STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0240

State of Minnesota,
Respondent,

vs.

Timothy Neal Grengs,
Appellant.

Filed December 26, 2017
Affirmed
Hooten, Judge

Scott County District Court
File No. 70-CR-16-6752

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

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith, T., Judge.

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

HOOTEN, Judge

Appellant challenges his first-degree criminal sexual conduct convictions, arguing that the district court abused its discretion by admitting *Spreigl* evidence of a prior sexual

incident with an adolescent female. He also contends that the district court abused its discretion by denying his requests for a different attorney. We affirm.

FACTS

In 2011, after the death of her father, N.H., a nine year-old girl, moved to live with her mother and appellant Timothy Neal Grengs, who was her mother's boyfriend, in the Prior Lake/Savage area. Shortly thereafter, Grengs began to engage in sexual contact with N.H. One night, while the rest of the family was sleeping, Grengs and N.H. sat on a couch and watched a movie. Grengs then proceeded to touch N.H.'s vaginal area over her clothing.

The family moved to Belle Plaine when N.H. was about 11 or 12 years old. Around this time, Grengs began to penetrate N.H.'s vagina with his fingers. N.H. estimated that this contact occurred several hundred times. Grengs's conduct then escalated to performing oral sex on N.H. and later pressuring N.H. to perform oral sex on him. N.H. estimated that Grengs forced her to provide him oral sex over 200 times.

When N.H. was about 13 years old, Grengs began forcing her to engage in vaginal intercourse. N.H. estimated that this occurred a hundred times. And, as punishment for receiving a poor grade in school, Grengs forced N.H. to engage in anal intercourse twice.

On April 6, 2016, N.H. told her mother about the sexual abuse she suffered from Grengs. They reported Grengs's conduct to police that same day. The state charged Grengs with four counts of first-degree criminal sexual conduct.

At his bail hearing in April 2016, Grengs requested that the district court appoint him a different attorney. The district court denied his request. And during a motion hearing

in July, Grengs stated that he wanted to fire his attorney. The district court again denied his request to substitute his attorney for a different public defender. The case proceeded to jury trial in August.

During trial, the state called V.A., a sixteen year-old girl, to testify about an incident that took place between her and Grengs on August 22, 2015. V.A. testified that she was N.H.'s neighbor and friend and that on August 21, 2015, she slept over at N.H.'s house. That night, V.A. and N.H.'s family watched two movies in the living room. After the second movie, V.A. and N.H. slept on the floor and Grengs slept on the couch. N.H.'s mother and her other children went to bed in their respective bedrooms. Around 6:00 or 7:00 a.m. the next morning, V.A. woke up to Grengs poking her with his finger. Grengs asked V.A. if she wanted to play the "poke game" on Facebook with their phones. V.A. rolled over to go back to sleep. Grengs kept poking V.A. and then pulled her back to the couch, hooking his hand around her sweatpants. He moved his hand inside V.A.'s sweatpants towards her inner thigh and near her vaginal area. V.A. tried to push away from him, causing the elastic of her sweatpants to tear. After V.A. moved away from him, Grengs started to send her text messages, asking her to come back to the couch, and then he made a throat-slitting gesture with his finger.

Grengs testified at trial that he did not have a sexual relationship with N.H. He also stated that he suggested a "poke war" on Facebook with V.A. but that she initiated the physical poking game. He denied reaching inside V.A.'s sweatpants but acknowledged that he had grabbed her by the waistband. He also told the jury that N.H. and V.A. had fabricated the allegations against him.

The jury found Grengs guilty of (1) first-degree criminal sexual conduct—sexual penetration of complainant under age 13, in violation of Minn. Stat. § 609.342, subd. 1(a) (2012); (2) first-degree criminal sexual conduct—sexual penetration of complainant over age 13 but under age 16, in violation of Minn. Stat. § 609.342, subd. 1(b) (2014); and (3) first-degree criminal sexual conduct—significant relationship with multiple acts over time, in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2012).[1] The district court sentenced Grengs to two consecutive terms of 172 months.[2] This appeal followed.

