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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1803

State of Minnesota,
Respondent,

vs.

Korie Jermaine Wash,
Appellant.

Filed December 7, 2020
Affirmed in part and remanded
Bjorkman, Judge

Anoka County District Court
File No. 02-CR-18-6613

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his two convictions of first-degree criminal sexual conduct arising from multiple acts of abuse, asserting that the district court (1) violated his rights

under the Confrontation Clause by permitting a witness to read from a criminal complaint relating to a prior conviction, (2) prejudicially erred by admitting evidence of the prior conviction as other-acts evidence, and (3) erred by convicting him of both offenses. Because the violation of appellant's right to confrontation did not affect his substantial rights and any error in admitting the evidence of the prior conviction did not prejudice him, we affirm in part. But because the district court erred in entering two convictions, we remand to the district court to vacate one of the convictions.

FACTS

S.J. and her mother lived in an apartment in Fridley between December 2016 and April 2017, when S.J. was ten years old. They lived with S.J.'s older sister, the sister's boyfriend, and their child. Soon after moving in, S.J.'s mother met appellant Korie Wash and began spending time with him at the apartment approximately two to three times per week. Sometime thereafter, Wash began to sexually abuse S.J.

At trial, S.J. described six instances of abuse. The first occurred while she was bathing. Wash entered the bathroom, removed S.J. from the bathtub, tied her arms and legs, gagged her, placed her on the toilet with her "bootie" in the air, placed a "baggie" on his "private part," and inserted his "private part" inside of her "bootie." The assault ended when S.J.'s mother returned to the apartment. S.J. later looked out of her bedroom window and saw Wash throw the "baggie" into a dumpster.

The second incident occurred while S.J. was in her bedroom one morning. Wash entered the room, "got on top" of her, and "put his thing inside" of her "private part." He

had a "baggie" on his penis and white "stuff" came out. S.J. again saw Wash throw the condom into the dumpster.

The third occurred one morning in the living room while the others were sleeping. S.J. sat on the couch and Wash "put his stuff" in her mouth. S.J. bit Wash's penis, and Wash then slapped her. S.J. described Wash's penis as pink on top and the same color as the rest of his skin on the bottom. This description was corroborated by the Anoka County detective who investigated S.J.'s reports and photographed Wash's penis.

The fourth incident occurred in the bathroom. Wash placed "his stuff" into S.J.'s "private part." S.J. confirmed this meant he placed his penis inside her vagina.

The last two incidents occurred in different locations. At the time of the fifth incident, S.J. was staying with her mother and Wash at a hotel in Brooklyn Park. After her mother went downstairs for breakfast, Wash came into S.J.'s bed and "put his stuff" in her "bootie" and "private part." S.J. tried to fight back, but lost. Her mother returned during the assault, told S.J. that she deserved it, and Wash proceeded to give S.J. "a whoopin." And the final incident took place in another apartment. S.J. was in a bedroom with her mother and Wash. Her mother, apparently upset by what happened in the hotel, put Wash's "thing" into S.J.'s "private part."

S.J. went to live with her father in April 2017. The next year, after displaying increasingly agitated behavior, S.J. told her father about the abuse. Her father contacted local police in Illinois, brought S.J. to the police station, and wrote down what she told the officers. S.J. provided details about the first incident in the bathroom, and the abuse that occurred in the living room and in the hotel.

S.J. then met with a forensic interviewer in Illinois, during which she described additional abuse by Wash and indicated that he had restrained her on one occasion with a pink jump rope. The details she provided differed only slightly from her trial testimony. For example, she told the interviewer that Wash tied her up with the pink jump rope in the bathroom, while at trial she linked the pink jump rope to an assault that occurred in the bedroom. S.J. also underwent 12 sessions with a therapist, where she again revealed details about the abuse.

S.J.'s testimony was corroborated at trial by her father, the forensic interviewer, the detective, and her therapist. The detective described his search of the Fridley apartment and confirmed that dumpsters are visible from the bedroom window. He confirmed that S.J.'s older sister and boyfriend lived there between November 2016 and May 2017, and, when searching their new apartment, he discovered a pink jump rope. The detective also verified that S.J.'s mother and Wash stayed at a Super 8 motel in Brooklyn Center for one night in April 2017.

