STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1522

State of Minnesota,
Respondent,

vs.

Brad Donald Tomlinson,
Appellant.

Filed December 23, 2019
Affirmed in part and appeal dismissed in part
Jesson, Judge

Stevens County District Court
File No. 75-CR-16-207

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Aaron Jordan, Stevens County Attorney, Morris, Minnesota (for respondent)

Robert M. Christensen, Robert M. Christensen, P.L.C., Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Jesson, Judge; and Smith, John, Judge.*

S Y L L A B U S

In cases where criminal charges are severed for trial and result in multiple final judgments, each final judgment is appealable and subject to the timelines in Minnesota Rule of Criminal Procedure 28.02.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

O P I N I O N

JESSON, Judge

Appellant Brad Donald Tomlinson, accused of criminal sexual conduct toward four young girls after befriending their parents and exploiting their trust, appeals his convictions of criminal sexual conduct involving two of the victims. Tomlinson argues that the district court abused its discretion by admitting evidence of a common scheme or plan in his trials. Because we agree with the state that the appeal from his first convictions is untimely, we review only Tomlinson's subsequent conviction. And because the district court did not abuse its discretion by admitting evidence of Tomlinson's common scheme in that trial, we affirm.

FACTS

A woman reported to the police in May 2016 that the man living with her, appellant Brad Donald Tomlinson, had been abusing young girls, including her granddaughters. The police investigated, interviewing four victims and Tomlinson. After the investigation, the state charged Tomlinson with five counts of criminal sexual conduct, including two counts in the first degree and three counts in the second degree. The different counts related to Tomlinson's different victims. Counts one and two related to Tomlinson's abuse of J.R., count three related to T.E., count four related to C.S., and count five related to L.M.

We review, in chronological order, the victims' allegations.[1] The incidents of abuse began in 1986 when the first victim, T.E., was about five years old. Tomlinson and her

[1] Our recitation of these allegations is based on the record, including the investigative interviews, pretrial hearings, and testimony at both trials.

father, who were close friends, hunted and fished together. T.E. would often wait for them to return after fishing trips. T.E. testified that, on five to seven different occasions, she dozed off at home on the couch while waiting for her father to return and woke up to Tomlinson touching her chest and vagina under her clothes.

Tomlinson's next victim, J.R., was about nine when the abuse began in 1994. Tomlinson was close friends with her father as well. Both men often went fishing and Tomlinson even brought J.R. on a fishing trip once. J.R.'s father had serious health problems so Tomlinson would often help him out, as he did with J.R., who has a physical disability. J.R. testified that Tomlinson would touch her breasts and vagina over and under her clothes at her home, often while her father was in the next room. Eventually, he penetrated her vagina with his fingers and tongue. The incidents occurred multiple times over five years, according to J.R. She reported that the abuse ended when her father died and she moved.

Tomlinson's third and fourth victims, C.S. and L.M., were granddaughters of the woman he was living with, who reported the abuse to the authorities in 2016. Both girls would often be around Tomlinson during visits with their grandmother. C.S. reported that in 2004, when she was 11, she went fishing with Tomlinson during a visit to her grandmother's. After they returned and everyone else was asleep, according to C.S., Tomlinson came up behind her and touched her chest under her shirt for about a minute. C.S. reported that she avoided Tomlinson after that incident.

L.M. reported that when she was spending time at her grandmother's home in 2008, at around age seven, Tomlinson groped her chest under her shirt. Her grandmother was at

home, in another room, when this occurred. L.M. recalled that this happened about five times. After that, L.M. stopped being alone with Tomlinson.

With these factual allegations in mind, we return to the procedural posture of this case. After the charges were filed, at a contested omnibus hearing, the district court dismissed the charge relating to Tomlinson's abuse of T.E. (count three) because it was outside the statute of limitations.[2] Then, at Tomlinson's request, the court severed the counts relating to J.R., C.S., and L.M. for trial. *See* Minn. R. Crim. P. 17.03, subd. 3(1).

