STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1583

State of Minnesota,
Respondent,

vs.

Zane Robert Stigen,
Appellant.

Filed September 25, 2017
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge
Concurring in part, dissenting in part, Kirk, Judge

Polk County District Court
File No. 60-CR-15-1713

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Florey, Judge.

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

RODENBERG, Judge

Appellant challenges both his conviction of first-degree sale of a controlled substance and his 322-month prison sentence for that conviction. Because the district court

erroneously admitted evidence of appellant's prior convictions under Minnesota Rule of Evidence 404(b), and because it is reasonably possible that the error significantly affected the verdict, we reverse the conviction and remand for a new trial. In the interest of judicial economy on remand, we affirm the district court's denial of appellant's request for a jury instruction concerning accomplice testimony.

FACTS

On September 22, 2015, police officers discovered about 1.8 grams of methamphetamine in the possession of T.N. T.N. told investigators that he had purchased the methamphetamine from K.F. on September 21, and believed that K.F. had obtained the methamphetamine from a person named "Zane." At the request of law enforcement, T.N. called K.F. and asked to buy more methamphetamine. K.F. told T.N. that he would need to go get the methamphetamine before he could deliver it. Officers observed K.F. drive to appellant Zane Stigen's home, enter, and then leave. Officers arrested K.F. and discovered 13.449 grams of methamphetamine in his vehicle. K.F. told investigators that appellant had supplied methamphetamine to him on September 21 and 22. Appellant was charged with first-degree sale of a controlled substance, in violation of Minn. Stat. § 152.021, subd. 1(1) (2014), for his sale of the methamphetamine to K.F. on September 21 and 22, 2015.

Before trial, the state moved to admit five of appellant's prior convictions under Minnesota Rule of Evidence 404(b) to prove knowledge, intent, identity, motive, and common scheme or plan. Appellant argued that the convictions should be excluded because they were remote in time, were not similar to the charged offense, and the potential for unfair prejudice outweighed any probative value of the convictions. The district court

ruled that three convictions were admissible to prove intent, knowledge, and identity: (1) a 1997 conviction of conspiracy to manufacture or sell 50 grams or more of methamphetamine, (2) a 2005 conviction of attempted fifth-degree possession of methamphetamine, and (3) a 2010 conviction of third-degree possession of methamphetamine.[1] The convictions were introduced at trial through an exhibit to which appellant stipulated. The exhibit identifies the three convictions, the offense year and general location of each offense, whether appellant pleaded guilty or was found guilty by a jury, and that appellant was sentenced to prison for each crime. The district court instructed the jury that the convictions were admitted for the limited purpose of establishing the identity of the seller, appellant's intent to sell methamphetamine, and appellant's knowledge of the presence and nature of the drug.

At the close of the evidence, the district court ruled that K.F. was not an accomplice to appellant and therefore an accomplice-corroboration instruction was not included in the final jury instructions. The jury returned a guilty verdict. Appellant waived his right to a jury trial on the question of whether he was a dangerous or repeat felony offender. The district court found that appellant qualified for an aggravated sentence under Minn. Stat. § 609.1095, subds. 2, 4 (2014). Appellant was sentenced to 322 months in prison.

This appeal followed.

[1] The convictions were identified to the jury as acts occurring in 1997, 2005, and 2010 and from which a conviction resulted. We refer to those convictions by the offense date. For two of the cases, a conviction did not result until the following year.

D E C I S I O N

I. The district court abused its discretion by admitting evidence of appellant's prior convictions under Minn. R. Evid. 404(b), and the wrongful admission of those convictions prejudiced appellant.

Appellant argues that the district court abused its discretion by admitting into evidence at trial three of his prior convictions under Minn. R. Evid. 404(b). He argues that the convictions were not relevant to prove knowledge, intent, or identity, and that the danger of unfair prejudice substantially outweighed any probative value the evidence may have had.

