STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1519

State of Minnesota,
Respondent,

vs.

Robert Lee Fettig,
Appellant.

Filed August 24, 2020
Affirmed
Slieter, Judge

Kandiyohi County District Court
File No. 34-CR-18-418

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Shane Baker, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Slieter, Judge; and Bryan, Judge.

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

SLIETER, Judge

In this direct appeal from his judgment of conviction for a fifth-degree controlled-substance crime, appellant Robert Lee Fettig argues that (1) the district court abused its

discretion by excluding evidence of an alternative perpetrator, and (2) the prosecutor committed misconduct by failing to adequately prepare a witness who volunteered prohibited testimony. Because the district court properly excluded evidence of an alternative perpetrator and the prosecutor did not commit reversible misconduct, we affirm.

FACTS

Fettig was charged with fifth-degree possession of a controlled substance (methamphetamine), in violation of Minn. Stat. § 152.025, subd. 2(1) (2016), after law enforcement deputies found a bag containing methamphetamine in a vehicle in which he was a passenger. The case was tried to a jury, and the following facts are based on the evidence presented at trial.

Fettig was a front-seat passenger in a Chevrolet Silverado pickup truck driven by and registered to T.W. Law enforcement stopped the truck following a report from a citizen that Fettig, for whom there was an active arrest warrant, was in the vehicle. As the deputies spoke with T.W. and Fettig through the driver-side window of the truck, the deputies smelled an odor of marijuana coming from inside the vehicle. Based on the odor, the deputies asked T.W. and Fettig to step out of the vehicle so they could search it. After T.W. got out of the vehicle, she told one of the deputies that Fettig had placed "something" between her seat and the center console.

The deputies found a bag containing a white, powdery substance between the driver's seat and the center console. The deputies also found a torch-style lighter in the area where T.W.'s feet were and over $1,000 in cash in T.W.'s purse. A field test showed the substance tested positive for methamphetamine, and subsequent testing by the

Minnesota Bureau of Criminal Apprehension confirmed the substance to be 2.094 grams of methamphetamine.

Fettig sought to introduce, as alternative-perpetrator evidence, T.W.'s pending controlled-substance charge and to preclude the prosecutor from eliciting testimony of his warrant status at the time of the stop. The district court denied Fettig's motion to present alternative-perpetrator evidence of T.W.'s pending charge, and the parties agreed not to reference Fettig's prior fifth-degree controlled-substance crime conviction and arrest warrant. However, despite this agreement, testimony of his arrest warrant led Fettig to move for a mistrial, which the district court denied. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by excluding alternative-perpetrator evidence.

Fettig contends that, by not allowing him to present evidence of T.W.'s pending drug charge, the district court precluded him from presenting an alternative-perpetrator defense. Fettig argues that this abuse of discretion warrants a new trial.

"District courts have discretion in ruling on evidentiary matters, and will not be reversed absent a clear abuse of discretion." *State v. Hokanson*, 821 N.W.2d 340, 350 (Minn. 2012). "If an appellate court concludes that the district court abused its discretion in excluding alternative perpetrator evidence, the appellate court must then determine whether the error was harmless beyond a reasonable doubt." *Id.* "An error is harmless beyond a reasonable doubt if the verdict rendered is surely unattributable to the error." *Id.* (quotation omitted).

"Every defendant has a constitutional right to present a complete defense, including evidence tending to prove another person committed the crime." *State v. Jenkins*, 782 N.W.2d 211, 224 (Minn. 2010); *see generally* Minn. R. Evid. 404(b). Evidence of other crimes of an alternative perpetrator is often called "reverse-*Spreigl*" evidence.[1] *State v. Johnson*, 568 N.W.2d 426, 433 (Minn. 1997). "The foundational requirements for reverse *Spreigl* evidence are the same as for *Spreigl* evidence." *Id.*

The right to present alternative-perpetrator evidence "is not absolute; courts may limit the defendant's evidence to ensure that the defendant does not confuse or mislead the jury." *Jenkins*, 782 N.W.2d at 224. Accordingly, there are certain limitations to the admission of reverse-*Spreigl* evidence. As a threshold limitation, the defendant must first "connect[] the alternative perpetrator to the charged crime." *State v. Jones*, 678 N.W.2d 1, 17 (Minn. 2004). The record shows Fettig successfully connected T.W. to the crime by showing that T.W. was in the vehicle with him at the time of the stop, and that the deputies found the baggie of methamphetamine next to T.W.'s seat and a torch-style lighter at her feet.

Having met this initial threshold, Fettig was required to meet each of the following elements: (1) provide clear and convincing evidence that T.W. participated in the reverse-*Spreigl* incident; (2) demonstrate that the reverse-*Spreigl* incident is relevant and material to Fettig's case; and (3) demonstrate that the probative value of the reverse-*Spreigl* evidence outweighs its potential for unfair prejudice. *See id.* at 16-17. Because caselaw

[1] *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

dictates that all three factors must be satisfied for a district court to admit reverse-*Spreigl* evidence and the first factor fails, we need not address the remaining factors.

