STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0160

State of Minnesota,
Respondent,

vs.

Nicholas James Bandur,
Appellant.

Filed December 2, 2019
Affirmed in part, reversed in part, and remanded
Reilly, Judge

Sherburne County District Court
File No. 71-CR-16-1777

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

Kathleen A. Heaney, Sherburne County Attorney, Leah G. Emmans, Assistant Sherburne County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Bratvold, Judge; and Slieter, Judge.

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

REILLY, Judge

In this direct appeal from judgment of conviction for criminal sexual conduct, appellant challenges the district court's admission of other-acts evidence and contends that

the district court erred in adjudicating him guilty of both counts of criminal sexual conduct of which a jury found him guilty. In his pro se supplemental brief, appellant also argues that the district court erred because no mental health evaluation was completed prior to sentencing to support a downward departure and appellant's counsel was ineffective when counsel failed to arrange a psychosexual evaluation. We reverse in part and remand with instructions to vacate the conviction for second-degree criminal sexual conduct. We affirm in all other respects.

FACTS

In September 2016, the victim reported to police that when he was 11 years old, appellant Nicholas James Bandur sexually abused him on multiple occasions. In December 2017, appellant was charged by complaint in Sherburne county district court with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) and second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a).

At trial, the victim testified to the following: when the victim was nine or ten years old and living in Monticello, appellant would stay overnight at his house. Appellant showed the victim pictures of nude people engaging in sex, asked the victim to undress himself, and touched the victim's penis. Appellant sucked on the victim's penis and instructed the victim to put his mouth on appellant's penis. When the victim was 11 or 12 years old and living in Big Lake, appellant continued to come over to his house and ask the victim to put his mouth on appellant's penis. When the victim moved to a new house, the activity stopped. Eventually, the victim told his mother what had happened with appellant.

The state filed a notice of intent to offer evidence of appellant's other acts involving the victim's brother. The state identified intent, absence of mistake or accident, and common scheme or plan as the bases for its admission. Appellant opposed the state's motion. After reviewing a copy of the statement made by the victim's brother to the Big Lake Police Department, the district court allowed the state to offer evidence of appellant's other acts involving the victim's brother, finding that there was clear and convincing evidence that appellant engaged in those acts. The district court found that the other-acts evidence was relevant given the similar timeframes and similar alleged acts. The district court acknowledged that the other-acts evidence would be prejudicial to appellant, but found that the probative value of the evidence outweighed any prejudice. The district court gave a cautionary instruction prior to the receipt of other-acts testimony and during final instructions before submitting the case to the jury.

At trial, the victim's brother testified that he was approximately 13 or 14 years old when appellant started coming to his house in Monticello. The victim's brother testified that he and appellant would play video games together and that when someone died on the video game they would have to do a truth or dare. One of the dares suggested by appellant involved stripping down and running around the outside of the house. The victim's brother declined to do this dare because it made him uncomfortable. The victim's brother also testified that appellant made a "proposition for a blow job" through hand motions, which he declined, and that "masturbation was propositioned" along with the truth or dare game. The victim's brother testified that these incidents continued at the house in Big Lake. He

eventually told his mother about what had happened and later learned that the victim told their mother as well.

Appellant did not testify at the trial, but his video statement to police was played for the jury. In his statement, appellant denied all of the allegations.

Following a jury trial, the jury found appellant guilty of first-degree criminal sexual conduct and second-degree criminal sexual conduct. Appellant was ordered to complete a presentence investigation. Appellant moved the court for a downward dispositional departure from the presumptive sentence of a 144-month commitment to the commissioner of corrections.

The district court denied appellant's motion for a downward dispositional departure and sentenced appellant on count I—criminal sexual conduct in the first degree—to the presumptive guidelines sentence of 144 months incarceration, followed by ten years of conditional release. The district court entered convictions for both count I and count II. This appeal follows.

D E C I S I O N

I. The District Court Did Not Abuse its Discretion when it Admitted Other-Acts Evidence.

Appellant argues that the district court abused its discretion by admitting other-acts evidence because the evidence was not relevant or needed and was overly prejudicial. Minnesota Rule of Evidence 404(b) governs the admissibility of evidence of other crimes or acts. This evidence is referred to as "*Spreigl* evidence" based on 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). Evidence of other crimes or acts is not admissible to prove "the defendant's character for the purpose of showing that he or she acted in conformity with that character." *Id*. However, such evidence may be admitted for the purpose of showing motive, intent, absence of mistake or accident, identity or a common scheme or plan. *Id.* (citing Minn. R. Evid. 404(b)). The court has developed a five-step process to determine whether to admit other-acts evidence. The steps include:

> (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 (Minn. 2006).