We review a district court's decision to admit evidence under Minn. R. Evid. 404(b) for an abuse of discretion. *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016). A district court "abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). Appellant bears the burden of proving that the district court erred in admitting the evidence and that the error resulted in prejudice. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). If evidence was admitted in error, we must determine whether "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id.* at 691. "[I]f there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted, then the error in admitting the evidence was prejudicial error." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994).

"Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). Such

evidence, also known as *Spreigl* evidence, is generally excluded because "it might . . . suggest[] that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts." *State v. Fardan*, 773 N.W.2d 303, 315 (Minn. 2009) (quotations omitted); *see State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965) (stating the common law exclusionary rule). However, evidence of another crime may be admitted under rule 404(b) to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b).

There are five requirements that must be satisfied before evidence of another crime, wrong, or act is admitted at trial:

> (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) there must be clear and convincing evidence that the defendant participated in the prior act; (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 prejudice to the defendant.

Ness, 707 N.W.2d at 686 (restating the five requirements outlined in Minn. R. Evid. 404(b)). As part of its analysis of whether to admit the evidence, a district court must conduct a thorough examination of the purpose for which the evidence is offered. *Id.* After the district court is satisfied that the purpose is one of the permitted exceptions to rule 404(b)'s general exclusion of other-acts evidence, the court must then determine whether the probative value of the evidence is outweighed by the potential to be unfairly prejudicial. *Id.*

Appellant's opposition to admission of his prior convictions at trial was limited to the fourth and fifth requirements; he did not dispute the adequacy of notice or of the state's intended use of the convictions, and he similarly did not dispute the fact of the convictions. His arguments on appeal are, likewise, limited to the fourth and fifth *Ness* requirements. *Id.*

The district court identified intent, knowledge, and identity as the reasons it admitted the three prior convictions. "In assessing the probative value and need for the evidence, the district court must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *Id.* (quotation omitted). This requires the district court to "isolat[e] the consequential fact for which the evidence is offered, and then determin[e] the relationship of the offered evidence to that fact and the relationship of the consequential fact to the disputed issues in the case." *Id.* A district court's consideration of relevance and materiality should include "the reasons and need for the evidence, and whether there is a time, place, or modus operandi nexus." *State v. Blom*, 682 N.W.2d 578, 612 (Minn. 2004). That prior crimes are of the same generic type as the charged offense is insufficient to warrant admission. *State v. Wright*, 719 N.W.2d 910, 917-18 (Minn. 2006) (citing *State v. Shannon*, 583 N.W.2d 579, 585 (Minn. 1998)). Once it is determined that the evidence is relevant to the disputed issue, we balance the relevance of the evidence, "the State's need to strengthen weak or inadequate proof," and the risk that the evidence will be used by the jury as propensity evidence. *Fardan*, 773 N.W.2d at 319. "If the admission of evidence of other crimes or misconduct is a close call, it should be excluded." *Ness*, 707 N.W.2d at 685.

The state argues that the prior-crimes evidence was admissible to prove appellant's knowledge or belief that the substance at issue was methamphetamine, noting that knowledge is a required element that the state must prove beyond a reasonable doubt. *See State v. Kuhnau*, 622 N.W.2d 552, 556-58 (Minn. 2001) (reversing conviction of conspiracy to commit a first-degree sale where the instruction on first-degree sale did not include the knowledge element); *see also* 10 *Minnesota Practice*, CRIMJIG 20.02 (2015) (requiring the state to prove that the defendant "knew or believed" the substance sold was a mixture containing the controlled substance at issue).

