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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1102**

State of Minnesota,
Appellant,

vs.

Thomas Charles Kipp,
Respondent.

**Filed January 29, 2024
Reversed and remanded
Cochran, Judge**

Ramsey County District Court
File No. 62-CR-20-1589

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

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this pretrial appeal, the state argues that the district court erred by denying its
motion to admit evidence in the prosecution of respondent for two counts of criminal sexual

conduct. The state further contends that exclusion of the evidence had a critical impact on its ability to prosecute respondent. We reverse and remand.

FACTS

Appellant State of Minnesota charged respondent Thomas Charles Kipp with five counts of criminal sexual conduct (CSC) involving two alleged victims. The charges included three counts of first-degree CSC (counts I-III) and two counts of second-degree CSC (counts IV-V). The alleged victim identified in counts I and IV was Kipp's daughter, E.K. The alleged victim identified in counts II, III, and V was Kipp's niece, K.B.

For each of the five counts, the complaint alleged that: the victim was under the age of 16 during the period of the alleged abuse, Kipp had a significant relationship to the victim, and the sexual abuse involved multiple acts committed over an extended period of time. The complaint specified that Kipp had taken numerous photographs of the girls naked and engaged in multiple acts of sexual contact with each girl. According to the complaint, E.K., born in 2006, was between the ages of 20 months and 6 years at the time of the alleged conduct; K.B., born in 2002, was between the ages of four and ten. E.K. first disclosed the alleged conduct in 2014, when she was eight years old. Around that time, E.K.'s mother and Kipp were going through a divorce, which was finalized in 2015.

The state filed its complaint in March 2020, following various investigations into Kipp's alleged conduct. Kipp filed a motion to dismiss all five counts for lack of probable cause. After the district court denied the motion to dismiss, Kipp pleaded not guilty to all counts.

In July 2021, the state filed notice of its intent to offer evidence at trial of Kipp's alleged acts against K.B. in the prosecution of counts involving E.K. and vice versa. The state later filed a memorandum in which it sought "an instruction to the jury that it may consider evidence of the defendant's criminal sexual acts against one child to determine the doing of the act against the other child." In its memorandum, the state argued such evidence is admissible under Minnesota Rule of Evidence 404(b), otherwise known as *Spreigl* evidence.¹ And it told the district court that it intended to offer this evidence "to show that the defendant used a common plan or scheme with both E.K. and K.B., [and] that his acts were intentional and calculated." The state argued that such evidence is highly relevant because it tends to disprove Kipp's defense that the allegations of sexual abuse were fabricated.²

Before ruling on the admissibility of this evidence, the district court issued an order dismissing the three counts of alleged sexual abuse of K.B. as barred by the statute of limitations. The district court also set a trial date for the remaining counts involving allegations of sexual abuse of E.K.

¹ Rule 404(b) provides that "[e]vidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1). But such evidence is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Evidence offered under one of the rule 404(b) exceptions is commonly referred to as "*Spreigl* evidence." *State v. McLeod*, 705 N.W.2d 776, 787 (Minn. 2005) (citing *State v. Spreigl*, 139 N.W.2d 167, 173 (1965)).

² In a separate motion, the state also sought to admit evidence of Kipp allegedly taking nude pictures of E.K. and K.B. as relationship evidence pursuant to Minnesota Statutes section 634.20 (2022).

Upon learning that only the charges involving E.K. would proceed to trial, the state filed an updated memorandum noticing its intent to admit evidence of Kipp's alleged sexual conduct against K.B. as *Spreigl* evidence. In the memorandum, the state argued that the *Spreigl* evidence relating to K.B. "has now become critical in the presentation" of its case involving E.K. The state maintained that the evidence would prove, among other things, that Kipp engaged in "a pattern of opportunistic fondling of young girls within the family context." At a hearing on the motion, the state made a similar argument, emphasizing that "K.B.'s testimony is highly relevant to show a common plan or scheme of opportunistic sexual touching and abuse of young females within the family" by Kipp, and therefore "highly relevant to disprove the defense that E.K.'s disclosures and testimony are fabricated, improperly influenced, or imagined."

The district court denied the state's motion to admit the evidence under rule 404(b) as *Spreigl* evidence. The district court also excluded any photographs of the alleged victims and any evidence of Kipp taking photographs. The district court ordered that K.B. could not testify about any alleged sexual conduct that Kipp performed against her, but the ruling permitted K.B. to testify as a fact witness "regarding what she observed" in relation to E.K.

This appeal follows.

DECISION

When appealing a pretrial order, the state must "clearly and unequivocally" show that (1) the district court's ruling was erroneous and (2) the ruling will have a "critical impact" on the state's ability to prosecute the defendant. *McLeod*, 705 N.W.2d at 784

(quotation omitted). Critical impact is a “threshold issue” that the state must show before we will consider whether a pretrial order is erroneous. *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017) (quotation omitted). Accordingly, we must first determine whether the excluded *Spreigl* evidence will have a critical impact on the state’s ability to prosecute the case.

