**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-1544**

State of Minnesota,
Respondent,

vs.

Larry Donnell Griffin,
Appellant.

**Filed August 27, 2018**
**Affirmed in part and remanded**
**Schellhas, Judge**

Ramsey County District Court
File No. 62-CR-16-7992

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

**SCHELLHAS**, Judge

Appellant challenges his convictions of first-degree criminal sexual conduct, arguing that the district court improperly admitted hearsay and *Spreigl* evidence. We affirm appellants conviction on count one and remand to the district court to vacate appellant's conviction on count two.

## FACTS

On August 30, 2016, St. Paul police officers received a report of a rape. Upon investigation, the officers learned that earlier that night, after victim A.M. left her boyfriend's St. Paul house on foot, appellant Larry Griffin pulled alongside her, introduced himself as Larry, and offered her a ride to, and later from, her friend's home. After picking up A.M. from her friend's home, Griffin told A.M. that he had to check on something. He then drove into an alley, pulled out a gun, told A.M. to remove her clothes, and vaginally penetrated her with his penis. Griffin then allowed A.M. to dress and drove her to her friend's home, where she obtained a ride to her home in Lino Lakes. Once home, A.M. called an aunt, described what had happened, and went to the hospital.

At the hospital, A.M. spoke with Officer Sean Maloney, and a sexual-assault nurse examiner examined her. During the exam, the nurse obtained DNA that matched Griffin's DNA profile and also matched DNA recovered in two other rape cases. St. Paul police arrested Griffin in November 2016, and found an air-gun in his van. Griffin admitted that he had given A.M. a ride on August 30, and claimed that he had hung out with her at her friend's home but denied that he and A.M. had sexual intercourse.

Respondent State of Minnesota charged Griffin with one count of first-degree criminal sexual conduct (CSC) (fear of great bodily harm) and one count of first-degree CSC (armed with a dangerous weapon). The state moved to admit *Spreigl* evidence of Griffin's rape of another victim, J.D., to show a common scheme or plan. The district court found that Griffin's rape of J.D. was supported by clear and convincing evidence. Noting that DNA obtained from both A.M. and J.D. matched Griffin's DNA, the court found that Griffin's rape of J.D. was "strikingly similar" to his alleged rape of A.M. and evidenced a common scheme or plan between the two alleged rapes. The court also found that the probative value of J.D.'s testimony was not outweighed by the risk of unfair prejudice to Griffin, and the court allowed admission of the *Spreigl* evidence.

The state presented testimony at trial from A.M., A.M.'s aunt, Officer Maloney, the sexual-assault nurse examiner, a DNA expert from the Minnesota Bureau of Criminal Apprehension, J.D., and Sergeant Cory Tell, who investigated the incident. The state also introduced numerous exhibits, including photographs of Griffin's van, photographs of A.M. taken at the hospital, results of A.M.'s sexual-assault exam, and a note describing the alleged rape that J.D. had written to an investigating officer.

Griffin testified that he had met A.M. at a gas station prior to August 30, and that they had used drugs together. He claimed that A.M. invited him over to her friend's home to do drugs, and he described the friend's home. Griffin claimed that he and A.M. had consensual sex, and that he told the arresting officer that he did not have sex with A.M. because he did not remember it at the time due to his drug use around the time of his arrest. Griffin also claimed that he knew J.D. but denied having sex with her.

The jury found Griffin guilty on both counts of first-degree CSC. The district court adjudicated Griffin guilty on count one and sentenced him to 216 months' imprisonment.[1]

This appeal follows.

## D E C I S I O N

### I.

Griffin argues that the district court erred by admitting A.M.'s out-of-court statements to her aunt and to Sergeant Tell. Griffin argues that the statements likely played a significant role in the jury's verdict and that he therefore is entitled to a new trial. We disagree. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). An out-of-court statement is not admissible as substantive evidence unless it is non-hearsay or falls within an exception to the hearsay rule. Minn. R. Evid. 802.

Appellate courts will not reverse based on an evidentiary error unless "a reasonable possibility" exists that the error "substantially affected the verdict." *State v. Williams*, 908 N.W.2d 362, 365 (Minn. 2018) (quotation omitted). Reversal requires that an appellant show both that the district court abused its discretion in admitting the evidence and that the appellant was thereby prejudiced. *Id*. "When an alleged evidentiary error is harmless an appellate court need not address the merits of the claimed error." *State v. Guzman*, 892 N.W.2d 801, 812–13 (Minn. 2017) (quotation omitted).

[1] The warrant of commitment reflects that Griffin was convicted of both counts of first-degree CSC.

*A.M.'s statements to her aunt*

Under Minn. R. Evid. 803(3), a hearsay statement is admissible if it is a "statement of the declarant's then existing state of mind." *State v. Jones*, 753 N.W.2d 677, 696–97 (Minn. 2008) (quotation omitted). "The statement must be contemporaneous with the mental state sought to be proven. There must be no suspicious circumstances suggesting a motive for the declarant to fabricate or misrepresent his or her thoughts. The declarant's state of mind must be relevant to an issue of the case." *State v. DeRosier*, 695 N.W.2d 97, 104–05 (Minn. 2005) (quotation omitted). Statements "unrelated to the declarant's statement of mind" are "not admissible" under this hearsay exception. *Id*. at 105.