The state argues that, because appellant did not stipulate to his knowledge of the nature of methamphetamine, the prior convictions for methamphetamine-related crimes were probative and material concerning whether appellant knew or believed that the substance allegedly sold by him was methamphetamine. A prior conviction for a methamphetamine-related crime tends to prove that appellant knew or believed that the substance was methamphetamine (if appellant was the seller). But appellant did not dispute at trial that whoever sold K.F. the methamphetamine knew it to be methamphetamine. Appellant's defense was that he was not the person who sold methamphetamine to K.F. K.F.'s lengthy testimony concerning his interactions with appellant culminating in his obtaining the methamphetamine from appellant amply proved appellant's familiarity with the drug without the need for evidence of appellant's earlier convictions. In light of this other evidence addressing the issue of appellant's knowledge of methamphetamine, the state's need for the prior-crime evidence on issues of knowledge and intent was de minimis.

The state also argues that appellant's three prior convictions were relevant and material to prove the identity of the person who sold the methamphetamine to K.F. This issue was genuinely in dispute at trial; in fact, it was the *only* issue in dispute. Appellant denied any connection to the drug sale. His argument during summation was that K.F. was the original supplier of the methamphetamine or, alternatively, that K.F. was covering for another supplier by accusing appellant. The state argued to the district court, and reiterated to the jury in summation, that the prior-conviction evidence identified appellant, rather than one or both of the other two people at appellant's home, as the source of the methamphetamine.

Evidence may be relevant to prove identity "if there is a sufficient 'time, place, or modus operandi nexus' between the charged offense and the *Spreigl* offense." *Wright*, 719 N.W.2d at 917 (quoting *Blom*, 682 N.W.2d at 612). If the crime is "sufficiently similar to the incident at issue before the jury" it may be admissible. *Id.* (quotation omitted).

> If, on the other hand, the prior offense is not particularly similar to the charged offense, there is an increased possibility that the jury will use the evidence improperly—for example, the jury might conclude that defendant is the type of person who would commit the charged crime and therefore it should not doubt the state's other evidence, however weak, identifying the defendant as the person who committed the offense.

State v. Cogshell, 538 N.W.2d 120, 124 (Minn. 1995). Crimes that are of the "same generic type" are not sufficiently similar. *Id.* at 123.

In cases where 404(b) evidence has been admitted to prove identity, the Minnesota Supreme Court has been rigorous in requiring that the evidence is not just evidence of a propensity to commit crimes, or even of a propensity to commit a general sort of crime. In

Cogshell, for example, the supreme court held that evidence of prior drug crimes was admissible where both drug offenses occurred in the same general area of St. Paul, involved the sale of crack cocaine, and the same packaging of the drug was used in both cases. *Id.* at 123-24. In *State v. Bartylla*, a prosecution on charges of first-degree murder and sexual assault of a woman whose home the assailant had entered through an unlocked door, the supreme court considered the admissibility of evidence of the defendant's similar entry into the home of a different woman two years earlier. 755 N.W.2d 8, 20-21 (Minn. 2008). The supreme court held that the admission of the prior-crimes evidence was properly admitted, because both cases involved assaults on women unknown to the defendant who were home alone at night, committed after entry into the homes through doors inadvertently left unlocked. *Id*. at 21. The district court in *Bartylla* had found that the circumstances of the two offenses had a "close relationship in terms of modus operandi," and the supreme court concluded that the evidence was therefore "probative with respect to identity and common scheme or plan because of the marked similarity"; the evidence was admissible not because it proved the defendant's assaultive propensities, but because the circumstances and manner of the earlier assault was markedly similar to the charged offense *Id.* at 21-22. *See also State v. Gomez*, 721 N.W.2d 871, 877-80 (Minn. 2006) (holding that prior crimes evidence was properly admitted to prove identity because, "[i]n each case, the victims were elderly, the victims were physically assaulted in their homes, and the victims' wallets or purses were taken or money was demanded"). *Cf. Shannon*, 583 N.W.2d at 585 (reversing a murder conviction because *Spreigl* evidence admitted at trial was neither proven by clear and convincing evidence nor sufficiently relevant, stating that

"general characteristics are simply not enough . . . for purposes of the admission of other crimes evidence").

