STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1669

State of Minnesota,
Respondent,

vs.

Christopher O'Brien Bogan,
Appellant.

Filed September 30, 2019
Affirmed
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-CR-17-23191

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Reyes, Judge; and Florey, Judge.

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

SMITH, TRACY M., Judge

In this direct appeal from a conviction for attempted third-degree criminal sexual conduct, appellant Christopher Bogan argues that the district court abused its discretion by

permitting the state to introduce evidence of another crime that he had committed. Because the district court did not abuse its discretion by admitting the evidence, we affirm.

FACTS

As found by the district court, sometime after 10:00 p.m. on August 15, 2017, C.V. left her boyfriend's apartment in Minneapolis after an argument and was looking for a cigarette. She was "very drunk." While walking to a convenience store, C.V. saw Bogan waiting at a bus stop and asked him for a cigarette. Bogan responded that he did not have any cigarettes. C.V. then began walking back toward her boyfriend's apartment, and Bogan followed her. They talked to each other while walking, but C.V. could not recall the details of the conversation.

C.V. and Bogan wound up in a nearby alley, where Bogan shoved C.V. up against a brick wall. C.V. was facing the wall, and Bogan held C.V.'s wrists so that her palms were pushed up against the wall. After Bogan pressed himself against the rear side of C.V.'s body for a few moments, he removed his hands from C.V.'s wrists and pulled down her shorts.[1] As her arms were then freed, C.V. managed to escape, and she fled the alley. C.V. came upon a squad car conducting a traffic stop and cried out for help. Peace officers detained Bogan.

The state charged Bogan with attempted first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2016), and with second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(e)(i) (2016). Immediately

[1] The evidence was inconclusive as to how low Bogan pulled down the shorts and the exact manner in which he did so.

before trial, the state added a lesser-included charge of fourth-degree criminal sexual conduct under Minn. Stat. § 609.345, subd. 1(c) (2016).

At the subsequent bench trial, the state introduced evidence of a separate, later incident in which Bogan beat and sexually assaulted B.S., a hearing-impaired individual who was of a similar age as C.V. Bogan sexually penetrated B.S., causing injuries to her vaginal area and rectum. The offense involving B.S. occurred in a park not far from the scene of the offense in this case, less than a month after the instant offense.[2]

At the end of trial, the district court acquitted Bogan of the charged offenses but found him guilty of attempted third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(c) (2016), as a lesser-included offense of attempted first-degree criminal sexual conduct. Bogan was sentenced to 24 months' imprisonment, to be served consecutively with his sentence for the crime against B.S.

This appeal follows.

D E C I S I O N

Evidence of other crimes or acts is commonly referred to as "*Spreigl* evidence" after the supreme court's decision in *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965). *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). "A district court's decision to admit *Spreigl* evidence is reviewed for an abuse of discretion. A defendant who claims the trial court erred in admitting evidence bears the burden of showing an error occurred and any resulting prejudice." *State v. Griffin*, 887 N.W.2d 257, 261-62 (Minn. 2016) (citation omitted).

[2] Bogan pleaded guilty to first-degree criminal sexual conduct in this other incident.

"Evidentiary errors warrant reversal if there is any reasonable doubt the result would have been different had the evidence not been admitted." *State v. Grayson*, 546 N.W.2d 731, 736 (Minn. 1996) (quotation omitted).

Spreigl evidence may be admitted only under certain circumstances. Minn. R. Evid. 404(b); *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). First, it "is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1). Rather, to be admissible, *Spreigl* evidence must be relevant to issues such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Second, the following conditions also have to be met:

> (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.

Ness, 707 N.W.2d at 686.

Here, the district court admitted the *Spreigl* evidence for two purposes—as proof of a common scheme or plan and as proof of intent. Bogan makes three arguments against the district court's decision. His first two arguments are that the evidence was not relevant to either of the purposes for which the district court admitted it. His third argument is that, even if the evidence was relevant, it was inadmissible because its probative value was outweighed by its potential prejudice.

Common scheme or plan

Bogan argues that the other incident was not relevant to show a common scheme or plan. Evidence of other acts tending to show a common scheme or plan is relevant to show that the act in the alleged offense actually occurred. *Ness*, 707 N.W.2d at 687-88 ("The [common-scheme-or-plan] exception . . . embrace[s] evidence of offenses which, because of their marked similarity in modus operandi to the charged offense, tend to corroborate evidence of the latter." (quotation omitted)). Whether another act tends to show a common scheme or plan is evaluated based on similarities of time, place, and modus operandi. *Id.* While the charged offense and the other incident must be markedly similar, *id.*, "[a]bsolute similarity between the charged offense and the *Spreigl* incident is not required to establish relevancy," *State v. Berry*, 484 N.W.2d 14, 17 (Minn. 1992).

Bogan argues that the other incident was not relevant because it was not markedly similar to the instant offense. Bogan's argument focuses on the factual differences between the instant offense and the other incident, particularly the difference in the seriousness of the two acts: the instant offense involved pushing the victim against a wall and pulling down her pants whereas the other incident involved injuries and sexual penetration using force.