D E C I S I O N

I.

Grengs first argues that the district court erred by admitting irrelevant and unfairly prejudicial *Spreigl* evidence regarding the August 22, 2015 incident with V.A. Evidentiary rulings are generally within the district court's discretion and will not be reversed absent an abuse of that discretion. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). Grengs bears the burden of showing that the district court erred by admitting the evidence and that he suffered prejudice as a result. *See id.*

Evidence of prior bad acts, commonly known as *Spreigl* evidence, is not admissible "to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). But

[1] The state dismissed one of the counts of first-degree criminal sexual conduct during trial.
[2] The district court did not impose a sentence for one of the first-degree criminal sexual conduct convictions—significant relationship with multiple acts over time—because it was part of the same behavioral incident as one of the other convictions. *See* Minn. Stat. § 609.035, subd. 1 (2012) ("[I]f 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 . . . .").

Spreigl evidence may be admitted for limited, specific purposes, including: motive, opportunity, intent, knowledge, identity, absence of mistake or accident, or a common scheme or plan. Minn. R. Evid. 404(b); *Kennedy*, 585 N.W.2d at 391. Minnesota courts undertake a five-step process in deciding whether to admit *Spreigl* evidence:

> (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.

State v. Ness, 707 N.W.2d 676, 685–86 (Minn. 2006). Grengs asserts that because V.A.'s testimony regarding the August 22, 2015 incident was irrelevant, immaterial, and unduly prejudicial, it failed the fourth and fifth requirements.

A. Relevance

Grengs contends that the district court erred by admitting the *Spreigl* evidence because it was not relevant to any proper purpose. The district court should evaluate the "real purpose" for which the *Spreigl* evidence is offered and ensure that this purpose is a permissible exception to the general rule against admitting evidence of prior bad acts. *Ness*, 707 N.W.2d at 686 (quotation omitted). In deciding the "real purpose," the district court "must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *Id.* (quotation omitted). "This entails isolating the consequential fact for which the evidence is offered, and then determining the relationship of the offered evidence to

that fact and the relationship of the consequential fact to the disputed issues in the case." *Id.*

Here, the state's proffered reason for V.A.'s testimony is that the two situations (N.H.'s incidents and V.A.'s incident) are "so tied together factually" and "so intertwined" that it would help the jury in a "he said/she said situation" to determine what actually happened. The state specified opportunity and motive as the bases for submitting the *Spreigl* evidence.

Grengs disputes that opportunity is the real purpose for the *Spreigl* evidence and asserts that whether he had the opportunity to commit the offenses was not in dispute. *Spreigl* evidence may be relevant to show opportunity to commit the charged offense when it is relevant to show how the defendant had the means and ability to commit the offense. *See State v. Campbell*, 367 N.W.2d 454, 459–60 (Minn. 1985) (concluding that evidence established opportunity by showing that defendant possessed and utilized mace five days before alleged offense in which defendant also used mace). A review of the record shows that it is questionable whether the August 22, 2015 incident with V.A. is relevant and material to show that Grengs had the opportunity to sexually assault N.H.

Grengs also argues that motive is not a legitimate justification for admitting the *Spreigl* evidence. Motive involves "external facts that create a desire in someone to do something." *Ness*, 707 N.W.2d at 687. Even if motive is not an essential element of the crime, the state is entitled to prove motive because it "explains the reason for an act and can be important to a required state of mind." *Id.* (quotation omitted). In the context of *Spreigl* evidence, a prior bad act is probative if it provides clear motive for committing the

charged offense. *State v. Burrell*, 772 N.W.2d 459, 466 (Minn. 2009). Here, the state maintained that V.A.'s testimony supported the rationale of "[Grengs's] liking underage girls and having sex with them." In *Ness*, the state similarly offered *Spreigl* evidence on the basis of motive because it showed that "gratification was Ness's motive for touching [the victim]." *Ness*, 707 N.W.2d at 687. But, the Minnesota Supreme Court held that the *Spreigl* evidence was not admissible to prove motive because the state conflated the issue of motive, which was not an element to the underlying offense, with intent. *Id.* Because the state provided a similar explanation as the one given in *Ness*, and the supreme court rejected that explanation as a basis to show motive, the state failed to provide an adequate purpose of motive to justify that V.A.'s testimony is relevant.

