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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1614

State of Minnesota,
Respondent,

vs.

Galgalo Jarso Hache,
Appellant.

Filed July 3, 2017
Affirmed
Jesson, Judge

Hennepin County District Court
File No. 27-CR-14-31495

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Rodenberg, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

JESSON, Judge

Appellant Galgalo Jarso Hache challenges his conviction of second-degree criminal sexual conduct, arguing that the district court plainly erred by admitting irrelevant and

prejudicial *Spreigl* evidence, and the prosecutor committed prejudicial misconduct during closing argument by characterizing appellant's prior contact with the complainant as "grooming" behavior. We affirm.

FACTS

Hache, who is in his seventies, was friends with the mother of six-year-old C.O. Hache came to their house often and would sometimes care for C.O. and her older brother, who is autistic. On October 18, 2013, C.O. was sitting in the back of her mother's van in her car seat. Her brother was also in the back seat, her mother was driving, and Hache was in the passenger seat. They stopped at a grocery store, and C.O.'s mother went inside to get a snack. The others remained in the van.

According to C.O., while her mother was gone, Hache called her up to the front seat and told her that he was going to check whether she had a diaper on that day. At that time, she wore diapers only at night. She obeyed, and she testified that he pushed her, told her to spread her legs apart, and moved his hand back and forth on her vaginal area over her clothing. On returning to the van, C.O.'s mother told her to return to the back seat.

C.O.'s mother testified that when she went into the store, she was "suspecting something," so she left her purchase on the counter and ran outside to the van. When she arrived, she saw her daughter sitting in the front, on Hache's lap, facing him, with her legs slightly spread. C.O. was wearing clothing, and Hache had his pants zipper open, but was wearing other pants underneath. C.O.'s mother saw his hand touch C.O.'s vaginal area over her clothing. She placed C.O. back in the car seat, and when they arrived back at her house, she told Hache to leave.

C.O.'s mother did not initially talk to her daughter about the incident because she respected Hache as a father figure and believed the community would be angry if he was arrested. Three days later, when she was taking C.O. to school, she told her to be wary of any male that tried to get too close to her. C.O. then told her what Hache had done. C.O.'s mother spoke to the school social worker, who contacted police. The social worker and a police officer escorted C.O. and her mother to the emergency room. An examining physician did not see any tearing or bruising in C.O.'s vaginal area, but C.O. demonstrated how Hache had rubbed that area. The physician instructed the family to follow up with CornerHouse. In December 2013, C.O.'s mother took C.O. for a CornerHouse interview, and C.O gave a version of the incident consistent with what her mother had seen.

The state charged Hache with second-degree criminal sexual conduct. *See* Minn. Stat. § 609.343, subd. 1(a) (2012). At his jury trial, both C.O. and her mother testified about the incident. The district court also admitted the CornerHouse interview into evidence. The defense did not object, other than to request that no video images be shown. In the audio of the videotaped interview, which was played for the jury, C.O. described the incident, stating that it felt "bad" and that Hache was "hurting [her]." She also stated that on other occasions, when Hache came to her house, she did "not want to give him a hug, but he always [gave] me a hug and kiss[ed] me." She stated in the interview that he would pick her up, hold her, touch her on the neck, have her sit facing outward on his lap, and kiss her on the lips.

Hache did not testify. In closing argument, the prosecutor stated, "at this point, as [C.O.] explained in CornerHouse, she had gotten hugs and kisses from him that she didn't like either." On rebuttal, the prosecutor also argued to the jury,

> [W]hen you look to see what their relationship was, the defense paints it as he comes into her home as the friendly grandfather. But as she said in CornerHouse, she didn't like those hugs and kisses. And you can look at those hugs and kisses and visits that he's grooming her to see what she'll accept as a physical touch from him and what she won't. And when he was in that car with her and her brother with the mom outside of it, he knew he had already been able to hug her, to rub her neck, to kiss her on the mouth. He already knew that he was able to put her on his lap before that day in the car. And he had an opportunity to go to the next step, and he took it.

The defense did not object to these statements.

The jury found Hache guilty, and the district court imposed a stayed sentence of 36 months, with supervised probation for five years. This appeal follows.

D E C I S I O N

I. The district court did not commit plain error affecting Hache's substantial rights by admitting C.O.'s statements about his prior acts of hugging and kissing her.

