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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1159

State of Minnesota,
Respondent,

vs.

Bradley Stephen Rierson,
Appellant.

Filed July 3, 2017
Affirmed
Ross, Judge

Stearns County District Court
File No. 73-CR-14-10951

Lori Swanson, Attorney General, Edwin W. Stockmeyer, III, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

ROSS, Judge

The state charged Bradley Rierson with seven counts of possessing child pornography or a computer containing child pornography. The jury found Rierson guilty. At trial, the jury learned that his son's former girlfriend—a child—sent Rierson nude

pictures of herself and that Rierson's browser history indicated his sexual preference for minor females. Rierson argues on appeal that this *Spreigl* evidence unfairly prejudiced him. He argues alternatively that only two of the convictions can stand because the evidence, the district court's instructions, and the jury's verdict together establish only that he possessed two *computers* containing child pornography, not that he possessed seven *images* of child pornography. And he argues finally that his consecutive sentences exaggerate the singular nature of his illegal behavior. We reject his first argument because the purported *Spreigl* evidence was either properly admitted or was not truly *Spreigl* evidence. We reject his second argument because, even if the district court erred by not instructing the jury to decide whether Rierson possessed the pornographic works themselves, the error did not substantially affect the verdict. And we reject his sentencing argument because sufficient evidence allowed the district court to determine that the seven pornographic images showed seven different child victims. We affirm.

FACTS

Police searching Bradley Rierson's basement in June 2014 found three computers: a laptop, a desktop, and a tower. Police seized the computers and discovered multiple thumbnail images of child pornography depicting unknown children on the desktop and the tower. They also found two nude pictures of a known adolescent girl, R.C.

The state charged Rierson with seven counts of possessing a pornographic work or a computer that contained a pornographic work involving a minor, in violation of Minnesota Statutes section 617.247, subdivision 4(a) (2012). Before trial, the state filed notice of its intent to offer evidence that R.C. sent nude pictures of herself to Rierson and

that those pictures were located on the desktop computer (the images of R.C. were not included in Rierson's charges in this case). Rierson moved in limine to preclude the evidence. The district court began the trial reserving the issue for later.

Among other witnesses, R.C. and Rierson's 20-year-old son, B.R., testified. B.R. testified that when he was 17 years old, he lived in Rierson's home from May 2012 to September 2012. B.R. and Rierson slept in the basement while Rierson's eventual wife, E.R., and three other children typically stayed on the home's main floor. Rierson spent most of his time in the basement using the desktop computer. Discussing Rierson's online browser history, B.R. said that Rierson prefers "younger-looking wom[e]n" and that his search queries would include phrases like "barely legal." Rierson did not object to this testimony. B.R. also testified that, during his summer in Rierson's home, B.R. had an online, romantic relationship with R.C., a 14-year-old girl. He said that R.C. emailed him several nude pictures of herself. He stated that he deleted these pictures from his email account before he left Rierson's home in September 2012. Contact between B.R. and R.C. ended about when he moved out of Rierson's home.

Seventeen-year-old R.C. testified that she began communicating with Rierson after her relationship with B.R. ended in October 2012. She was 14 years old at that time. For about two months, Rierson and R.C. maintained nearly daily contact, either online or by phone. R.C. estimated that she electronically sent Rierson 15 to 20 nude pictures of herself. She testified that she did not send those pictures to anyone else. She identified the two pictures that the police located on the desktop computer's hard drive as two of these pictures. Rierson did not object to this testimony.

The district court defined the crime of electronically possessing child pornography for the jury. With no objections, the court defined the first element of the offense, saying, "First, the defendant possessed a computer disk or computer or other electronic, magnetic or optical storage system or a storage system of any other type containing a pornographic work." After closing arguments, the district court provided the jury with a verdict form, directing the jury to find Rierson either guilty or not guilty for each of the seven separate counts.