The state now contends on appeal that the *Spreigl* evidence was relevant to establish a common scheme or plan and also to rebut Grengs's claim that N.H. fabricated her story. Grengs disagrees, arguing that because the district court did not explicitly articulate common scheme or plan as the purpose for the *Spreigl* evidence, we may not analyze the evidence's relevancy under that basis.

Appellate courts "review whether . . . the rationale *cited by the district court* provides a proper basis upon which to admit . . . the evidence." *State v. Rossberg*, 851 N.W.2d 609, 615–16 (Minn. 2014) (quotation omitted). Prior to V.A. testifying, the district court identified the "precise disputed fact" as "whether there was contact of a sexual nature between Mr. Grengs and [N.H.]."[3] In admitting the evidence, the district court further

[3] Grengs argues that this does not appropriately identify the precise disputed issue because it "simply states the ultimate issue of guilt." *See Rossberg*, 851 N.W.2d at 615. However,

discussed that the *Spreigl* evidence is relevant because "there is a sufficient time, place, or modus operandi nexus between the charged offense and the *Spreigl* offense." This reasoning demonstrates that the district court determined that the real purpose of the *Spreigl* evidence was to establish a common scheme or plan. *See Kennedy*, 585 N.W.2d at 387 (holding that district court did not abuse its discretion by ruling that "a subsequent incident amounted to a common scheme or plan when it was substantially similar to the charged offense in terms of time, place, and modus operandi"). Grengs fails to cite any relevant authority that the district court's failure to explicitly identify this exception by name prohibits us from evaluating the evidence under that exception. Based on the state's emphasis regarding the similarity between the charged offenses and *Spreigl* incident and the district court's thorough explanation, the district court adequately identified the precise disputed fact and cited the proper basis—common scheme or plan—for admitting the *Spreigl* evidence.

Grengs asserts that even if we evaluate the common scheme or plan exception, the *Spreigl* evidence was not admissible because it lacked a "marked similarity" to the charged offenses. "[I]n determining whether a bad act is admissible under the common scheme or plan exception, it must have a marked similarity in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688. But "if the prior crime is simply of the same generic type as the charged offense, it ordinarily should be excluded," *State v. Wright*, 719 N.W.2d 910, 917–

"*Spreigl* evidence may be introduced to establish, by showing a common scheme or plan––that a sexual act occurred." *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007) (citation omitted).

18 (Minn. 2006) (quotation omitted), because this use of evidence poses a particular risk of unfair prejudice. *Ness*, 707 N.W.2d at 687.

The *Spreigl* incident is markedly similar to the charged offenses. These incidents both involved adolescent girls of similar ages, occurred in Grengs's home, and involved conduct which began with Grengs physically touching each of these girls' vaginal area through her pants. Moreover, Grengs denied all of the sexual encounters during his testimony and claimed that both N.H. and V.A. fabricated their stories. The *Spreigl* evidence was relevant to show a common scheme or plan because it provided context and corroboration to both N.H. and V.A.'s versions of the important events. *See State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993) (explaining that *Spreigl* evidence was relevant because it "tended to disprove the defense that [the victim] was fabricating or imagining the occurrence of sexual contact").

Grengs relies on *Ness* as a comparative case in which the supreme court ruled that although the victim and *Spreigl* witness were of similar age and the alleged touching was of similar nature, the *Spreigl* incidents were not markedly similar to justify the evidence's admission. *See Ness*, 707 N.W.2d at 689. But in that case, the *Spreigl* incidents occurred 35 years before the charged offense. *Id.* Here, the *Spreigl* incident and the charged offenses were much closer in time. In fact, N.H. testified that Grengs forced her to perform oral sex on him the day after V.A. slept over at her house. Based upon this record, the district court properly exercised its discretion by finding that the *Spreigl* evidence was relevant to the state's case in proving the charged offenses.

