STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1830

State of Minnesota,
Respondent,

vs.

Angel Pablo Torres, Jr.,
Appellant.

Filed October 8, 2018
Affirmed
Smith, Tracy M., Judge

Scott County District Court
File No. 70-CR-16-19774

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, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Kirk, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

Appellant Angel Pablo Torres Jr. challenges his conviction of first-degree criminal sexual conduct, arguing that the district court erred in (1) granting the state's request to

admit evidence of an alleged prior sexual assault by Torres of another high-school student and (2) excluding evidence offered by Torres to show that the victim of the charged offense had previously flirted with him. We affirm.

FACTS

On November 1, 2016, D.R.A. told a high-school resource officer that Torres, a fellow high-school student and classmate, had just penetrated her anally, without her consent, in the boys' locker room of the high school. D.R.A. reported that she and Torres left their classroom to get a drink of water and that, after they used the drinking fountain, Torres grabbed her wrist and brought her into the boys' locker room. Torres then led her to a disabled restroom stall, locked the stall door, and pulled down her pants and his own pants while she repeatedly told him "no" and "stop." Torres also got ahold of D.R.A.'s cell phone and threatened to drop it in the toilet. He next turned D.R.A. around and penetrated her anally and vaginally with his fingers. After Torres ejaculated onto the restroom floor, D.R.A. and Torres left the locker room and returned to their classroom.

When she reached the classroom, D.R.A. immediately approached a classmate and told her that she needed to talk. They left the classroom, and D.R.A. called her boyfriend and told both him and the classmate that Torres had raped her. D.R.A. then went to the school office and reported the sexual assault to a school resource officer and to another student who was waiting in the office. A responding police investigator took a full statement from D.R.A. in which she reported again that Torres had raped her. A school security video showed Torres and D.R.A. leave their classroom, stop at a drinking fountain,

and later exit the boys' locker room. A sexual-assault examination of D.R.A. conducted that day revealed that D.R.A. sustained a two-centimeter anal tear.

Respondent State of Minnesota charged Torres with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2016). Before trial, Torres filed notice of his intent to rely on a defense of consent and moved to admit at trial evidence of D.R.A.'s previous sexual conduct with him, including (1) one instance of prior consensual sexual intercourse between him and D.R.A., which D.R.A. had reported to the police investigator, and (2) testimony from J.D.N., a high-school classmate, who reported observing D.R.A. flirt with Torres and touch his leg one or two days before the date of the charged offense. The state moved to admit evidence of Torres's alleged prior sexual assault of P.J.R., another high-school student.

Both J.D.N. and P.J.R. testified at a pretrial evidentiary hearing. Following the hearing, the district court granted the state's request to admit the evidence involving Torres's prior act against P.J.R and Torres's request to admit the evidence that he and D.R.A. had prior consensual sexual intercourse. The district court denied Torres's request to admit J.D.N.'s testimony that D.R.A. had previously flirted with Torres.

After a two-day jury trial at which both D.R.A. and Torres testified, the jury found Torres guilty of first-degree criminal sexual conduct. The district court convicted Torres of the offense and sentenced him to 144 months in prison.

This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by granting the state's request to admit *Spreigl* evidence of an alleged prior sexual assault by Torres.

Torres argues that the district court erred by granting the state's request to admit the evidence of an alleged prior sexual assault by Torres of P.J.R.

We review the district court's decision to admit "evidence of other crimes, wrongs, or acts for an abuse of discretion." *State v. Welle*, 870 N.W.2d 360, 365 (Minn. 2015). We will affirm the ruling unless Torres meets his burden to "show that the district court abused its discretion by admitting the evidence and that the erroneous admission was prejudicial." *State v. Rossberg*, 851 N.W.2d 609, 615 (Minn. 2014). An erroneous admission is prejudicial when there is "a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009).

Evidence of other crimes, wrongs, or acts is not admissible to prove bad character or a propensity to commit the charged crime. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). However, such evidence, also referred to as *Spreigl* evidence, may be admissible for other, limited purposes. *Fardan*, 773 N.W.2d at 315-16 (discussing *State v. Spreigl*, 139 N.W.2d 167, 171 (Minn. 1965)). These purposes include evidence offered as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Fardan*, 773 N.W.2d at 316 (quoting Minn. R. Evid. 404(b)).

In determining the admissibility of *Spreigl* evidence, the district court must ensure that (1) the state has given notice of its intent to admit the evidence; (2) the state has clearly indicated what the evidence will be offered to prove; (3) there exists clear and convincing

evidence that the defendant participated in the prior act; (4) the evidence is relevant and material to the state's case; and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant. Minn. R. Evid. 404(b); *see also Ness*, 707 N.W.2d at 685-86. This five-step procedure is "designed to ensure that the evidence is subjected to an exacting review." *Ness*, 707 N.W.2d at 685 (quotation omitted). "If the admission of such evidence is a close call, it should be excluded." *Fardan*, 773 N.W.2d at 316.