"Admission of *Spreigl* evidence rests within the sound discretion of the trial court and a trial court's ruling will not be disturbed absent a clear abuse of discretion." *State v. DeWald*, 464 N.W.2d 500, 503 (Minn. 1991). When a defendant claims the trial court erred in admitting evidence, the defendant "bears the burden of showing an error occurred and any resulting prejudice." *State v. Griffin*, 887 N.W.2d 257, 261-62 (Minn. 2016) (citations omitted). Appellant does not challenge the first three factors.

A. Other-Acts Evidence is Relevant Where Defendant Disputes that Sexual Conduct Occurred.

Appellant argues that the other-acts evidence was not relevant since neither identity nor intent was at issue. More specifically, appellant contends that

> [i]n this case no issue existed as to whether the conduct was a mistake or accident. If it happened, it was criminal sexual

> conduct; if it did not happen, no crime occurred. If no issue existed as to whether the behavior was an accident but, instead, the only issue was the complainant's credibility, as the prosecution conceded, then the Spreigl evidence would have and could only have been used by the jury, despite the cautionary instruction, to improperly imply appellant had a propensity to sexually assault young boys.

Appellant essentially claims that other-acts evidence under Minnesota Rule of Evidence 404(b) is irrelevant where a defendant denies allegations of sexual abuse or misconduct. This is contrary to caselaw, which provides that "[i]n criminal sexual conduct cases, particularly in child sex abuse prosecutions, prior acts of sexual conduct are often relevant where the defendant disputes that the sexual conduct occurred or where the defendant asserts the victim is fabricating the allegations." *State v. Boehl*, 697 N.W.2d 215, 219 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005). Due to the "secrecy in which such acts take place, the vulnerability of the victims, the absence of physical proof of the crime . . . and a general lack of confidence in the ability of the jury to assess the credibility of child witnesses," prior bad acts or convictions are relevant to show a common scheme or plan, or that the act occurred. *Id*. at 219-20 (quotation and citation omitted). "Admission for this purpose . . . should be proper at least where the corpus delicti truly is in issue and where the trial court is satisfied that the other crime is sufficiently relevant to the charged crime." *State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993).

Appellant denied all allegations of inappropriate sexual conduct with the victim. Therefore, corpus delicti "truly was in issue." Additionally, the district court found that the other-acts evidence was relevant given that the incidents were "similar in time frames" and "similar acts [were] being alleged." Appellant does not challenge these findings. The

district court did not abuse its discretion when it found that the other-acts evidence was relevant.

B. The Other-Acts Evidence Was Not Unfairly Prejudicial.

Appellant next argues that the other-acts evidence was overly prejudicial. Specifically, appellant argues that the other-acts evidence had no proper purpose except to imply that appellant had a propensity to sexually assault young boys, and that its prejudicial effect outweighed any probative value. Courts, when determining the need for other-acts evidence should "conduct a thoroughgoing examination of the purposes for which *Spreigl* evidence is offered and . . . weigh the probative value of the evidence on disputed issues in the case against its potential for unfair prejudice." *Ness,* 707 N.W.2d at 690. "[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.* at 688. "The prosecution's need for other-acts evidence should be addressed in balancing probative value against potential prejudice, not as an independent necessity requirement." *Id*.

Here, the district court found that the other-acts evidence was relevant given the similar timeframes and alleged acts. The district court also considered the fact that the victim and his brother were "similar ages," and the incidents occurred in "similar locations." The district court acknowledged that the other-acts evidence would be prejudicial to appellant, but found that the probative value of the evidence outweighed any prejudice. Moreover, the district court considered the weakness of the state's case, noting

the delayed report and lack of physical evidence. Appellant conceded that the state's case was weak, noting that "[t]here was no corroborating evidence: no semen, DNA, eyewitnesses or any person who was told contemporaneously about the allegations." *But cf. Ness*, 707 N.W.2d at 689 (concluding that the probative value of the other-acts evidence was outweighed by its potential for unfair prejudice because, in part, the other-acts evidence was not needed "to strengthen otherwise weak or inadequate proof of an element of the charged offense or the state's case as a whole"). The district court did not abuse its discretion when it found that the probative value of the other-acts evidence was not outweighed by its potential for unfair prejudice.

