failure-to-register charge. In determining the relevance and materiality of *Spreigl* evidence, the district court should consider the issues in the case and the reasons and need for the evidence. *Kennedy*, 585 N.W.2d at 390. Under Minnesota law, the state must prove beyond a reasonable doubt that Litzau "knowingly violate[d]" the registration requirements. *See* Minn. Stat. § 243.166, subd. 5(a). Because Litzau did not testify and there was no direct evidence of Litzau's intent, knowledge, or lack of mistake, the state sought to use the 2009 conviction to prove beyond a reasonable doubt that Litzau "knowingly violate[d]" the registration requirements.

The district court should also examine whether there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in time, place, or modus operandi. *Kennedy*, 585 N.W.2d at 390. But *Spreigl* evidence "need not be identical in every way to the charged crime." *State v. Lynch*, 590 N.W.2d 75, 81 (Minn. 1999). "The closer the relationship between the events, the greater the relevance or probative value of the evidence and the lesser the likelihood that the evidence will be used for an improper purpose." *Id.* at 80 (quotation omitted).

The prosecutor presented evidence of the 2009 conviction through the testimony of a Crow Wing County investigator, who investigated an allegation that Litzau was not living at his registered address in Backus. The investigator testified that he learned that Litzau was staying with a woman in Crow Wing County and, while he was meeting with the woman at her residence, he saw Litzau drive by. The investigator initiated a traffic stop, and Litzau told him that he had stayed at the Crow Wing County address the night before and was going to register the address, but had not yet done so.

Comparing the timing of that conviction with the current charge, the 2009 conviction arose out of an incident occurring in 2008; the current charge occurred in May 2010. No bright-line rule exists for determining when a prior act has become too remote in time to be relevant, *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005), and *Spreigl* evidence has been held admissible in circumstances of long gaps, where other indicia of relevance exist. *See Washington*, 693 N.W.2d at 202-03 (16-year gap). As for place, the 2009 conviction occurred in Crow Wing County; the current charges arose in Cass County. The counties are adjacent, and both are located within the Ninth Judicial District. With respect to modus operandi, the two incidents were similar in that Litzau was living with women while maintaining a primary registered address in Backus.

Litzau's theory of defense was that he was living at his registered address. Thus, he argues that the *Spreigl* evidence did little to address the question of whether appellant knowingly violated the registration laws by living at G.R.'s house. But Litzau cites no legal support for his assertion that the admissibility of *Spreigl* evidence relates to defense

theory. We conclude that the issues in the case related to the need for the evidence and that the charged offense is sufficiently related to the prior conviction.

B. Balancing

Litzau argues that the 2009 conviction is irrelevant, and therefore its admission was inherently prejudicial and an abuse of the district court's discretion. *Spreigl* evidence may be excluded if its probative value is substantially outweighed by its potential for unfair prejudice. Minn. R. Evid. 403. Unfair prejudice refers to "the capacity of evidence to persuade by illegitimate means." *State v. Cermak*, 365 N.W.2d 243, 247 n.2 (Minn. 1985) (quotation omitted).

Litzau contends that the *Spreigl* evidence was not necessary to strengthen weak or inadequate proof of the elements of the charged offense because the state had witnesses who had first-hand knowledge of the offense. "The prosecution's need for other-acts evidence should be addressed in balancing probative value against potential prejudice, not as an independent necessity requirement . . . ." *Ness*, 707 N.W.2d at 690. Here, the state argued that its case was weak on the issue for which the evidence was offered: to show that Litzau *knowingly* violated the registration requirement. Litzau did not testify, and the witnesses who provided testimony on the registration charge did not address whether Litzau knowingly violated the law.

We also note that the district court gave cautionary instructions to the jury at the time the *Spreigl* evidence was introduced and at the conclusion of the evidence. And juries are presumed to follow instructions provided by the district court. *State v. Hill*, 801 N.W.2d 646, 658 (Minn. 2011). For these reasons, we conclude that the probative value

of the 2009 conviction was not outweighed by the danger of unfair prejudice and that the district court did not abuse its discretion by admitting the evidence.

Affirmed.