But all three relevant aspects of the other act—time, place, and modus operandi—tend to show a common scheme or plan. In both the *Spreigl* act and the charged offense, Bogan physically subdued a vulnerable woman and pulled down her lower garment in an attempt to sexually penetrate her. Both incidents occurred in public areas that were geographically close to each other. The two acts occurred less than a month apart, and both

occurred late at night. While Bogan emphasizes that penetration was accomplished in the other act, but was not accomplished in the charged offense, that distinction is not meaningful; a plan does not cease to be common merely because an attempt fails. *See, e.g.*, *State v. Lewis*, 385 N.W.2d 352, 355 (Minn. App. 1986) (affirming the admission of other acts of attempted arson as *Spreigl* evidence in an arson prosecution), *review denied* (Minn. May 29, 1986). The other incident had the requisite similarity to the instant offense, and the district court did not abuse its discretion by ruling that the evidence was relevant to show a common scheme or plan.

Intent

Bogan also argues that the other incident was not relevant to prove intent. He relies on *Ness*, 707 N.W.2d at 687. In *Ness*, the defendant was accused of engaging in sexual contact with an 11-year-old boy, in violation of Minn. Stat. § 609.343, subd. 1(a) (2004). *Id.* at 679. Ness's intent was not a disputed issue because his "sexual or aggressive intent [could] readily be inferred from the contacts themselves" and he categorically denied making the alleged contacts. *Id.* at 687. Bogan argues that his intent was not a disputed issue for the same reasons. But *Ness* is distinguishable. Bogan was charged with attempting to commit first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(e)(i). Because "[a]ttempt to commit a certain crime requires proof that the defendant specifically intended to commit that particular crime," the state had to prove that Bogan intended to sexually penetrate C.V. using force or coercion. *State v. Landherr*, 542 N.W.2d 686, 687 (Minn. App. 1996), *review denied* (Minn. Mar. 19, 1996); *see* Minn. Stat. § 609.342, subd. 1 ("A person who engages in sexual penetration with another person . . .

is guilty of criminal sexual conduct in the first degree if . . . the actor causes personal injury [and] . . . uses force or coercion to accomplish the act . . . ."). Unlike in *Ness*, proving mere "sexual or aggressive intent" would not have met the state's burden. *See Ness*, 707 N.W.2d at 687. And Bogan's attorney argued at trial that Bogan did not intend to commit criminal sexual conduct, contending that Bogan may have simply "misread" the situation. Whether Bogan specifically intended to sexually penetrate C.V. using force or coercion was disputed at trial. The district court did not abuse its discretion by concluding that the *Spreigl* evidence was relevant to the issue of intent.

Probative value versus potential prejudicial effect

Bogan's final argument is that, even if the *Spreigl* evidence is relevant for a proper purpose, its prejudicial effect substantially outweighed its probative value. Specifically, he argues that the state did not need the *Spreigl* evidence, and that the risk of it being improperly used as a propensity evidence was too great.[3] *See Ness*, 707 N.W.2d at 690 ("The prosecution's need for other-acts evidence should be addressed in balancing probative value against potential prejudice.").

The elements of the crime of attempt are: (1) an intent to commit an underlying crime and (2) a substantial step taken toward the underlying crime's commission. Minn. Stat. § 609.17, subd. 1 (2016). Bogan's brief identifies a number of sources of evidence tending to show the facts of his conduct, including C.V.'s testimony, testimony of police

[3] Bogan also argues that the evidence had low probative value because it was not relevant to show intent or common scheme or plan. But because the evidence was relevant to those issues, we need not address that aspect of his argument again.

officers, and body-camera footage of the aftermath of the offense. Thus, Bogan is correct that the state had strong evidence for the substantial-step element. However, we need not determine exactly what additional probative value the *Spreigl* evidence had in regard to the substantial-step element, because the probative value of the evidence as to Bogan's intent outweighs its potential prejudice. Intent is a state of mind and must generally be proved by circumstantial evidence, which requires the fact-finder to make an inference based on "the totality of the circumstances." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). Bogan's admission that he had committed sexual assault with force against another obviously vulnerable woman under similar conditions was a circumstance that strengthened the inference that Bogan intended to sexually penetrate C.V. The *Spreigl* evidence therefore had significant probative value.

At the same time, the risk of prejudice was minimized by the fact that Bogan had a bench trial. As the supreme court explained in *State v. Burrell*:

> The distinction between a jury trial and a bench trial is important. The risk of unfair prejudice . . . is reduced because there is comparatively less risk that the district court judge, as compared to a jury of laypersons, would use the evidence for an improper purpose or have his sense of reason overcome by emotion. Indeed, excluding relevant evidence at a bench trial on the grounds of unfair prejudice is in a sense ridiculous.

772 N.W.2d 459, 467 (Minn. 2009) (citations and quotation omitted). The risk of prejudice to Bogan did not substantially outweigh the probative value of the *Spreigl* evidence.

The district court did not abuse its discretion by admitting the *Spreigl* evidence.

Affirmed.