B. Probative Value versus Unfair Prejudice

Grengs next argues that even if the *Spreigl* evidence was relevant, the district court still erred by admitting the evidence because its probative value was outweighed by its prejudicial effect. Minnesota courts must balance the *Spreigl* evidence's probative value against the risk that the evidence will be used as propensity evidence. *State v. Fardan*, 773 N.W.2d 303, 319 (Minn. 2009). As part of this balancing, the district court should consider "how necessary the *Spreigl* evidence is to the state's case." *Kennedy*, 585 N.W.2d at 391 (quotation omitted). For instance, if the state's other evidence is weak or inadequate, and the *Spreigl* evidence is needed for the state to meet its burden of proof, then the evidence should be admitted. *Id.* at 391–92.

Much of the state's case relied on N.H.'s testimony. Because Grengs questioned N.H.'s credibility and denied that he had sexual contact with N.H., the state needed the *Spreigl* evidence that Grengs committed similar sexual contact with a girl that was N.H.'s neighbor and friend as part of a common scheme or plan. *See Ness*, 707 N.W.2d at 690 ("[T]he evidence of other offenses may be needed because, as a practical matter, it is not clear that the jury will believe the state's other evidence bearing on the disputed issue." (quotation omitted)). And the district court gave cautionary instructions, stating that the evidence was offered for the "limited purpose" of assisting the jury in determining whether Grengs committed the offenses charged in the complaint—after V.A. testified and before closing argument—in order to reduce the chance that the jury would improperly use the evidence to convict Grengs based on his propensity to commit sexual offenses rather than on the evidence as a whole. *See State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015).

Because the probative value of V.A.'s testimony outweighed its prejudicial effect, we conclude that the district court did not abuse its discretion by admitting this evidence.

C. Effect on the Verdict

Even if the district court erred by admitting the *Spreigl* evidence, Grengs is not entitled to a new trial. "To warrant a new trial, the erroneous admission of *Spreigl* evidence must create a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Fardan*, 773 N.W.2d at 320 (quotation omitted). We consider several factors in determining whether erroneously admitted *Spreigl* evidence significantly impacted the verdict, including (1) the strength of the state's other evidence; (2) the presence of a cautionary instruction; and (3) the state's reliance on the evidence during closing argument. *State v. Thao*, 875 N.W.2d 834, 839–40 (Minn. 2016). Again, it is Grengs's burden to show that he was prejudiced by the evidence's admission. *See Fardan*, 773 N.W.2d at 320.

Here, the state's other evidence was not as weak as Grengs claims, but not as strong as the state claims. The state's case depended almost entirely on N.H.'s testimony. Although N.H.'s mother testified that she witnessed Grengs awkwardly stare at N.H., the only direct evidence of Grengs's sexual misconduct came from N.H.'s testimony. And the state did not present any physical evidence to substantiate N.H.'s testimony. But, as discussed previously, the district court gave the jury two cautionary instructions regarding Grengs's encounter with V.A. And appellate courts "presume a jury follows a [district] court's cautionary instruction." *State v. Riddley*, 776 N.W.2d 419, 428 (Minn. 2009). Although the state alluded to the *Spreigl* incident in closing argument, the state did not

dwell on it. Rather, the state focused on N.H.'s testimony and the credibility of Grengs's testimony. Based on this record, we conclude that Grengs failed to show that the admission of V.A.'s testimony, even if deemed erroneous, significantly affected the verdict.[4]

II.

Grengs contends that the district court committed reversible error when it summarily denied his pretrial requests for appointment of substitute counsel. We review a district court's denial of a request for substitute counsel for an abuse of discretion. *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006).

A criminal defendant has a constitutional right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. This right permits a defendant "a fair opportunity to secure counsel of his choice." *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). But a defendant does not have "the unbridled right to be represented by counsel of his own choosing." *State v. Fagerstrom*, 286 Minn. 295, 290, 176 N.W.2d 261, 264 (1970). A defendant's request for a substitution of counsel will be granted only if his request is reasonable and timely, and exceptional circumstances exist. *Vance*, 254 N.W.2d at 358.