The jury found Rierson guilty on all seven counts of possession of a pornographic work involving a minor child. The district court sentenced Rierson to 60 months in prison for the first count and consecutive terms of 15 months for each of the remaining six counts.

Rierson appeals.

DECISION

Rierson appeals on three grounds. He first argues for a new trial because the district court improperly admitted *Spreigl* evidence. He next contends that five of the seven counts of conviction fail because only two computers contained child pornography and the district court instructed the jury to decide only whether he possessed *computers* containing a pornographic work (not whether he possessed the *pornographic works* themselves). He finally maintains that he should not serve a consecutive prison term for each count because his crime constituted only a single behavioral incident. The arguments do not prevail.

I

Rierson argues that the evidence of his online relationship with R.C. constituted *Spreigl* evidence that was irrelevant and highly prejudicial. He similarly contends that

B.R.'s testimony about Rierson's online browsing history and his preference for "younger-looking women" was *Spreigl* evidence for which the state failed to provide advance notice or explain its relevancy.

Evidence of prior bad acts, commonly referred to as *Spreigl* evidence, is admissible for some things but not others. *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). It is admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible to show that a defendant acted in conformity with his character. Minn. R. Evid. 404(b).

We typically review the district court's admission of *Spreigl* evidence for an abuse of discretion. *Ture v. State*, 681 N.W.2d 9, 15 (Minn. 2004). But when, as it regards some of the challenged evidence here, a defendant did not object when the district court admitted the evidence, we review only for plain error. *State v. Word*, 755 N.W.2d 776, 781 (Minn. App. 2008). We consider if there was an error, if that error was plain or obvious, and if the error affected the defendant's substantial rights. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). And even if the district court plainly erred by admitting *Spreigl* evidence, we will not vacate a guilty verdict unless the defendant carries his burden to demonstrate that the improperly admitted evidence "significantly affected the verdict." *State v. Ness*, 707 N.W.2d 676, 685, 691 (Minn. 2006).

The district court may admit *Spreigl* evidence only if the evidence clears five requirements: (1) the state must notify the defendant of its intent to admit the evidence; (2) the state must disclose clearly what the evidence will be offered to prove; (3) clear and convincing evidence must prove that the defendant participated in the prior act; (4) the

evidence must be relevant; and (5) the potential prejudice to the defendant must not exceed the evidence's probative value. *See Ness*, 707 N.W.2d at 685–86. Rierson contends that admitting R.C.'s testimony of Rierson's relationship with R.C. failed the fourth and fifth requirements and that admitting B.R.'s contested testimony of Rierson's browsing history failed the first and fourth requirements. We first address the evidence of Rierson's relationship with R.C. and then the evidence of his browsing history.

Evidence of Rierson's Online Relationship with R.C.

We will review only for plain error whether the district court properly admitted evidence of Rierson's relationship with R.C. Although Rierson objected to the evidence in limine, the district court did not grant the motion in limine and Rierson failed to renew his objection when the state introduced the evidence.

Rierson argues that the evidence that R.C. emailed Rierson nude pictures of herself should have been prohibited as *Spreigl* evidence because it was irrelevant and highly prejudicial. He is wrong. "*Spreigl* evidence may be relevant and material to show the identity of the perpetrator if identity is at issue and if there is a sufficient time, place, or modus operandi nexus between the charged offense and the *Spreigl* offense." *State v. Wright*, 719 N.W.2d 910, 917 (Minn. 2006) (quotation omitted). The state had to prove that Rierson either knew or had reason to know that he possessed pornographic images involving minors. *See* Minn. Stat. § 617.247, subd. 4(a). And Rierson's trial theory was that, without his knowledge, someone else had downloaded the images onto the two computers. B.R. even stated that Rierson urged him to take the blame by testifying (falsely) that R.C. had sent the two pictures to B.R., not to Rierson. Rierson's trial theory invited

the jury to infer that perhaps his son (R.C.'s former boyfriend) had put the images on Rierson's computers. By establishing that B.R.'s relationship with R.C. had ended, that Rierson himself had begun a relationship with R.C., that as part of that relationship R.C. sent nude images of herself to Rierson exclusively, and that some of those images were stored on Rierson's computer in the same file as other pornographic child images, the state effectively connected Rierson to the other pornographic images on the two computers. This evidence was relevant to explain why Rierson would have pictures of his son's ex-girlfriend and to connect him to the other improper images.