During his testimony, the detective also read the probable-cause portion of a 2006 criminal complaint that charged Wash with criminal sexual conduct. Wash pleaded guilty to that charge in 2007. The district court admitted the conviction as *Spreigl*[1] evidence of a

[1] *Spreigl* evidence is that of "other crimes, wrongs, or bad acts," which are generally excluded as improper character evidence under Minn. R. Evid. 404(b). *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006) (citing *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965)). However, such evidence may be admitted "for limited, specific purposes," including "showing motive, intent, knowledge, identity, absence of mistake or accident, or a common scheme or plan." *Id.*

common plan or scheme. And the district court admitted the criminal complaint over Wash's general objection.

The jury found Wash guilty of both charges. The district court entered two convictions and sentenced Wash to 360 months in prison. Wash appeals.

D E C I S I O N

I. Admission of the 2006 criminal complaint violated the Confrontation Clause but did not affect Wash's substantial rights.

Wash asserts, and the state agrees, that having the detective read the probable-cause portion of the 2006 criminal complaint at trial violated Wash's rights under the Confrontation Clause. U.S. Const. amend. VI; *see State v. Wright*, 719 N.W.2d 910, 917 n.1 (Minn. 2006) ("Statements in a complaint are hearsay, implicating confrontation concerns."); *see also State v. Sailee*, 792 N.W.2d 90, 97 (Minn. App. 2010) (holding that admitting a prior criminal complaint plainly violates a defendant's confrontation rights), *review denied* (Minn. Mar. 15, 2011); *State v. McClenton*, 781 N.W.2d 181, 193 (Minn. App. 2010) (reaching the same conclusion), *review denied* (Minn. June 29, 2010).

We generally review whether the admission of evidence violates the Confrontation Clause de novo, determining whether any such error was harmless. *State v. Caulfield*, 722 N.W.2d 304, 308, 314 (Minn. 2006). Under the constitutional harmless-error analysis, we do not overturn a jury's verdict unless the verdict was "surely unattributable" to the error. *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997) (quotation omitted).

The state urges us to apply a different standard of review because Wash did not object to the challenged evidence based on the Confrontation Clause. This argument has

merit. Parties must raise evidentiary issues in the district court in order to obtain appellate review. *See State v. Williams*, 525 N.W.2d 538, 544 (Minn. 1994). But we have discretion to review issues presented for the first time on appeal for plain error. *Id.* A party seeking relief based on plain error must demonstrate "(1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

The plain-error standard applies to constitutional error. *State v. Rossberg*, 851 N.W.2d 609, 618 (Minn. 2014). The *Rossberg* court considered whether two statements admitted at trial violated the defendant's rights under the Confrontation Clause. *Id.* at 617. As in this case, Rossberg's lawyer did not raise a Confrontation Clause objection in the district court, so the supreme court reviewed the challenge for plain error. *Id.* at 618. After reviewing the record evidence, the supreme court concluded that even if admission of the statements violated Rossberg's confrontation right, the constitutional violations did not affect his substantial rights. *Id.*; *see also State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010) (applying plain-error review when the defendant objected on hearsay grounds but did not assert a confrontation objection); *State v. Tscheu*, 758 N.W.2d 849, 864 (Minn. 2008) (concluding no plain error because the guilty verdict was surely unattributable to the Confrontation Clause violations).

With the alternative standards for reviewing constitutional error in mind, we consider which applies here and whether Wash established grounds for reversal.

The harmless-error standard of review applies to evidence admitted over a timely objection stating the specific ground, *Rossberg*, 851 N.W.2d at 617-18 (citing Minn. R. Evid. 103(a)(1)), or when "the ground for the objection is clear from the context of the

objection." *State v. Brown*, 792 N.W.2d 815, 820 (Minn. 2011). Neither circumstance is present here. Before trial, the state noticed its intent to offer evidence of Wash's 2007 criminal-sexual-conduct conviction. Defense counsel moved in limine to exclude this evidence, and the state attached the criminal complaint to its responsive memorandum. During the hearing, defense counsel argued the evidence was not proper under *Spreigl*; counsel did not object based on the Confrontation Clause. At trial, the state presented the evidence by having the detective read from the probable-cause portion of the criminal complaint. Defense counsel objected, stating "my objection here is to the way it's going to be offered," and noting that he did not "have a transcript from whatever was pled to, whatever facts were admitted to." Again, counsel did not object based on the Confrontation Clause. The context does not reveal to us whether defense counsel's objection was based on foundation, relevance, general hearsay concerns, or something else. Accordingly, the plain-error standard governs our review.