Grengs asserts that his pretrial requests for a different attorney were timely. We agree. At his bail hearing in April 2016, Grengs requested a different attorney. The district

[4] The state contends on appeal that V.A.'s testimony about her encounter with Grengs may be admitted under the intrinsic evidence and immediate episode exceptions. But, the state concedes that it only presented V.A.'s testimony as *Spreigl* evidence. Because we conclude that the testimony is admissible *Spreigl* evidence, we need not consider whether the testimony is admissible under the intrinsic evidence and immediate episode exceptions.

court denied the request, stating that "[w]e don't change public defenders."[5] And at a motion hearing in July, Grengs stated that he wanted to fire his attorney, but the district court prohibited him from doing so, stating "[h]e's the one we appointed. You don't get to pick your public defender." Unlike in *Clark*, in which the defendant made his request for different counsel on the first day of trial after the jury was selected, 722 N.W.2d at 465, these requests were made several weeks before trial and therefore were timely. But we must also decide if his requests were reasonable and whether exceptional circumstances justified substituting counsel. *See Vance*, 254 N.W.2d at 358.

Grengs claims that the district court's failure to conduct an adequate "searching inquiry" after these requests amounted to an abuse of discretion. But a searching inquiry is only necessary if the defendant shows exceptional circumstances or "voices serious allegations of inadequate representation." *State v. Munt*, 831 N.W.2d 569, 586 (Minn. 2013) (quotation omitted). "[E]xceptional circumstances are those that affect a court-appointed attorney's ability or competence to represent the client." *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). However, general dissatisfaction with appointed counsel is not an exceptional circumstance. *Munt*, 831 N.W.2d at 586.

[5] Grengs claims that the district court misstated the law by informing him that it could not appoint substitute counsel. To the extent that the district court informed Grengs that he could not change counsel under any circumstances, this court has previously construed similar statements as harmless error when the defendant fails to show exceptional circumstances. *See State v. Lamar*, 474 N.W.2d 1, 2–3 (Minn. App. 1991) (explaining that district court's statement to defendant that he "can't get a different public defender" was "not an accurate statement of the law" but that any error was harmless because defendant failed to demonstrate exceptional circumstances), *review denied* (Minn. Sept. 13, 1991).

Here, Grengs's expressed reasons for desiring a different attorney do not rise to the level of exceptional circumstances that would warrant any additional searching inquiry. Grengs stated that his attorney was "not being truthful with me. He's jerking me around." But, without articulating any specific instances of untruthfulness, Grengs's allegations merely reflect his general dissatisfaction. And Grengs's statements that he and his attorney "don't work well together" and that their relationship was "like oil and water" also fail to show that his circumstances were exceptional. *See State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (concluding that personal tension between defendant and his attorney was not exceptional circumstance). There is no indication that Grengs's attorney failed to adequately represent him. The district court did not abuse its discretion by denying Grengs's pretrial requests for substitution of counsel.

Grengs also contends that his attempt to fire his attorney during the middle of trial demonstrates that the district court failed to make a sufficient searching inquiry. But despite his requests for new counsel at the bail hearing in April 2016 and the motion hearing in July 2016, Grengs still continued to retain the same attorney proceeding into trial. *See Munt*, 831 N.W.2d at 587 (explaining that defendant's acquiescence to his counsel's continued representation confirms that district court did not err by not making additional inquiry into defendant's complaints regarding representation). The district court had advised Grengs at the July hearing, more than a month before trial, that he could exercise his option of hiring a private attorney. From the time of his first appearance, Grengs had four months to hire a private attorney, which clearly establishes that he had "a fair opportunity to secure counsel of his choice." *See Vance*, 254 N.W.2d at 358.

We conclude that the district court did not abuse its discretion by denying Grengs's pretrial requests for substitution of counsel.

Affirmed.