At the first trial, relating to Tomlinson's abuse of J.R. (counts one and two), the state moved to admit testimony from Tomlinson's other victims, asserting that their accounts established his common scheme or plan of abuse. After holding an evidentiary hearing, the district court granted the state's motion and permitted the three other victims, T.E., C.S., and L.M., to testify. The jury found Tomlinson guilty of first-degree criminal sexual conduct toward J.R. on both counts. About five months later, the district court sentenced Tomlinson to 86 months in prison on count one and 110 months on count two, to be served concurrently.

Two weeks after sentencing, the state proceeded with trial on Tomlinson's abuse of C.S. (count four). Again, the state moved to admit testimony from Tomlinson's other

[2] Tomlinson abused T.E. from about 1986 to 1988. T.E. disclosed Tomlinson's abuse in 1998 to a mandated reporter but the state did not pursue charges at the time because T.E. said she did not want to make a report. Because Tomlinson was not charged within three years of that report to police, the district court determined that the statute of limitations bars prosecution. *See* Minn. Stat. § 628.26(e) (2018) (requiring charges be brought within nine years of the offense or three years of its reporting to police, whichever is later).

victims, J.R. and T.E., as evidence of a common scheme or plan.[3] The district court held an evidentiary hearing. The state explained that Tomlinson got close to each victim's family over time, gaining their trust and spending time at their homes, often fishing with the families and the victims. Tomlinson would then position himself to have access to the girls alone. The girls were similar ages when the abuse started—between five and 11. And Tomlinson's abusive conduct was similar. Following arguments from the state and Tomlinson, the district court granted the state's request.

Trial continued, and C.S., J.R., and T.E. testified, among other witnesses. And the testimony of the three victims was consistent with the allegations described above. The jury found Tomlinson guilty of second-degree criminal sexual conduct toward C.S. (count four). Tomlinson was sentenced to 21 months in prison, to be served consecutively to his previous sentence. This appeal follows.[4]

ISSUES

I. Is Tomlinson's appeal from his first convictions untimely?

II. Did the district court abuse its discretion by admitting evidence of Tomlinson's other bad acts?

ANALYSIS

Tomlinson argues that his convictions should be reversed because the district court abused its discretion by admitting testimony from his other victims at both trials. In response, the state contends that Tomlinson's appeal relating to the first trial fails as

[3] The state did not seek to have L.M. testify at the second trial.

[4] The state agreed to a continuance for dismissal on Tomlinson's abuse of L.M. (count five), pending the outcome of this appeal.

untimely and that, with regard to the second trial, admission of the other victims' testimony was not an abuse of discretion. Below, we first address the threshold issue of timeliness before turning to the evidentiary dispute.

I. Tomlinson's appeal from his first convictions is untimely.

The question of whether Tomlinson's appeal of his first two convictions (counts one and two) is timely is a question of law, which we review de novo. *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016). To answer this question, we turn to the Minnesota Rules of Criminal Procedure. Tomlinson has a right to appeal any final judgment. Minn. R. Crim. P. 28.02, subd. 2(1). A judgment is final when a defendant is convicted and sentenced. *Id.* And in a felony case like this, the final judgment must be appealed within 90 days, with an additional 30-day grace period, for good cause.[5] *See id.*, subd. 4(3)(a), (g).

Here, Tomlinson was sentenced for his first two convictions on April 11, 2018, and he filed this appeal on September 14, 2018—156 days later. This is well outside the 90-day requirement. His appeal relating to his first convictions (counts one and two) is untimely.[6]

[5] Certain posttrial motions also toll the time for an appeal. *See* Minn. R. Crim. P. 28.02, subd. 4(3)(e). But here, this tolling is not at issue because Tomlinson's posttrial motions were resolved before his sentencing hearing.

[6] We note that the district court reissued a single warrant of commitment following Tomlinson's sentencing in the second trial, but that is not enough to revive an untimely appeal. Tomlinson's sentencing for the first trial was still a distinct final judgment under a strict, plain reading of the rules, and the rules prevent us from extending the timeline for filing an appeal. *See* Minn. R. Crim. P. 28.01, subd. 3 (noting that the court "may not alter the time for filing" an appeal).