At the pretrial hearing, P.J.R. testified that she knew Torres through his cousin and that, in October 2015, while she stood in the common area of the high school, Torres borrowed her cell phone and then walked away with it and entered a stairwell. She followed after him and asked him to return it. Torres refused. He stopped and twice attempted to kiss her, and then he grabbed her wrists and placed her hands on top of his pants, over his erect penis. P.J.R. resisted and told him "no." Torres ascended to the school's third floor while still carrying P.J.R.'s phone and then asked if she would give him "oral sex or a hand job." P.J.R. told him "no." Torres responded that he would return the phone if she would let him use it to message a friend for a ride. P.J.R. agreed, and they sat down next to a locker. While seated, Torres grabbed P.J.R.'s wrist and moved her hand inside his pants, in direct contact with his erect penis. P.J.R. tried to pull her hand away, but he grabbed her wrist more tightly. Torres eventually let go of her hand and returned the phone.

The district court ruled that the evidence was admissible, reasoning that the state presented clear and convincing evidence of the prior act through P.J.R.'s credible

testimony, the evidence was relevant and material proof of Torres's common scheme or plan and the absence of mistake or accident, and its probative value outweighed any potential for unfair prejudice.

A. Relevance and materiality

Torres argues that the evidence is not relevant or material proof of a common scheme or plan because the charged offense and the prior act involving P.J.R. are dissimilar.

Closeness in time, place, and modus operandi, between prior acts and the charged offense, is considered to increase the probative value of other-acts evidence and to lessen the risk of improper use of the evidence. *Ness*, 707 N.W.2d at 688. With respect to modus operandi, *Spreigl* evidence admitted to show a common scheme or plan need not be identical to the charged offense but must have "a marked similarity" to it. *Id.*

Torres asserts that the circumstances on which the district court relied in ruling that P.J.R.'s testimony is relevant and material—that both acts occurred at the same high school and both victims knew Torres, were isolated by him, and told him "no"—are insufficient to show a common scheme or plan. However, in addition to those circumstances, the district court relied on other similarities between the charged offense and the prior act, including Torres's use of physical force to overcome the victims' resistance to his sexual advances and his holding hostage the victims' cell phones to deter them from leaving. Torres also brought both victims to isolated areas of the high school and refused to return their cell phones while he pressured them and, ultimately, forced them to engage in nonconsensual sexual contact with him. Torres's use of nearly identical tactics in both

incidents reflects a markedly similar modus operandi and, along with the similar circumstances of place and familiarity with the victims, demonstrates that the evidence is sufficiently similar with the charged offense to constitute proof of a common scheme or plan. Therefore, the district court did not err in determining that the *Spreigl* evidence was relevant and material to the state's case.[1]

B. Risk of unfair prejudice

Torres argues that the probative value of the *Spreigl* evidence is outweighed by its risk of unfair prejudice because it improperly suggests to the jury that he had acted in conformity with a propensity to commit nonconsensual sexual acts.

Unfair prejudice "is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). In balancing the probative value of *Spreigl* evidence against its prejudicial effect, courts should consider the state's need for the evidence in its case against the defendant. *Ness*, 707 N.W.2d at 690.

Here, the state's need for *Spreigl* evidence to strengthen its case on the issue of consent was significant because D.R.A. and Torres gave conflicting testimony. The district court also mitigated any potential for improper use of the evidence by providing the jury two cautionary instructions, both before the state introduced the evidence and before the

[1] Torres also argues that the district court erred in concluding that the *Spreigl* evidence was relevant and material to proving an absence of mistake or accident. Because we conclude that the same *Spreigl* evidence is admissible proof of Torres's common scheme or plan, we need not decide this issue.

court submitted the case to the jury. *See State v. DeWald*, 464 N.W.2d 500, 505 (Minn. 1991) (stating that "the potential for prejudicial impact from the *Spreigl* evidence [is] arguably lessened by the trial court's . . . cautionary instructions to the jury"). Further, the Minnesota Supreme Court has held that *Spreigl* evidence is admissible and "highly relevant to the issue of consent" in a criminal sexual conduct case when the evidence "showed a pattern of similar aggressive sexual behavior by [the] defendant against other women in the community." *State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984). In this case, the *Spreigl* evidence tended to show that Torres had engaged in a pattern of similar aggressive sexual conduct by isolating female high-school students using their cell phones and coercing them to engage in nonconsensual sexual contact. The district court did not abuse its discretion in concluding that the probative value of the *Spreigl* evidence is not outweighed by a risk of unfair prejudice and in admitting the evidence of Torres's prior act of alleged sexual misconduct.

II. The district court did not abuse its discretion by excluding evidence offered by Torres to show that D.R.A. had flirted with him prior to the date of the charged offense.

Torres argues that the district court abused its discretion by excluding evidence that D.R.A. flirted with him prior to the date of the charged offense because the court (1) erred in applying Minn. R. Evid. 412 to determine the admissibility of the evidence or, in the alternative, (2) erred in excluding the evidence even if Minn. R. Evid. 412 applies. Torres contends that the court's exclusionary ruling violated his constitutional right to present a complete defense.