Here, when it moved to admit the convictions under Minn. R. Evid. 404(b), the state presented the district court with records concerning the prior convictions. The 1997 conviction involved a plan by appellant and others to create a laboratory near Crookston to manufacture methamphetamine using a recipe that the group had obtained and to sell the methamphetamine that was produced. The 2005 conviction resulted from appellant's attempt to purchase methamphetamine. The purchase was foiled by police, who intercepted a call, imitated a dealer, set a location to meet, and discovered appellant waiting in a van with cash. The 2010 conviction resulted from police stopping appellant's vehicle in East Grand Forks because the vehicle's registration had expired. A broken glass pipe was discovered in appellant's vehicle and a bag containing methamphetamine was located near where the stop occurred. A detective determined that appellant would have been in possession of the methamphetamine within one city block or 300 feet of a city park or school.

While these convictions have one similarity—all involve methamphetamine—they are not "substantially similar" so as to properly identify appellant as the person who sold the drugs to K.F. on September 21 and 22. *See Cogshell*, 538 N.W.2d at 124 (requiring the prior-crime evidence be "sufficiently or substantially similar" to the charged offense, considering "matters such as time, place and modus operandi in determining similarity"); *see also Ness*, 707 N.W.2d at 688 (requiring "marked similarity" of the prior acts to the charged offense where the evidence is offered as proof of a common scheme or plan). The

admission of appellant's prior convictions, two of which did not even involve any sale at all, without any meaningful connection to the charged offense in time, place, or modus operandi, invited the jury to convict appellant because he was a known drug user and had previously conspired to manufacture methamphetamine.[2]

The past-crimes evidence did not identify appellant as the seller of the methamphetamine in any significant way, other than its tendency to prove appellant's past propensity to commit crimes involving methamphetamine markedly *dissimilar* to the charged offense. When the admissibility of bad-acts evidence is a "close call," the evidence should be excluded. *Ness*, 707 N.W.2d at 685. Here, the admissibility of appellant's past drug crimes was not even a close call.

The district court abused its discretion in admitting the evidence of appellant's prior convictions under rule 404(b).

Having determined that the district court erred in admitting the prior-crimes evidence, we consider whether appellant has demonstrated that he was prejudiced. When considering whether a defendant has established a reasonable possibility that the erroneous admission of bad-acts evidence significantly affected the verdict, "we consider whether the district court provided the jury a cautionary instruction, whether the state dwelled on the

[2] Appellant argued to the district court that the convictions were not relevant because of their remoteness in time to the charged offense. Although appellant does not make this precise argument on appeal, we observe that a remote temporal relationship between crimes does not render the evidence less relevant when, as here, there have been significant periods of incarceration between crimes. *Wright*, 719 N.W.2d at 918.

evidence in closing argument, and whether the evidence of guilt was strong." *State v. Fraga*, 898 N.W.2d. 263, 274 (Minn. 2017).[3]

The district court twice cautioned the jury concerning the proper use of the prior convictions: first before the stipulated exhibit was read to the jury, and again in the district court's final instructions to the jury. We have recognized that cautionary instructions minimize prejudice to the defendant. *Jackson v. State*, 447 N.W.2d 430, 433 (Minn. App. 1989). But here, we are not satisfied that the cautionary instructions were sufficient to ameliorate the risk of the jury using the prior convictions as propensity evidence. The risk that the evidence would be used for an improper purpose was exacerbated by the state's explicit invitation to the jury to use the prior-crimes evidence to prove appellant's propensity to commit drug crimes. The state argued during summation that the identity of the supplier was "the man with three prior methamphetamine-related convictions." This argument encouraged the jury to find appellant guilty based on his past conduct.