Our decision is driven not only by the wording of rule 28.02, but by Minnesota Supreme Court guidance in a recent decision, *State v. Sleen*, No. A18-1486 (Minn. Dec. 19, 2018) (mem.). Similar to the posture here, the appellant in *Sleen* was charged with several counts of criminal sexual conduct, relating to different complainants, that were severed for trial. *Sleen*, No. A18-1486, at 1 (Minn. Dec. 19, 2018) (mem.). But Sleen took the opposite path of Tomlinson: he sought appellate review after he was sentenced on only *one* of the severed counts, while the remaining counts were still pending before the district court. *Id.* at 1-2. Upon review, we concluded that the appeal was premature, reasoning that Minnesota Rule of Criminal Procedure 17.03, subdivision 3, did not permit appeals after final judgments on severed counts and that permitting such appeals would allow interlocutory review. *State v. Sleen*, No. A18-1486 (Minn. App. Oct. 16, 2018) (order). But the supreme court reversed, reasoning that Sleen's appeal was permitted because the judgment it challenged was final even though it did not resolve the severed counts. *Sleen*, No. A18-1486, at 3 (Minn. Dec. 19, 2018) (mem.). The court wrote:

> Rule 28.02, subdivision 2(1) gives a defendant the right to appeal from "*any* adverse final judgment." (Emphasis added). The fact that the final judgment on [one count] did not resolve the severed counts does not determine appealability. The plain language of [r]ule 28.02, subdivision 2(1), authorizes an appeal from "any" final judgment. To conclude otherwise under the facts of this case reads the word "any" out of the rule.

Id.

Still, presented with the 90-day limitation on the right to appeal imposed by rule 28.02, Tomlinson attempts to seek refuge in two different rule provisions. First, he posits that the rules allow other charges joined for prosecution to be included in an appeal. *See*

Minn. R. Crim. P. 28.02, subd. 4(3)(a) ("Other charges that were joined for prosecution with the felony or gross misdemeanor may be included in the appeal."). But we read that subsection of the rule to require that charges *once* joined for prosecution *remain* joined. Here, while the charges were originally joined, the counts were later severed at Tomlinson's request. As a result, the charges were not joined for purposes of this rule provision.

Second, Tomlinson argues that we should read rule 28.02, about the time requirements for appeals, in light of the overarching rule stating that the Minnesota Rules of Criminal Procedure are "intended to provide a just determination of criminal proceedings, and ensure a simple and fair procedure that eliminates unjustified expense and delay." Minn. R. Crim. P. 1.02. And, according to Tomlinson, it would be more "simple and fair" to appeal all of his convictions together.

It may, indeed, be simpler to simultaneously appeal all of one's convictions at one time. Yet Minnesota Rule of Criminal Procedure 28.02, subdivision 1, states that a defendant may appeal "only as these rules permit." And specific provisions control general provisions—such as rule 1.02—when the two conflict. Minn. Stat. § 645.26, subd. 1 (2018); *see also In re M.O.*, 838 N.W.2d 577, 583 (Minn. App. 2013) ("Courts may apply principles of statutory interpretation when interpreting rules of court."), *review denied* (Minn. Oct. 23, 2013). Because rule 28.02 is more specific than rule 1.02, it controls here and does not permit us to alter the timeline to allow Tomlinson's late appeal. We further note that, were we to adopt Tomlinson's argument, we would have to ignore another subdivision of rule 28 that explicitly prohibits us from altering the timeline for filing an

appeal. Minn. R. Crim. P. 28.01, subd. 3. And our holding would run counter to the long-standing policy favoring the finality of a judgment. *See Kaiser v. State*, 641 N.W.2d 900, 903 (Minn. 2002) ("Public policy favors the finality of judgments . . . .").