Hache challenges the district court's admission of the statements in the CornerHouse interview that he had previously given C.O. unwanted hugs and kisses. He did not object to introduction of any portion of the CornerHouse interview, except to argue that video should not be shown. As the defense acknowledges, we therefore consider his challenge under the plain-error standard of review for unobjected-to evidence. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under this standard, the defendant must establish (1) an error, (2) that is plain, and (3) that affects substantial rights. *Id*. "An error

is plain if it is clear or obvious, and usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007) (quotation[] omitted). An error affects substantial rights if there is a reasonable likelihood that it substantially affected the verdict. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006).

Hache argues that the district court plainly erred by admitting evidence of his prior acts under Minnesota Rule of Evidence 404(b). That rule provides that "[e]vidence 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). This type of evidence, commonly known as *Spreigl* evidence, may nonetheless be admitted for other purposes, such as to show intent, motive, identity, mistake, or a common scheme or plan. *Id.*; *State v. Welle*, 870 N.W.2d 360, 364 (Minn. 2015); *see State v. Spreigl*, 272 Minn. 488, 491, 139 N.W.2d 167, 169 (1965). The admission of *Spreigl* evidence requires that the state give notice to the defense and clearly indicate what the evidence is intended to prove; that evidence of the defendant's participation in the other acts is clear and convincing; that the evidence is relevant and material to proving the state's case; and that its probative value is not outweighed by its potential for unfair prejudice to the defense . *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

The state argues that Hache's prior acts fall within a different category of evidence: common-law relationship evidence. "[R]elationship evidence is character evidence that may be offered 'to show the strained relationship between the accused and the victim [and] is relevant to establishing motive and intent and is therefore admissible.'" *State v. Loving*,

775 N.W.2d 872, 880 (Minn. 2009) (quoting *State v. Mills*, 562 N.W.2d 276, 285 (Minn. 1997)) (quotation marks omitted). Such evidence has been admitted when there has been prior animosity or a difficult relationship between the defendant and the victim. For instance, in a homicide case where a landlord shot a former tenant, their history of prior disputes was properly admitted as relationship evidence. *State v. Boyce*, 284 Minn. 242, 247, 260, 170 N.W.2d 104, 108, 115 (1969). The *Spreigl* notice requirement is not a condition for admission of common-law relationship evidence, which pertains directly to the history of the relationship between the victim and the defendant. *State v. Blanchard*, 315 N.W.2d 427, 431 (1982). But other portions of the *Spreigl*-type analysis still apply. *State v. Hormann*, 805 N.W.2d 883, 890 (Minn. App. 2011), *review denied* (Minn. Jan. 17, 2012).

Hache's prior acts of hugging and kissing C.O. are properly analyzed as *Spreigl* evidence, rather than common-law relationship evidence. The evidence was not offered to illuminate a prior "strained relationship" between Hache and C.O., *Loving*, 775 N.W.2d at 880, but rather to show a pattern of Hache's specific, intrusive conduct toward C.O. *See* Minn. R. Evid. 404(b).

We conclude, however, that the district court did not commit plain error by admitting the evidence as *Spreigl* evidence. Hache points out that the state did not give formal notice of its purpose in offering the evidence, and the district court did not give a cautionary instruction on its use. But "a [district] court's failure to sua sponte strike unnoticed *Spreigl* evidence or provide a cautionary instruction is not ordinarily plain error." *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001). Here, the defense was aware several

months before trial that the state intended to offer the CornerHouse interview, which included C.O.'s statements about the prior acts. *See Wanglie v. State*, 398 N.W.2d 54, 58 (Minn. App. 1986) (concluding that the district court did not abuse its discretion by admitting *Spreigl* evidence without formal notice when defense was prepared for evidence).

Hache argues that evidence of his prior acts is irrelevant and only marginally probative of his intent with respect to the charged offense. But the prior acts are relevant to refute an argument that Hache touched C.O. for a valid purpose and probative for the purpose of demonstrating that Hache actually touched C.O.'s intimate parts. And evidence of the acts is clear and convincing because it was detailed, clearly stated, and consistent with other statements by C.O. *See Kennedy*, 585 N.W.2d at 389 (stating that no requirement exists for corroboration of *Spreigl* evidence).