T.W.'s Participation in Reverse-*Spreigl* Incident

Fettig must show by clear and convincing evidence that T.W. participated in the reverse-*Spreigl* incident. "'Clear and convincing' requires more than a preponderance of the evidence, but less than proof beyond a reasonable doubt." *Johnson*, 568 N.W.2d at 433. "[T]he evidence must clearly show the person's direct participation in the other crime." *State v. Miller*, 754 N.W.2d 686, 701 (Minn. 2008) (quotation omitted). "[Appellate courts] have found evidence to be clear and convincing on the strength of a conviction, a victim's clear identification of the defendant as the assailant, or the defendant's own confession of participation in the incident." *Id.* (quotation omitted).

Fettig did not provide the district court with clear and convincing evidence of T.W.'s participation in the reverse-*Spreigl* incident. Fettig alleges, without an offer of proof, that T.W. participated in a drug crime. This does not meet the clear and convincing standard. Even if we presume that a criminal complaint was filed which alleges T.W. participated in the drug crime, probable cause needed to support a criminal complaint is not the clear-and-convincing-evidence standard needed to show participation in the crime for purposes of reverse-*Spreigl*. *Cf. State v. Scholberg*, 393 N.W.2d 247, 249 (Minn. App. 1986) (holding that criminal charges alone do not demonstrate participation in the offense). Fettig provided the district court with little information about the charge other than brief, unsubstantiated details about the general nature of the charge, and that T.W. allegedly told law enforcement during its investigation that she was a drug dealer. Based upon this

record, the district court properly concluded that Fettig failed to demonstrate by clear and convincing evidence that T.W. participated in the reverse-*Spreigl* incident. Because the district court did not abuse its discretion in excluding the reverse-*Spreigl* evidence, we need not undergo a harmless-error analysis.

II. Fettig is not entitled to a new trial due to prosecutorial misconduct.

Fettig argues that a mistrial is warranted on the grounds that the prosecutor committed misconduct by failing to prepare T.W. for her testimony and that this failure led to T.W. uttering the prohibited statements.

"The denial of a motion for a mistrial is reviewed for an abuse of discretion." *State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016). "In cases involving serious prosecutorial misconduct this court will reverse if the misconduct was so prejudicial as to have substantially affected the jury and denied appellant a fair trial." *State v. McNeil*, 658 N.W.2d 228, 231-32 (Minn. App. 2003). In Minnesota, "the state has an absolute duty to prepare its witnesses to ensure they are aware of the limits of permissible testimony." *Id*. at 232.

During trial, the prosecutor asked T.W., "Prior to the officers approaching the vehicle, what was Mr. Fettig doing?" T.W. responded, "Well, we knew we were going to get pulled over because [Fettig] had a warrant." Fettig immediately moved for a mistrial. The district court denied Fettig's mistrial motion but offered to instruct the jury to give no consideration to T.W.'s reference of Fettig's warrant. Fettig's counsel rejected this offer explaining that it was "better to not" give the curative instruction so not to "add anything more to it." No curative instruction was provided to the jury.

T.W. resumed her testimony. Eventually during her testimony, and unprompted by the prosecutor, T.W. stated that "[She and Fettig] knew [Fettig] was going to jail" due to the presence of the drugs in the vehicle. Fettig again asked for a mistrial on the grounds that this was an improper reference to his warrant status. The district court denied Fettig's motion.

Given the factual record of this case, we will presume, without so ruling, that the prosecutor erred in failing to prepare T.W. for her testimony which led to the prohibited utterances. We next analyze whether the prohibited utterances caused prejudice.

When reviewing whether testimony was prejudicial, appellate courts consider whether the testimony was emphasized and assess the strength of the other evidence in the record supporting the conviction. *See State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978); *see also McNeil*, 658 N.W.2d at 233 (concluding that, despite error, there was no prejudice because of the "overwhelming weight of the evidence" supporting the verdict).

The record reflects that T.W.'s statements were not emphasized during the trial. In fact, Fettig rejected the district court's offer to provide a curative instruction to avoid drawing unnecessary emphasis to T.W.'s statements. Further, the district court concluded that T.W.'s second statement was not necessarily an improper reference to his warrant because the statement could be interpreted to relate to the presence of drugs in the vehicle as T.W. had testified. Lastly, the weight of the evidence supporting the verdict is overwhelming. We therefore determine that the district court did not abuse its discretion by concluding that neither statement resulted in error.

In sum, the district court did not abuse its discretion in denying Fettig's mistrial motion.

Affirmed.