Because we agree with the parties that permitting the detective to read the criminal complaint to the jury was plain error, we turn our analysis to whether the error affected Wash's substantial rights. Wash bears the burden of "establishing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). The record does not convince us that Wash has met this "heavy burden." *Tscheu*, 758 N.W.2d at 864 (quotation omitted).

The jury heard testimony from almost 13-year-old S.J., who detailed several incidents of sexual assault. These incidents all occurred within a limited time frame, and

S.J. provided specific detail regarding where they took place and the time of day. S.J. used age-appropriate language to describe the assaults. S.J.'s father related hearing S.J.'s narrative of the abuse in 2018, which was largely consistent with her testimony two years later at trial. The forensic interviewer's testimony and the video of the interview further corroborate S.J.'s trial testimony. In short, the jury heard S.J. give detailed testimony of abuse at the hands of Wash. Her testimony was consistent with accounts she gave others, including her father, a forensic interviewer, and her therapist over the course of two years. Moreover, S.J. described Wash's penis in detail, a description consistent with that of the detective and the photographs. The detective further corroborated other elements of S.J.'s testimony, including the location of the dumpsters in relation to the Fridley apartment and the existence of a specific jump rope that may have been used as part of the pattern of abuse.

In short, overwhelming evidence supports the jury's findings of guilt. On this record, we are not persuaded that the absence of the error—the detective's reading from the 2006 complaint—would have significantly impacted the jury. Because admission of the probable-cause portion of the 2006 complaint did not affect Wash's substantial rights, he is not entitled to reversal or a new trial on that basis.

II. Evidence of Wash's 2007 criminal-sexual-conduct conviction as *Spreigl* evidence did not prejudice him.

Even if we assume that evidence of Wash's prior conviction was admitted in error, he must show that "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016).

This possibility is lessened where the evidence of guilt is considerable. *Id.* And it is lessened when the *Spreigl* evidence constitutes a small portion of the trial evidence, the state did not rely on the *Spreigl* evidence in its closing argument, and the district court cautions the jury about its use. *State v. Clark*, 738 N.W.2d 316, 347-48 (Minn. 2007). That is the situation here.

As noted above, the evidence of Wash's guilt was considerable. S.J.'s trial testimony was detailed, it included age-appropriate language, and was largely consistent with the reports she previously made to her father, the forensic interviewer, and her therapist. The police investigator corroborated the timelines and locations of a large portion of the events S.J. described. And S.J. gave an accurate description of Wash's penis.

Moreover, as in *Clark*, the district court gave a cautionary instruction regarding the use of the *Spreigl* evidence prior to its introduction and during final jury instructions. The *Spreigl* evidence constituted three pages of testimony out of a four-day-long jury trial with live witnesses. And the state did not rely upon the *Spreigl* evidence in making its closing argument. We conclude that Wash has not demonstrated he was prejudiced by admission of his 2007 conviction.

III. The district court erred by convicting Wash of both offenses.

Wash contends that the district court erred by entering convictions on both counts because the offenses arose from the same behavioral incident and involved the same victim. The state agrees, and we do also. Minnesota law provides that "[u]pon 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 (2016). When a defendant is convicted of more

than one charge for the same conduct, the district court should adjudicate and impose sentence on one count only, leaving the remaining guilty verdict intact but with no adjudication. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). The warrant of commitment shows convictions on both counts 1 and 2. As the actions constituting count 1 are encompassed within the actions constituting count 2, Wash cannot be formally adjudicated on both counts. Accordingly, we remand to the district court to clarify on which count it is formally adjudicating Wash and to amend the warrant of commitment accordingly, without disturbing the jury's finding of guilt.

Affirmed in part and remanded.