We acknowledge that, at times, the practical effect of rule 28.02 may be challenging because it could result in the temporary suspension of district court jurisdiction and effectively permit interlocutory review.[7] But, with the plain language of the rule and *Sleen* in mind, we strictly construe rule 28.02 of the Minnesota Rules of Criminal Procedure. Accordingly, we conclude that Tomlinson's appeal from his first two convictions (counts one and two) is untimely and must be dismissed.[8]

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[7] For example, if a defendant appealed a conviction after sentencing on some counts while the remaining counts were pending in district court, the same issue may be pending in two courts at the same time. For this reason, an appeal ordinarily suspends a district court's jurisdiction to avoid this problem. *State v. Dwire*, 409 N.W.2d 498, 502 (Minn. 1987); *see also Bonynge v. City of Minneapolis*, 430 N.W.2d 265, 266 (Minn. App. 1988) (recognizing "the policy against piecemeal appellate review"). Further, if a defendant raised an issue in an appeal before that issue was decided by the district court in a remaining severed count, the defendant may effectively obtain interlocutory review of that issue, which is not otherwise permitted. *See, e.g., State v. Kvale*, 352 N.W.2d 137, 139-40 (Minn. App. 1984) (holding that a defendant does not have the right to appeal a pretrial evidentiary ruling but may seek discretionary review).

We observe that, in other similarly situated matters, the state has avoided these challenging effects by reissuing a new complaint on the remaining counts. *See* Minn. R. Crim. P. 17.05 (permitting amendment of the complaint). Alternatively, we have observed instances where sentencing is stayed until after all severed charges are adjudicated so there is one final judgment in the matter.

[8] We also note that the clear meaning of rule 28.02 is not the only thing barring Tomlinson's appeal of his first convictions. Rather, this partial dismissal is a direct consequence of the legal strategy to sever the charged counts for trial.

II. The district court did not abuse its discretion by admitting evidence of Tomlinson's other bad acts at trial.

With the timeliness issue on Tomlinson's first convictions (counts one and two) addressed, we turn to his subsequent conviction (count four), involving his criminal sexual conduct toward C.S. Tomlinson argues that the district court abused its discretion by allowing his other victims to testify at this trial. We review the district court's decision to admit evidence of a defendant's other bad acts for an abuse of discretion. *State v. Griffin*, 887 N.W.2d 257, 261-62 (Minn. 2016). Generally, evidence of a defendant's other bad acts is not admissible to show that a defendant acted in conformity with such behavior. *State v. Spreigl*, 139 N.W.2d 167, 170-71 (Minn. 1965). But other-bad-act evidence, often called *Spreigl* evidence, may be admissible for another purpose, such as to show a common scheme or plan. Minn. R. Evid. 404(b)(1); *State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006). Offenses that have a "marked similarity" to the charged offense can be used to show a common scheme or plan. *Ness*, 707 N.W.2d at 688.

To determine whether to admit *Spreigl* evidence, a district court generally uses a five-step test:

> (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.

Id. at 685-86 (emphasis added); *see also* Minn. R. Evid. 404(b)(2). Contesting four of the five prongs[9] of the test, Tomlinson argues that the district court abused its discretion by admitting testimony from his other victims. We review each of the contested prongs in turn.

Offered to Prove

First, Tomlinson argues that the state was too vague in suggesting what the *Spreigl* evidence was offered to prove. But the district court found that the state "clearly indicated" what the evidence was offered to prove: that Tomlinson had a common scheme or plan because of the similarity of the victims' accounts.

Based upon our review of the record, the district court's assessment is correct. The state clearly articulated the reasons it offered the testimony. And the state provided nearly identical evidence for the same purpose in the earlier trial on counts one and two. Thus, Tomlinson was aware of what the *Spreigl* evidence was offered to prove.

Clear and Convincing Evidence

Next, Tomlinson argues that the witnesses' testimony did not establish the acts by clear and convincing evidence. The district court found that the testimony met this burden.

To be clear and convincing, the evidence surrounding a defendant's participation in a *Spreigl* incident should have a high probability of truthfulness. *Ness*, 707 N.W.2d at 686. Here, the witnesses provided consistent, detailed testimony about their relationships with Tomlinson and the circumstances surrounding their abuse. And Tomlinson was convicted

[9] Tomlinson concedes that the notice requirement was met.

of abusing one of the two witnesses, establishing his conduct with regard to her by *more* than clear and convincing evidence. Moreover, the district court found the testimony from both *Spreigl* witnesses credible, a determination to which this court defers. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993). The district court did not abuse its discretion in finding that Tomlinson's acts were established by clear and convincing evidence.