Here, A.M.'s aunt, T.V., testified about how A.M. told her about what happened, including that she was scared because she had been raped. The court concluded that T.V.'s testimony was admissible because it described A.M.'s then-existing state of mind under Minn. R. Evid. 803(3). Griffin argues that A.M.'s statements to T.V. were not admissible because they went "well beyond any description of her then-existing state of mind."

T.V.'s testimony about what A.M. told her about being raped closely matched A.M.'s testimony at trial. We conclude that the district court did not commit reversible error by admitting T.V.'s testimony about A.M.'s prior statements because A.M.'s prior statements to T.V., on the morning after she was assaulted, were materially consistent with her trial testimony. A.M.'s statements to T.V. therefore did not constitute hearsay. *See* Minn. R. Evid. 801(d)(1)(B) ("A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and helpful to the trier of fact in

evaluating the declarant's credibility as a witness."). To the extent that any of A.M.'s prior statements to T.V. were inconsistent with her trial testimony, they were not so inconsistent as to fall outside the bounds of admissibility under rule 801(d)(1)(B). *See State v. Bakken*, 604 N.W.2d 106, 109–10 (Minn. App. 2000) (stating that "trial testimony and the [declarant's] prior statement need not be verbatim," and that an inconsistent statement falls outside the bounds of rule 801(d)(1)(B) when the inconsistency "directly affects the elements of the criminal charge"), *review denied* (Minn. Feb. 24, 2000).

*A.M.'s statements to Sergeant Tell*

Griffin also argues that the district court committed reversible error by admitting, as a prior consistent statement, A.M.'s statements to Sergeant Tell because they included "additional factual assertions" about how she had described the layout of her friend's home, thereby providing jurors with an otherwise absent basis for discounting Griffin's version of events. A statement is not hearsay if the declarant testifies and is subject to cross-examination, and the statement is "consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." Minn. R. Evid. 801(d)(1)(B). "A statement properly admitted under rule 801(d)(1)(B) operates as substantive evidence." *State v. Plevell*, 889 N.W.2d 584, 589 (Minn. App. 2017).

Prior to admitting a statement under rule 801(d)(1)(B), a district court must make a threshold determination that the declarant's credibility has been challenged and it would help the jury in evaluating the declarant's credibility. *Id*. The prior statement and trial testimony must be consistent and "should not be the means to prove new points not covered

in the testimony of the speaker." *State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007) (quotation omitted).

Sergeant Tell recounted what A.M. told him during his investigation, as follows:

> [A.M.] had invited [Griffin] into [her friend]'s house. [Griffin] said he was uncomfortable. As they talked in the car, some of her friends . . . were making him uncomfortable. In order to try to make him feel more comfortable, she had described the layout of [her friend's] house to him in hopes that maybe he would be a little more comfortable in . . . how the situation was laid out.

Having determined that Griffin had challenged A.M.'s credibility on cross-examination, the district court admitted Sergeant Tell's testimony, concluding that it was helpful to the jury in judging A.M.'s credibility because it provided "greater context and more details" about A.M.'s testimony about the rape.

This case largely depended on the jury's credibility determinations of A.M. and Griffin. *See State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017) ("As the fact finder, the jury is in a unique position to determine the credibility of the witnesses and weigh the evidence before it."). Here, the state presented other evidence intended to cast doubt on Griffin's testimony, including that his story changed over time regarding whether he had sex with A.M., whether the sex was consensual, and the effect of Griffin's drug use on his ability to recall the facts. Even if the district court abused its discretion by admitting Sergeant Tell's testimony, we conclude that any error does not warrant reversal because his testimony did not prejudice Griffin. *See DeRosier*, 695 N.W.2d at 106 ("Inasmuch as the victim's hearsay statements were cumulative, merely corroborating other witnesses'

testimony and were not otherwise prejudicial, the verdict rendered was surely unattributable to any error in admitting the hearsay statements.").

**II.**

Griffin argues that the district court erred by admitting *Spreigl* evidence regarding his rape of J.D. because it "was not markedly similar in modus operandi and because the probative value of the evidence was outweighed by its potential for unfair prejudice." Griffin argues that he is entitled to a new trial because this evidence significantly affected the verdict. We disagree.

"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). The "general exclusionary rule is grounded in the defendant's constitutional right to a fair trial." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006) (citing *State v. Spreigl*, 272 Minn. 488, 495, 139 N.W.2d 167, 171 (1965)). "The overarching concern behind excluding such evidence is that it might be used for an improper purpose, such as suggesting 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). But *Spreigl* evidence may be admitted for limited, specific purposes to show "motive, intent, knowledge, identity, absence of mistake or accident, or a common scheme or plan." *Ness*, 707 N.W.2d at 685. *Spreigl* evidence also may be admitted to show whether the conduct on which the charge was based actually occurred. *State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993).