[3] Appellate courts frequently consider how the state presented the evidence to the jury as part of this analysis. *See State v. Bolte*, 530 N.W.2d 191, 198-99 (Minn. 1995) (considering how the state presented the evidence when determining whether the erroneous admission of *Spreigl* evidence was prejudicial). Here, after the district court ruled that evidence of the prior crimes would be admitted, appellant stipulated to an exhibit describing the convictions and certain facts concerning each of them. Because appellant stipulated to the exhibit, he may not challenge the manner in which the evidence was presented. *State v. Head*, 561 N.W.2d 182, 188 (Minn. App. 1997), *review denied* (Minn. May 28, 1997). And appellant makes no plain-error challenge to the manner of presentation in this appeal. Nevertheless, we note that the stipulated exhibit's inclusion of facts concerning whether appellant was found guilty by a jury or pleaded guilty, and that appellant was sentenced to prison for each crime, was unnecessary to the jury's consideration of whether the evidence proved knowledge, intent, or identity. Including these facts only enhanced the risk that the jury would consider appellant a proper candidate for punishment based on those prior convictions, without including any of the information that would aid the jury in its determination of the contested issue of identity.

The state had direct evidence of appellant's guilt: K.F.'s testimony. But K.F.'s testimony was the only evidence directly connecting appellant to the sale of the methamphetamine. No methamphetamine was found on appellant or at appellant's home—a search warrant was obtained and executed after K.F. was arrested, but no methamphetamine was found. The police found methamphetamine in the possession of T.N. and K.F., but found none in appellant's possession. The defense strategy involved attacking K.F.'s credibility, pointing to the plea agreement K.F. reached with the state, and evidence suggesting that K.F. had ties to the drug trade independent of his connection to appellant. It is very possible that the jury was skeptical of K.F.'s testimony until the state introduced appellant's history of methamphetamine-related crimes and argued that appellant must be the source of the drugs because of his criminal history, evidence that should not have been admitted, and an improper argument that the rule 404(b) evidence should be used as evidence of appellant's propensity to commit the charged offense.

On careful review of the record, we conclude that it is reasonably possible that the evidence of other crimes was used by the jury for an improper purpose. Because there is a reasonable possibility that the verdict would have been more favorable to appellant had the propensity evidence not been admitted, we reverse and remand for a new trial.

II. Appellant was not entitled to an accomplice-corroboration instruction.

We next address the question of whether the district court should have provided an accomplice-corroboration instruction concerning K.F.'s testimony. Although this issue is not necessary to our decision, we address the question in the interest of judicial efficiency

because the same question will likely arise again on remand. *State v. Clark*, 755 N.W.2d 241, 258-59 (Minn. 2008).

As an initial matter, the parties disagree on whether appellant preserved the instruction issue for appeal. The state argues that appellant forfeited the right to challenge the lack of an accomplice-corroboration instruction by failing to request the instruction or object to its omission. *See State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998) (noting that a failure to object to an omission in a jury instruction or propose a specific jury instruction constitutes a forfeiture of the right to appeal the issue). Therefore, the state argues, we should apply a plain-error standard of review. Under that standard, "we determine whether the jury instructions (1) contained an error, (2) that was plain, and (3) that affected the defendant's substantial rights." *State v. Washington-Davis*, 881 N.W.2d 531, 541 (Minn. 2016). If these three elements are met, we must then consider "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotation omitted).

If a party requests an accomplice-corroboration instruction, or objects to its omission, a reviewing court will apply a harmless-error standard of review. *State v. Jackson*, 746 N.W.2d 894, 898 (Minn. 2008); *State v. Shoop*, 441 N.W.2d 475, 480 (Minn. 1989). If the district court erred in refusing to give the requested instruction, the reviewing court must "examine all relevant factors to determine whether, beyond a reasonable doubt, the error did not have a significant impact on the verdict." *Shoop*, 441 N.W.2d at 481.

We are satisfied that appellant did not forfeit the issue. The parties discussed the appropriateness of an accomplice-corroboration instruction, arguments were made by both

parties, and the issue was decided by the district court.[4] We therefore review the district court's denial of an accomplice-corroboration instruction using a harmless-error analysis.