Relevant and Material

Next, Tomlinson argues that the *Spreigl* evidence was not relevant or material because the accounts are mere uncorroborated, cumulative allegations such that none of the allegations serve to make any material facts more or less likely. The district court concluded that the evidence was relevant and material.

When there is a close relationship—in terms of time, place, or modus operandi—between the charged offense and the *Spreigl* offense, the evidence is relevant and material. *State v. Gomez*, 721 N.W.2d 871, 878 (Minn. 2006). The evidence here showed the "marked similarities" in Tomlinson's modus operandi, including that his victims were all young girls, that he gained access to them through a relationship with their parent or grandparent, and the similarity of the sexual conduct. *See Ness*, 707 N.W.2d at 689. This evidence supports the district court's conclusion.

But Tomlinson also contends that the allegations are too old to be relevant or material. We acknowledge this concern, but here it is mitigated because the acts showed a pattern of markedly similar conduct. *See id.* (noting that concerns about remoteness in time are lessened if the acts demonstrate an ongoing pattern or repeated similar conduct).

As a result, the district court did not abuse its discretion in concluding that the evidence was relevant and material.

Probative Value Greater Than Potential Prejudice

Finally, Tomlinson argues that the *Spreigl* evidence was obviously prejudicial and its admission allowed the jury to convict him based on his character and not the merits of the evidence. The district court found that the *Spreigl* evidence was both probative and prejudicial but that when balancing the two factors, the probative value outweighed the unfair prejudice.[10]

In reviewing this decision for an abuse of discretion, we note that the probative value of this *Spreigl* evidence is high because of the many similarities between the victims' accounts, including how Tomlinson knew the victims, how they came to trust him, and how he used that trust to gain access to the victims in places where they felt safe. But, while there was the potential for unfair prejudice in admitting the testimony, the district court provided a cautionary instruction before and after each *Spreigl* witness testified, and at the end of trial before the jury deliberated. *See State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998) (noting that providing cautionary instructions lessened the likelihood that the jury would give undue weight to the evidence). In light of this instruction, the district court did not abuse its discretion in concluding that the probative value exceeded the potential for unfair prejudice such that admission was appropriate.

[10] Once a court determines that *Spreigl* evidence is relevant, it must balance the risk that it will be used for a propensity inference against its probative value. *State v. Fardan*, 773 N.W.2d 303, 319 (Minn. 2009).

In sum, because the district court's findings and conclusions were thorough and satisfied each element of the five-step test, the district court's decision to admit *Spreigl* evidence was not an abuse of discretion.[11]

D E C I S I O N

Tomlinson appealed his convictions, arguing that the district court abused its discretion by admitting evidence of his common scheme or plan of abuse. But Tomlinson's first convictions were a final judgment separate from his subsequent conviction, and Minnesota Rule of Criminal Procedure 28.02 required that they be appealed within 90 days of that judgment. They were not. Because his appeal from the first convictions was untimely under rule 28.02, we dismiss that portion of this appeal. With regard to Tomlinson's appeal of his subsequent conviction, the district court did not abuse its discretion in admitting testimony from his other victims at trial. Accordingly, we affirm.

Affirmed in part and appeal dismissed in part.

[11] Because the appeal from Tomlinson's first convictions is dismissed, we do not address his argument about the district court judge's alleged bias. Tomlinson's only argument on this issue relates to the transcript during the trial on counts one and two, which we do not address because that appeal is dismissed. Tomlinson raised an additional concern about a comment the judge made at sentencing in his second trial but the issue was not raised in his principal brief. As a result, we decline to review it. *See, e.g.*, *Larson v. Degner*, 78 N.W.2d 333, 336 (Minn. 1956) (raising issues for appeal in a reply brief is "not proper practice and is not to be permitted"); *State v. Paige*, 256 N.W.2d 298, 304 (Minn. 1977) (declining to consider an issue raised for the first time in a reply brief).