In addition to failing to demonstrate that the evidence was irrelevant, Rierson fails to demonstrate that it was disproportionately prejudicial. It is self-evident that testimony revealing his sexual interest in R.C.—a child—would put him under a shadow. But given the state's need to establish that Rierson, rather than his son, was responsible for receiving and retaining the child pornography, the probative value of the evidence meets or exceeds any risk of its unfair use. The district court did not err by admitting evidence that Rierson had a lustful relationship with R.C. and that she sent him nude pictures of herself.

Evidence of Rierson's Internet Search History and Preferences

Rierson unpersuasively contends that B.R.'s testimony about Rierson's internet browsing should have been excluded as *Spreigl* evidence about which the state gave no advance notice and for which the state failed to establish relevancy. The challenged testimony occurred during the following exchange between the prosecutor and B.R.:

> Q: Any other ways that you personally have reason to believe that he's looked at pornography . . . .

> A: Living with him when I was a sneaky son and looked at his browser history but that's about it.
> Q: What did looking at his browser history tell you about your father and pornography?
> A: Um—that he does like younger-looking wom[e]n.
> Q: What were the words that you saw there?
> A: Um—barely legal—ah—candid, stuff like that.

The state argues that it did not need to provide notice concerning this testimony because it was not *Spreigl* evidence. We agree. The supreme court has established that where "there is nothing per se wrong" with an act, it is not *Spreigl* evidence. *See Ture*, 681 N.W.2d at 17. However suggestive B.R.'s testimony might have been in this context, the reference to "barely legal" does not implicate an act which is "per se wrong." *See id.* at 16–17 (ruling that evidence of defendant collecting personal information about women was not *Spreigl* evidence because there is nothing inherently wrong with collecting this information).

Even if Rierson accurately characterized the testimony as *Spreigl* evidence, its relevance is readily apparent. Like the evidence of Rierson's relationship with R.C., this evidence tends to prove that Rierson is sexually interested in young females and motivated to use his computer to explore that interest. It also corroborates the evidence of his sexual interest in R.C., and together these facts help the jury understand Rierson's preference to see and retain images of the girls who were the subjects of the child pornography on the computers. And we note that the evidence is even less prejudicial than the evidence of his relationship with R.C., since, theoretically, "barely legal" at least suggests "legal." The district court did not err by admitting B.R.'s testimony. Finally, even if B.R.'s testimony

constituted unnoticed and irrelevant *Spreigl* evidence, we see no reasonable possibility that it significantly affected the verdict. *See Ness*, 707 N.W.2d at 691.

II

Rierson also asks us to vacate five of his seven convictions because the jury found only that the images of child pornography in his possession were stored on two computers, falling short of a finding that he illegally possessed seven images. The operative statute criminalizes the possession of "a pornographic work on a computer disk or computer or other electronic, magnetic, or optical storage system or a storage system of any other type, containing a pornographic work, knowing or with reason to know its content and character." Minn. Stat. § 617.247, subd. 4(a). This renders illegal "*both* the possession of a pornographic work itself *and* the possession of a computer storing a pornographic work." *State v. Bakken*, 883 N.W.2d 264, 268 (Minn. 2016). The state charged Rierson in the alternative, alleging seven counts of possessing a pornographic work *or* a computer that contained a pornographic work involving a minor. The state had the authority to charge Rierson with seven counts of possession, whether it charged him for possessing the seven pornographic images themselves or possessing the computers that stored the images.