Hache argues that the probative value of the evidence is outweighed by its prejudicial effect because C.O. twice mentioned the hugging and kissing in the CornerHouse interview. And he maintains that the prosecution's statement about "grooming" at closing argument further invited the jury to make an unwarranted connection between the *Spreigl* evidence and the charged conduct, inferring that Hache had a propensity to have committed the charged offense. In balancing the probative value of *Spreigl* evidence against its potential for unfair prejudice, unfairly prejudicial evidence "is not merely damaging evidence, even severely damaging evidence," but instead "is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). Here, the prejudice to Hache was lessened

because the type of conduct in the prior incidents was potentially innocuous and less serious than that in the charged offense. And the prosecutor's statements about "grooming" behavior at closing argument were used to rebut the defense theory that, in context, Hache did not touch C.O. in a sexual manner. Thus, the district court did not plainly err by admitting the evidence.

Finally, we note that any error in admitting the evidence did not affect Hache's substantial rights because there is no reasonable likelihood that it substantially affected the jury's verdict. *See Manthey*, 711 N.W.2d at 504. The evidence against Hache was strong. C.O.'s trial testimony was consistent with her version of the incident in the CornerHouse interview. Her mother corroborated that account, testifying that she saw Hache engaging in sexual behavior with C.O. when she returned to the car. Therefore, the third prong of the plain-error test was not met, and Hache is not entitled to a new trial on the basis of an error in admitting *Spreigl* evidence.

II. The prosecutor's references in closing argument to "grooming" behavior, which would support an inference of sexual intent, did not constitute misconduct that was reversible error.

Hache argues that the prosecutor's statements at closing argument that referred to the other-acts evidence as "grooming" C.O., and implied his sexual intent, amounted to prejudicial misconduct that warrants reversal. "Generally, a prosecutor's acts may constitute misconduct if they have the effect of materially undermining the fairness of a trial." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Prosecutorial misconduct includes violating clear or established standards of conduct or clear directives in caselaw. *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008). This includes intentionally

misstating the evidence or misleading the jury as to inferences that it may draw. *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009). But a prosecutor may argue reasonable inferences from the facts presented, *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000), and a prosecutor need not present a colorless argument. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995).

Because Hache did not object to these statements at trial, we address this issue under a modified plain-error test. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). Under this standard, the defendant must first establish that the misconduct constitutes error and that the error was plain. *Id.* If prosecutorial misconduct amounts to plain or obvious error, the burden shifts to the state to demonstrate that its misconduct did not prejudice the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). Whether the state meets this burden depends on the strength of evidence against the defendant, the pervasiveness of the misconduct, and the defendant's opportunity and efforts to rebut the improper conduct. *Davis*, 735 N.W.2d at 682.

Hache argues that the prosecutor's references in closing argument to Hache's prior acts as "grooming," and his argument that this behavior indicated sexual intent, constituted misconduct. "Grooming" behavior is a term of art that refers to developing a relationship with a victim, often a child, as a precursor to sexual activity, and it is sometimes the subject of expert testimony. *See In re Bieganowski*, 520 N.W.2d 525, 530 (Minn. 1994), *review denied* (Minn. Oct. 27, 2994). Here, the prosecutor did not seek to admit expert testimony on this issue. But Hache has identified no rule or caselaw that requires expert testimony before this term is used. "An alleged error does not contravene caselaw unless the issue is

conclusively resolved." *State v. Hollins*, 765 N.W.2d 125, 133 (Minn. App. 2009) (quotation omitted). And we disagree with Hache's argument that the record contains no other evidence that would support a reasonable inference that he acted with sexual intent in the prior encounters. C.O. testified that Hache would kiss her on the lips and that his affections were unwanted. This evidence is sufficient to allow the prosecutor to argue a reasonable inference that Hache's actions may have been sexually motivated. *See Johnson*, 616 N.W.2d at 728.

Further, even if plain error occurred, the state has sustained its burden to show that such an error did not prejudice Hache's substantial rights. *Davis*, 735 N.W.2d at 682. The evidence against Hache was very strong: it included both C.O.'s and her mother's consistent versions of the incident. *See*, *e.g., State v. McNeil*, 658 N.W.2d 228, 236 (Minn. App. 2003) (holding that prosecutorial misconduct did not deny a defendant a fair trial because it was outweighed by the victim's testimony). And the challenged references took up less than one page of a 28-page closing argument. *See*, *e.g., State v. Peltier*, 874 N.W.2d 792, 806 (Minn. 2016) (concluding that prosecutorial misconduct did not affect substantial rights, in part, when the misconduct comprised only one page of a 39-page closing argument). Under these circumstances, no reasonable likelihood exists that the absence of the misconduct would have a significant effect on the jury's verdict. *Ramey*, 721 N.W.2d at 302. We therefore reject Hache's argument that prosecutorial misconduct entitles him to a new trial.

Affirmed.