"The test for determining if a witness is an accomplice is whether the witness could have been 'indicted and convicted for the crime with which the defendant is charged.'" *State v. Pendleton*, 759 N.W.2d 900, 907 (Minn. 2009) (quoting *State v. Lee*, 683 N.W.2d 309, 314 (Minn. 2004)). "In addition to directly committing the criminal acts, a person may be considered an accomplice if he or she aided and abetted the crime with which the defendant is charged." *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010). When the issue of whether an individual should be considered an accomplice is subject to different interpretations, it becomes a question of fact for the jury. *Id.* at 298. "But when 'the facts of the case are undisputed and there is only one inference to be drawn as to whether or not the witness is an accomplice, then it is a question for the court to decide.'" *Jackson*, 746 N.W.2d at 898 (quoting *State v. Flournoy*, 535 N.W.2d 354, 359 (Minn. 1995)).

In *State v. Swyningan*, 304 Minn. 552, 555-56, 229 N.W.2d 29, 32-33 (1975), the Minnesota Supreme Court considered whether a buyer of a controlled substance was an accomplice to the seller of the controlled substance. The supreme court stated, "one who receives heroin cannot be an accomplice of a person charged with distributing heroin." 304 Minn. at 556, 229 N.W.2d at 32. The defendant-seller also argued that corroboration of the buyer's testimony was required because the defendant could have been charged as an

[4] The record is imperfect, and it appears that there were off-the-record discussions regarding the requested instruction. The record sufficiently reflects that the instruction was requested, and the district court distinctly ruled that it would not be given to the jury.

accomplice to the buyer's subsequent transfer of the controlled substance to a third party. *Id.*, 229 N.W.2d at 32-33. The supreme court rejected this argument, concluding that the second transaction was "separate and distinct . . . from the distribution for which defendant has been charged. Since it is a separate transaction, it would also be a separate and distinct crime. Participants guilty of one crime are not accomplices of those guilty of a separate and distinct crime." *Id.*, 229 N.W.2d at 33.

Appellant asks us to disregard the supreme court's holding in *Swyningan*, arguing that we should apply our rationale from *State v. Vasquez*, 776 N.W.2d 452 (Minn. App. 2009), to find that, because K.F. was a "link in the chain of distribution," he should be considered an accomplice to appellant.

In *Vasquez*, we held that a buyer of a controlled substance was an accomplice to the seller of the controlled substance, when the seller was charged with third-degree felony murder. 776 N.W.2d at 459. In that case, the buyer exchanged the money with the seller, took possession of the entire amount of heroin, and cooked the heroin. *Id.* The victim then used the prepared heroin, which resulted in her death. *Id.* We held that the buyer was an accomplice to the seller because the buyer had played a role in the "chain of distribution" that culminated in the victim's death. *Id.* *See also* Minn. Stat. § 609.195(b) (2006) (stating that a person is guilty of third-degree murder if he "proximately causes the death of a human being by, directly or indirectly, unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering a controlled substance classified in Schedule I or II"). *Vasquez* is not applicable here. In *Vasquez*, both the buyer and seller could be charged with third-degree felony murder for their separate roles in the distribution

of the heroin that led to the victim's death. The statute at issue in *Vasquez* is not at issue in this case.

Here, appellant was charged with first-degree sale of a controlled substance for his sale of methamphetamine to K.F. on September 21 and 22. To be guilty of the charged crime, appellant must be proved to have unlawfully sold ten grams or more of methamphetamine. Minn. Stat. § 152.021, subd. 1(1). Under *Swyningan*, K.F., as a buyer, was not an accomplice to appellant's sale to K.F. 304 Minn. at 556, 229 N.W.2d at 32. Also under *Swyningan*, corroboration of K.F.'s testimony was not required because appellant was not an accomplice to K.F.'s subsequent sale to T.N. *Id.*, 229 N.W.2d at 33. The transfers from appellant to K.F. and then from K.F. to T.N. were separate and distinct crimes, with each seller liable for his own sale. *Id.* The district court did not err in declining to instruct the jury on the requirement that accomplice testimony be corroborated by other evidence.[5]

Affirmed in part, reversed in part, and remanded.