Torres's arguments implicate both plain-error and harmless-error analyses. Because we conclude that Torres does not meet his burden to show that the district court committed reversible error under either standard of review, we need not decide which standard controls.

A. Plain error

Torres argues that D.R.A.'s prior flirting does not constitute evidence of "previous sexual conduct" covered by Minn. R. Evid. 412[2] and that the district court therefore erred in applying the rule. However, Torres moved the district court to admit the evidence under rule 412 and did not seek to admit it under any other evidentiary rule. A party cannot "appeal an error that he invited or that could have been prevented at the district court" unless the "error meets the plain error test." *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). Under the plain-error test, Torres bears the burden to show an "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "An error is 'plain' if it is clear or obvious." *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010). A plain error is typically shown "if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

[2] Rule 412 generally prohibits evidence of a victim's "previous sexual conduct" in criminal sexual-conduct prosecutions unless an exception applies. One such exception is when (1) consent is a defense, (2) the sexual conduct involves the accused, and (3) "the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature." Minn. R. Evid. 412(1); *see also* Minn. Stat. § 609.347, subd. 3 (2016) (outlining identical framework for admitting evidence of a victim's previous sexual conduct).

J.D.N. testified that he observed D.R.A. and Torres talking and laughing often in the class he shared with them and engaging in what he interpreted to be flirting. J.D.N. estimated that he had observed D.R.A. place her hand on Torres's thigh approximately one or two days before the date of the charged offense. He stated that D.R.A. and Torres "seemed kind of close like something was going on."

Neither Minn. R. Evid. 412 nor Minnesota statute defines the type of prior conduct by a victim that qualifies as "previous sexual conduct." Torres cites no Minnesota case, and we did not find any in our research, holding that a victim's prior flirting with the accused is, or is not, evidence of previous sexual conduct covered by rule 412. Therefore, even if it was error to consider the flirting described by J.D.N. as sexual conduct under rule 412, Torres cannot satisfy his burden to show that the error was plain.

B. Harmless error

Torres also argues that, even if rule 412 applies, exclusion of the evidence of D.R.A.'s prior flirting was reversible error because the evidence is relevant and probative of consent and its exclusion implicates his constitutional right to present a defense.

In general, we review the district court's ruling excluding evidence for a clear abuse of discretion. *State v. Pendleton*, 706 N.W.2d 500, 510 (Minn. 2005). In so doing, we apply a harmless-error test in which "we determine first whether the district court erred, and if so, whether that error was harmless." *State v. Olsen*, 824 N.W.2d 334, 340 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013). But if we determine that the district court erred in excluding evidence and the error implicates a constitutional right, the defendant is entitled to a new trial "unless the error is harmless beyond a reasonable doubt."

State v. Davis, 820 N.W.2d 525, 533 (Minn. 2012). Accordingly, "when the ruling results in the erroneous exclusion of defense evidence in violation of the defendant's constitutional rights, the verdict must be reversed if 'there is a reasonable possibility that the verdict might have been different if the evidence had been admitted.'" *State v. Graham*, 764 N.W.2d 340, 351 (Minn. 2009) (quoting *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994)).

The district court determined that the evidence of previous flirting lacked any probative value with respect to whether D.R.A. later consented to sexual intercourse. Generally, evidence is relevant if it has "any tendency to make the existence of any [material] fact . . . more probable or less probable." Minn. R. Evid. 401. Although Torres cites no Minnesota case holding that evidence of a victim's prior flirting with the accused is relevant to establishing a consent defense, even assuming that J.D.N.'s testimony has a minimal tendency to make more or less probable D.R.A.'s consent to sexual intercourse with Torres, the alleged error is not reversible if there is no reasonable possibility that the jury would have reached a different verdict if the evidence had been admitted.

The state presented substantial evidence that D.R.A. did not consent to sexual intercourse with Torres, including the following: (1) D.R.A. unequivocally testified that she did not consent and told Torres, "no," "stop," and "let's go back to class," throughout the assault; (2) within minutes of the assault, D.R.A. told two classmates and a school resource officer that Torres had raped her, and called her boyfriend on her cell phone and told him the same, (3) D.R.A. later provided the same information to a police investigator; (4) five witnesses testified that D.R.A. was emotionally distraught following the assault; (5) surveillance video showed D.R.A. and Torres exit the boys' locker room and head

toward their classroom and then showed D.R.A., approximately one minute later, leave the classroom with a classmate, gather her belongings, and take out her cell phone; and (6) a sexual-assault examination of D.R.A. conducted that day revealed that she suffered an injury to her anus.

Based on the strength of the state's evidence, it is not apparent how J.D.N.'s testimony that he observed mere prior flirting between D.R.A. and Torres would have strengthened Torres's consent defense, particularly in light of the weightier evidence, which was admitted by the district court, that D.R.A. and Torres had consensual sexual intercourse a few months earlier. Torres presents no theory to explain how the jury would have reached a different verdict if J.D.N.'s testimony had been admitted. We conclude there is no reasonable possibility that the verdict might have been different had J.D.N.'s testimony of flirting been admitted. Any error in excluding it was harmless beyond a reasonable doubt.

Affirmed.