Prior to admitting *Spreigl* evidence, a district court must ensure in part that the evidence is relevant and its potential for prejudice does not outweigh its probative value. *Ness*, 707 N.W.2d at 685–86. If the admission or exclusion of *Spreigl* evidence is closely balanced, the district court should exclude it. *Fardan*, 773 N.W.2d at 316.

"A district court's decision to admit *Spreigl* evidence is reviewed for an abuse of discretion." *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016). "A defendant who claims the [district] court erred in admitting evidence bears the burden of showing an error occurred and any resulting prejudice." *Id.* "If an appellate court determines that the district court erroneously admitted *Spreigl* evidence, the court must then determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id*. at 262.

Here, J.D. testified that on the night of September 22, 2016, she was walking in St. Paul when a tan van approached her and the male driver offered to give her a ride. The driver asked J.D. if she had a methamphetamine pipe, and she stated that she knew where to find one. J.D. asked for a phone charger, and when the driver stated that he had one, she got in his car. The driver identified himself as "Larry" and shared various personal details with J.D. "Larry" then drove to an alley on the pretense that he had to check on something, threatened J.D. with a knife, and forced her to have sexual intercourse with him. After "Larry" "was finished," he allowed J.D. to leave. The district court determined that clear and convincing evidence supported a finding that "Larry" was Griffin.

*Relevance of J.D.'s testimony*

To be relevant to show a common scheme or plan, a prior bad act must have a "marked similarity in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688 (emphasis omitted). "[T]he closer the relationship between the other acts and the charged offense, in terms of time, place, or modus operandi, the greater the relevance and probative value of the other-acts evidence and the lesser the likelihood that the evidence will be used for an improper purpose." *Id.*

Here, the district court found that A.M.'s and J.D.'s rapes occurred within one month of each other, at a similar place on the east side of St. Paul near Payne Avenue, and that the modus operandi was "markedly similar" because both incidents "involved friendly overture[s], [a luring] of a woman into defendant's vehicle, and eventually . . . sexual[ly] assaulting them." We agree with the district court that the *Spreigl* incident was markedly similar to the crime charged. In each incident, a man, who called himself "Larry," approached his victim in a tan van and asked a woman walking alone if she needed a ride and engaged in seemingly friendly conversation with the woman. Then, in each incident, the man drove into an alley under false pretenses, threatened the woman with a dangerous weapon, instructed her to remove her clothes, engaged in nonconsensual vaginal penetration with the woman, and then allowed her to dress and leave. We conclude that the district court did not err by concluding that J.D.'s testimony was relevant.

*Probative value of J.D.'s testimony*

Minnesota courts must balance the probative value of *Spreigl* evidence against the risk that the evidence will be used as propensity evidence. *See id*. at 689–91. For this

determination, appellate courts balance the relevance of the *Spreigl* incident, the risk of the evidence being used as propensity evidence, and the state's need to strengthen weak or inadequate proof in the case. *Id.* Here, the state needed J.D.'s testimony because Griffin challenged A.M.'s credibility, claiming that they had consensual sex. The *Spreigl* evidence involving J.D. showed that Griffin engaged in nonconsensual sex with J.D., using a common scheme or plan, thereby bolstering A.M.'s credibility. *See id.* 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)).

*Unfair Prejudice to Griffin*

Unfair prejudice "does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015) (quotation omitted). "When determining whether the admission of prior-bad-acts evidence is harmful," the supreme court has "considered whether the district court instructed the jury to limit the use of the other crime evidence and not to convict the defendant based on that evidence." *State v. Thao*, 875 N.W.2d 834, 839 (Minn. 2016) (quotation omitted). The reading of cautionary instructions lessens the probability of undue weight being given by the jury to *Spreigl* evidence. *See Griffin*, 887 N.W.2d at 262–63 (concluding no abuse of discretion for admitting *Spreigl* evidence where court used cautionary instructions).

Here, the district court gave cautionary instructions before admitting J.D.'s testimony and prior to closing arguments. We presume that the jury followed these cautionary instructions. *See Welle*, 870 N.W.2d at 366 (explaining that appellate courts "presume that the jury followed these cautionary instructions"). We therefore conclude that J.D.'s *Spreigl* testimony did not unfairly prejudice Griffin, and that the district court did not abuse its discretion by admitting the testimony.

**III.**

The state charged Griffin with two counts of first-degree CSC, and the jury returned guilty verdicts on both counts. Although the record reflects that, orally, the district court properly adjudicated Griffin's guilt on only count one and sentenced him on only count one, the warrant of commitment reflects judgment of convictions for both counts. Griffin argues that his convictions of both counts are improper when he committed only one act, and he asks this court to direct the district court to vacate the conviction on count two and issue a corrected judgment. The state agrees, as do we.

Griffin cannot legally be convicted of both counts of first-degree CSC for the same offense on the basis of the same act involving the same victim. *See Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) ("When the defendant is convicted on more than one charge for the same act the court is to adjudicate formally and impose sentence on one count only." (quotation omitted)). We therefore affirm Griffin's conviction on count one and remand with instructions to vacate his conviction on count two.

**Affirmed in part and remanded.**