Finally, appellant argues that this court should reverse and remand for a new trial because the improper other-acts testimony affected the verdict. "When the district court has erroneously admitted other-acts evidence, this court must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id*. at 691. Because we conclude that the district court did not erroneously admit the other-acts evidence, we need not consider this argument.

II. The District Court Erroneously Convicted Appellant of The Crime Charged and a Lesser-Included Offense.

The parties agree that the district court erroneously adjudicated appellant guilty of first-degree criminal sexual conduct and the lesser-included offense of second-degree criminal sexual conduct. Second-degree criminal sexual conduct is a lesser-included offense of first-degree criminal sexual conduct. *State v. Kobow*, 466 N.W.2d 747, 753 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). "Upon prosecution for a crime,

the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2018). An "included offense" includes "a crime necessarily proved if the crime charged were proved." *Id*., subd. 1(4). "A guilty verdict alone is not a conviction." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007). Where a defendant is convicted of more than one charge for the same conduct, the district court should formally adjudicate and impose sentence on one count only, while leaving the remaining guilty verdict intact with no formal adjudication. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). "Whether a defendant was 'formally adjudicated' guilty of an offense is usually determined by looking at the official judgment of conviction." *State v. Plan*, 316 N.W.2d 727, 729 (Minn. 1982). Whether the district court erred by formally adjudicating multiple convictions is a question of law reviewed de novo. *State v. Ferguson*, 729 N.W.2d 604, 618 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).

The jury found appellant guilty of both first-degree criminal sexual and second-degree criminal sexual conduct based on the same occurrences, and the district court entered convictions for both offenses at sentencing and in the official judgment. The proper practice is for the district court to formally adjudicate and impose sentence on only one count. *LaTourelle*, 343 N.W.2d at 284. Appellant's second-degree criminal sexual conduct offense is a lesser-included offense to the first-degree criminal sexual conduct offense; therefore, the district court erroneously entered convictions for both offenses. We reverse and remand to the district court with instructions to vacate the adjudication of guilt with respect to the second-degree criminal sexual conduct charge, without disturbing the jury's finding of guilt on that charge.

III. Appellant is Not Entitled to Relief on His Pro Se Arguments.

Appellant makes additional arguments in his pro se supplemental brief. Appellant argues that a mental health evaluation should have been completed prior to his sentencing to support his request for a downward departure. A presentence investigation (the PSI) was completed, which addressed appellant's mental health. According to the PSI, appellant denied ever being diagnosed with a mental health condition, being prescribed psychotropic medication, or being treated by a mental health professional. Appellant did report that he was diagnosed with autism as a child, but stated that the diagnosis does not generally impact him. Because appellant denied any mental health diagnoses and denied being treated by a mental health professional, appellant's argument is without merit.

Appellant also argues that no safeguards were put in place regarding his mental health concern "to help him in a [sic] environment to help protect him from being a bigger target due to the severity of the charges." Appellant cites to no legal authority to support this contention. Because inadequately briefed issues are not properly before the court, we decline to address this argument. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (concluding that appellant's arguments were not properly before the court because appellant failed "to make and develop any argument, other than a general statement"), *review denied* (Minn. Aug. 5, 1997).

Finally, appellant contends that he received ineffective assistance of counsel because "it was the duty of [his] lawyer or the state or both to set up a PSE"[1] and one was

[1] It appears appellant is referring to a psychosexual evaluation.

never conducted. More specifically, appellant argues that his lawyer did not arrange the PSE after asking for one at his sentencing. And because it was never conducted, appellant was not given enough information to argue for a downward departure.

In order to succeed on a claim of ineffective assistance of counsel, the claimant must prove that his counsel's representation "fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052)). Under the prejudice prong, an "[appellant] must show that counsel's errors 'actually' had an adverse effect." *Gates*, 398 N.W.2d at 562. Where the claim does not satisfy one of the *Strickland* requirements, "we need not consider the other requirement." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017) (citation omitted).

Appellant has not met his burden of proving that but-for counsel's error in not arranging a PSE, the result of the proceedings would have been different. Appellant argues that "[w]ithout that PSE not enough evidence was given for a chance at a downward departure." But appellant denied that he had *any* sexual contact with the victim and so it is unclear what helpful information may have been obtained from a psychosexual evaluation. Furthermore, appellant has not articulated how the district court's decision regarding a sentencing departure would have been different if the results of a psychosexual

evaluation would have been provided. Appellant is not entitled to relief on these arguments.

Affirmed, in part, reversed, in part, and remanded.