Rierson asserts that only two of his convictions are appropriate because as to each count the district court specifically instructed the jury to decide whether Rierson possessed *a computer containing* a pornographic work, not generally whether he possessed a pornographic work. In its final instruction to the jury, the district court defined the first element of the offense as: "First, [Rierson] possessed a computer disk or computer or other electronic, magnetic or optical storage system or a storage system of any other type

containing a pornographic work." This description of the first element deviates from the standard recommended jury instruction by omitting the phrase "First, defendant possessed *a pornographic work or* a computer disk . . . ." 10 *Minnesota Practice*, CRIMJIG 12.107 (2015) (emphasis added).

The charging complaint, the prosecutor's arguments, and the evidence at trial all are consistent with a conviction under either theory of the offense—possessing the computers that had the images or possessing the images on the computers. The only concern is the propriety of the instruction, so we construe this issue as asking whether the district court's final instruction was erroneous. Neither party raised any concern about the jury instruction, so we review any potential error in the instruction for plain error. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012).

As discussed, this standard permits reversal only based on an error that is plain and that affects the defendant's substantial rights. *State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013). To affect a defendant's substantial rights, an error in the jury instruction must be prejudicial, meaning that "there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury's verdict." *Id.* (quotation omitted). The state charged and tried this case on the theory that Rierson possessed the pornographic works themselves and also that he possessed the computers that stored them. While the district court has broad discretion in fashioning the jury instructions, it must rightly define the crime charged and explain its elements. *Milton*, 821 N.W.2d at 805. Based on the state's presenting both theories (possession of the works and possession of the computers containing them), we hold that the district court plainly erred by omitting the phrase "a

pornographic work" in describing the first element. *See State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012) ("Jury instructions, reviewed in their entirety, must fairly and adequately explain the law of the case."). The question then becomes whether this error affected Rierson's substantial rights by significantly influencing the jury's verdicts. We believe that it did not.

In addition to the flawed instruction, the district court also instructed the jury that, "In this case [Rierson] has been charged with multiple offenses. You should consider each offense and the evidence pertaining to it separately." Each of the state's seven exhibits was a pornographic image that included a corresponding count number on the exhibit itself. For instance, exhibit 59 is conspicuously labeled, "COUNT ONE." The verdict form listed seven distinct criminal counts. For each count, the form directed the jury to decide whether Rierson was guilty or not guilty of the charge with reference to specific file numbers corresponding to the prohibited pornographic images. For example, "On the charge of Possession of Pornographic *Work* Involving Minors (*File #7*), we find [Rierson] . . . Guilty." (Emphasis Added.)

These circumstances were sufficient to inform the jury that it must decide whether Rierson possessed seven different pornographic works, not merely whether he possessed two computers that contained pornographic works. And corroborating these circumstances, the parties' closing arguments reiterated the specific issue. The prosecutor told the jury that "there's 7 counts" and "[t]here's 7 different files here before you [and] they all have the same elements [that the state has] to prove beyond a reasonable doubt." The prosecutor often referred to the pornographic images as "counts" and the computers as evidentiary

items. Consistent with all of this, Rierson's own counsel declared plainly during closing argument, "We are here because [Rierson] is being charged with seven counts of having seven photos that contain pornographic images involving minors."

The jury returned the verdict form separately checking the word "Guilty" for each of the seven counts, illustrating that it found Rierson guilty of all seven counts—as in guilty of possessing all seven images. Despite the district court's omission of the phrase "a pornographic work" in defining the first element, the rest of the instructions, the verdict form, the relevant exhibits, the prosecutor's arguments, and the arguments of Rierson's attorney all unquestionably informed the jury of its duty to decide whether Rierson possessed seven pornographic works depicting minors. Rierson has shown no prejudice and we will not vacate five of his seven convictions because of the error.