[5] Appellant raises several issues concerning his sentence. Because we reverse appellant's conviction and remand for a new trial, we do not reach the sentencing issues.

KIRK, Judge (concurring in part, dissenting in part)

I agree with the majority's conclusion that the district court correctly denied appellant's request for an accomplice-corroboration instruction. But I dissent from the majority's conclusion that the district court erred when it admitted appellant's prior convictions under rule 404(b). I would affirm the conviction, but I would reverse and remand the district court's sentence to allow consideration of the recent decision of our supreme court in *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017).

The majority finds fault with the district court's admission of *Spreigl* evidence. *See State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965) (providing that evidence of a defendant's connection to other crimes is generally excluded); *see also* Minn. R. Evid. 404(b) (excluding evidence of other crimes unless certain procedural requirements are met and the evidence is offered to prove an enumerated exception). Before *Spreigl* evidence may be admitted, the district court must engage in a five-step process "designed to ensure that the evidence is subjected to an exacting review." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006) (quotation omitted). The state must give notice of its intent to admit the evidence, clearly indicate what the evidence will be offered to prove, and demonstrate by clear and convincing evidence that the defendant committed the other-crime acts. Minn. R. Evid. 404(b). If these requirements have been met, the district court must determine if the evidence is relevant and material to the state's case, and decide if the evidence should be excluded because the probative value of the evidence is outweighed by the potential prejudice to the defendant. *Id.*; *Ness*, 707 N.W.2d at 686.

These procedural safeguards were satisfied in this case. The state moved to admit evidence of five of appellant's prior drug convictions. The district court gave careful consideration to the state's request to introduce evidence of the offenses to show such things as intent, knowledge, and identity. The district court found that three of the prior convictions were relevant and material to the state's case. Those convictions were a 1997 conviction for conspiracy to manufacture or sell 50 grams or more of methamphetamine, a 2005 conviction for attempted fifth-degree possession of methamphetamine, and a 2010 conviction for third-degree possession of methamphetamine.

The district court did not err in concluding that evidence of the prior methamphetamine-related convictions was relevant. These offenses demonstrated an affinity of appellant to methamphetamine over nearly two decades and involved the manufacture, sale, and possession of methamphetamine. Although the crimes span decades, appellant spent significant periods of time incarcerated after each of the drug convictions, so the remoteness of these offenses does not diminish the evidence's relevance. *Ness*, 707 N.W.2d at 689 (noting that concerns regarding the relevance of remote offenses are lessened if the defendant was incarcerated for a significant part of that time). Rather, it demonstrates appellant's repeated connection to the illegal use and transfer of methamphetamine following periods of incarceration for drug-related crimes. *See State v. Washington*, 693 N.W.2d 195, 202 (Minn. 2005) (noting that otherwise stale convictions may be relevant when other intervening acts tend to bolster their relevancy). Evidence that appellant has conspired to manufacture or sell methamphetamine, and has attempted to and succeeded in possessing methamphetamine, was relevant to the disputed

issue in this case—whether appellant had transferred possession of methamphetamine to K.F.