III

Rierson argues that the district court erred by imposing consecutive sentences for each of the seven counts of conviction because the state failed to prove that five of the pornographic images depicted different children. It is true that "if 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." Minn. Stat. § 609.035, subd. 1 (2012). But our caselaw has established a multiple-victim exception. *State v. Marquardt*, 294 N.W.2d 849, 850–51 (Minn. 1980).

Under this exception, the district court may impose multiple sentences for convictions arising out of a single behavioral incident if the offenses involve multiple victims and the multiple sentences would not unfairly exaggerate the criminality of the

defendant's conduct. *State v. Rhoades*, 690 N.W.2d 135, 138 (Minn. App. 2004). Whether possessing multiple images of child pornography invokes the multiple-victim exception to section 609.035 presents a question of law that we review de novo. *Id.* at 137. We will not disturb the district court's decision to impose consecutive sentences under this exception unless the district court clearly abused its discretion. *Id.* at 138. Because the state relies on the multiple-victim exception to establish that Rierson's conduct does not constitute a single behavioral incident, and proving that his conduct does not constitute a single behavioral incident requires proof by a preponderance of the evidence, *see State v. Williams*, 608 N.W.2d 837, 841–42 (Minn. 2000), the state had to prove by a preponderance of the evidence that Rierson's conduct involved multiple victims. We review the district court's implicit factual finding that the pornographic images depicted different children. *See Bakken*, 883 N.W.2d at 270 (stating that single-behavioral-incident analysis involves mixed question of law and fact, and that we review fact-findings for clear error).

We have already applied the multiple-victim exception to section 617.247, because one of the statute's purposes is "to protect minors from the physical and psychological damage caused by their being used in pornographic work depicting sexual conduct." *See Rhoades*, 690 N.W.2d at 138–39; Minn. Stat. § 617.247, subd. 1 (2016). The circumstances direct us to apply it here as well. Rierson does not persuade us otherwise by contending that the state failed to offer sufficient evidence that the pornographic images depicted different children. Police identified one pornographic image on the desktop computer's hard drive and six pornographic images on the computer tower's hard drive. The police

investigator testified that the image from the desktop computer (exhibit 59, count one) depicted a girl of approximately two to three years of age. He also testified about each of the images on the computer tower's hard drive. He described exhibit 60 (count two) as a still picture from a video depicting an identified girl from the registry of the National Center for Missing and Exploited Children (NCMEC). Exhibit 61 (count three) was also a thumbnail of a video showing a known girl from the NCMEC registry. Exhibit 62 (count four) was a thumbnail photo of an underage girl from a pornographic film commonly referred to at the NCMEC as the "Vicky series." Exhibit 63 (count five) showed a juvenile boy engaging in a sexual act with an adult woman. Exhibit 64 (count six) was a thumbnail of another known video involving an underage girl. And exhibit 65 (count seven) is another known image of child pornography, a thumbnail of a video depicting a young, prepubescent female.

Each exhibit portraying a pornographic image was received into evidence without objection. Some exhibits provide descriptive information, including the file's name and size, the date the file was created, modified, and accessed, and the metadata path tracking how each file was stored on the computer. Several of the file names also note the age or ethnicity of the child. For example, exhibit 61 (count three) states that the image depicts an eight-year-old Brazilian girl. Exhibit 62 (count four) provides that the girl in the Vicky series is six years old. Exhibit 63 (count five) notes that the boy is 13 years old.

The district court also considered the presentence investigation (PSI) report before sentencing Rierson. The PSI more descriptively identified the children in each pornographic image. For example, the PSI noted that the image on exhibit 60 (count two)

depicted a female child between the ages of five and eight. The image on exhibit 64 (count six) included a "known juvenile female." And the image on exhibit 65 (count seven) showed a female child between the ages of two to five.

Based on the police investigator's testimony, the descriptions set forth in some of the admitted exhibits, and the details provided for each image in the PSI, we cannot say that the district court clearly erred by implicitly finding that the images depict different children. The district court therefore did not abuse its discretion by imposing consecutive sentences for each count of the conviction.

Affirmed.