Not only was the evidence relevant, but it was also critical to a successful prosecution of the case. The state's case relied on the testimony of K.F., an admitted drug dealer, who received a significant benefit from the state for his cooperation. K.F.'s testimony is the only direct evidence of appellant's involvement. The other circumstantial evidence that supports K.F.'s testimony, such as the officer's surveillance of appellant's house and T.N.'s belief that a man named "Zane" was K.F.'s source of the methamphetamine, would be insufficient to establish the key element of the prosecution's case, the delivery of the methamphetamine. *See* Minn. Stat. § 152.021, subd. 1(1) (2014) (requiring the state to prove a sale of methamphetamine); *see also* Minn. Stat. § 152.01, subd. 15a(1) (2014) (defining "sell" as "sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture"). K.F., who tested positive for methamphetamine and admitted to using methamphetamine during the sale, had considerable credibility issues which weakened his otherwise probative testimony. During summation, the prosecutor acknowledged that K.F.'s credibility was what the case "really boils down to." The Minnesota Supreme Court and the Minnesota Court of Appeals have upheld the admission of *Spreigl* evidence in cases where the evidence was necessary to bolster the credibility of a witness. *See State v. Scruggs*, 822 N.W.2d 631, 644 (Minn. 2012); *State v. Rucker*, 752 N.W.2d 538, 550-51 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008); *see also State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008) (affirming

admission of *Spreigl* evidence on identity grounds because the state's other evidence concerning identity was open to alternative explanations and not dispositive).

While the evidence of appellant's prior crimes had the potential to prejudice appellant here, such a danger did not outweigh the probative value of the evidence. The evidence was both relevant to the disputed issue at trial and necessary to strengthen the state's evidence concerning the transfer. I would defer to the trial court's discretion on evidentiary questions and its responsibility to weigh the need of the state to strengthen weak or inadequate proof and the risk that the evidence will be used as propensity evidence. *See State v. Fardan*, 773 N.W.2d 303, 319 (Minn. 2009).

To the extent the evidence had the potential to prejudice appellant, there were safeguards against illegitimate persuasion. The court provided two limiting instructions as necessary when allowing the other-crime evidence. The supreme court has consistently noted that cautionary instructions minimize the prejudicial effect of the evidence. *See State v. Rossberg*, 851 N.W.2d 609, 616 (Minn. 2014) (noting that erroneous admission of evidence did not significantly affect the verdict where the district court "minimized the risk of prejudice by carefully and repeatedly instructing the jury not to find [the defendant] guilty based on his past conduct"); *Bartylla*, 755 N.W.2d at 22 (finding that any potentially unfair prejudice was mitigated by the district court's cautionary instructions); *State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998) (reasoning that cautionary instructions lessened the probability of undue prejudice). The evidence was also presented to the jury through a stipulated exhibit, which often minimizes the risk that a defendant will be convicted based on the facts underlying the other crimes. *See, e.g.*, *Fardan*, 773 N.W.2d

at 320 (affirming after erroneous admission of *Spreigl* evidence due, in part, to the manner in which it was presented); *State v. Riddley*, 776 N.W.2d 419, 428 (Minn. 2009) (noting that other-crime evidence "was not graphic or inflammatory," which made it less prejudicial); *State v. Clark*, 738 N.W.2d 316, 347-48 (Minn. 2007) (concluding that defendant was not prejudiced by erroneously admitted *Spreigl* evidence, in part, because the evidence was introduced through a brief exhibit and not through live testimony). However, here the stipulated exhibit included evidence related to appellant's convictions and the resultant sentences in addition to facts related to the *Spreigl* conduct. Had appellant raised this issue, a finding of plain error and reversal may have been appropriate.

Because I would affirm the conviction, I would also reverse and remand the case for a new sentencing hearing in light of the supreme court's recent decision in *Kirby*. *See Kirby*, 899 N.W.2d at 487 ("The amelioration doctrine requires the resentencing of a person whose conviction was not yet final on the effective date of section 18(b) of the Drug Sentencing Reform Act."). While the district court had authority under Minn. Stat. § 609.1095, subds. 2, 4 (2014), to sentence appellant to the maximum-statutory sentence permitted by law, it appears from the record that the district court based its 322-month sentence on a double upward departure from the presumptive guideline sentence. As such, the district court should be provided the opportunity to consider whether the reduced presumptive sentence for appellant's crime under *Kirby* impacts the district court's sentencing decision.