I. The state has shown critical impact.

The state argues that the district court’s decision will have a critical impact on its ability to prosecute the case against Kipp because the exclusion of the *Spreigl* evidence significantly reduces the state’s likelihood of successfully prosecuting the remaining CSC charges. The state emphasizes that the “primary evidence here is the testimony of a single child [E.K.] whose credibility will undoubtedly be challenged at trial.” According to the state, K.B.’s testimony will demonstrate that Kipp’s conduct was part of a pattern or design against young female relatives and that E.K.’s allegations were not the result of fabrication, imagination, or improper influence. The state maintains that K.B.’s testimony will provide “necessary corroboration.” We agree.

The state can show critical impact when the exclusion of evidence “significantly reduces the likelihood of a successful prosecution.” *State v. Joon Kyu Kim*, 398 N.W.2d 544, 551 (Minn. 1987). To show that excluded evidence significantly reduces the likelihood of a successful prosecution, the state need not show that “its case becomes so weak that all possibility of conviction has been destroyed or that the absence of the evidence will cause the state’s case to collapse.” *State v. Carlin*, 423 N.W.2d 741, 743 (Minn. App. 1988) (citing *Joon Kyu Kim*, 398 N.W.2d at 550-51). “Whether suppression

of a particular piece of evidence will significantly reduce the likelihood of a successful prosecution depends in large part on the nature of the state's evidence against the accused." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995). And "evidence that is particularly unique in nature and quality is more likely to meet the critical impact test." *McLeod*, 705 N.W.2d at 784 (quotation omitted).

In *McLeod*, the supreme court held that the critical-impact test was satisfied in circumstances similar to those presented in this case. *Id.* at 784-87. The *McLeod* case involved a pediatrician who was charged with criminal sexual conduct involving two teenage male patients (Child A and Child B). *Id.* at 779-80. After the district court severed the charges relating to Child A from the charge relating to Child B, the state moved to admit evidence of the pediatrician's alleged abuse of Child B as *Spreigl* evidence in the trial regarding Child A. *Id.* at 780. The state claimed that the *Spreigl* evidence established a common scheme or plan of sexual abuse by the pediatrician against teenage male patients. *Id.* at 785. The state also hoped to use the *Spreigl* evidence to undermine the defense that Child A fabricated the allegations against the pediatrician. *Id.* The district court denied the *Spreigl* motion. *Id.* at 783.

The supreme court reversed and remanded, concluding that exclusion of evidence of alleged sexual abuse committed upon Child B would have a critical impact on the state's ability to prosecute its case involving Child A. *Id.* at 786-87. In reaching this conclusion, the supreme court noted that Child A's reported allegations of sexual abuse by the doctor would be the state's primary evidence at trial and so "the state's case appear[ed] to rest primarily on whether the jury believe[ed] Child A." *Id.* at 785-87. As a result, the supreme

court concluded that the evidence relating to Child B would be critically important to demonstrating Child A's credibility. *Id.* at 786-87. The supreme court explained, "even one previous act or attempt of sexual misconduct can, when common features exist between the acts, be highly indicative of a design to commit sexual misconduct." *Id.* at 786. The supreme court continued:

Being able to demonstrate this pattern or design *is particularly important in child sexual abuse cases* where there will be problems of secrecy, victim vulnerability, the absence of physical proof of the crime, the unwillingness of some victims to testify, and a general lack of confidence in the ability of the jury to assess the credibility of child witnesses.

Id. (emphasis added). Based on this analysis, the supreme court held "exclusion of the *Spreigl* evidence has a critical impact on the pending trial when exclusion of the evidence significantly reduces the likelihood that the state will be able to demonstrate a possible pattern of conduct or design that is sexual in nature." *Id.* at 787.

The supreme court's decision in *McLeod* compels us to conclude that the state has satisfied the critical-impact test in this case. Like *McLeod*, the state's primary evidence in this case is the testimony of the alleged victim. And the record reflects that Kipp will almost certainly challenge the alleged victim's credibility at trial. In pretrial proceedings, Kipp's attorney maintained that E.K.'s allegations were the result of improper influence by E.K.'s mother, who was going through a divorce from Kipp at the time of E.K.'s initial disclosure. E.K.'s credibility also is likely to be challenged because she was a young child during the period of alleged abuse (between the ages of 20 months and 6 years) and she delayed reporting until age eight. Thus, whether the state will be able to successfully

prosecute this case depends primarily on whether the jury believes E.K. Considering the central role E.K.'s credibility will play in this case, we are satisfied that the state has shown clearly and unequivocally that the district court's order to suppress K.B.'s testimony as a *Spreigl* witness will have a critical impact on the state's case. As the supreme court stated in *McLeod*, being able to demonstrate a pattern or design of sexual abuse is "particularly important" in a child sexual abuse case because of the "general lack of confidence in the ability of the jury to assess the credibility of child witnesses." *Id.* at 786.

Kipp argues that the state cannot show a critical impact because the district court's order only precludes K.B. from testifying about Kipp's alleged abuse of K.B.; it does not preclude K.B. from testifying as a fact witness about any abuse of E.K. that she observed. We are not persuaded. While the district court's order does provide that "K.B. can testify as a fact witness regarding what she observed," the district court did not identify any evidence in the record to show that K.B. observed Kipp sexually abusing E.K. More importantly, Kipp's argument ignores that the supreme court held in *McLeod* that "exclusion of the *Spreigl* evidence has a critical impact on the pending trial when exclusion of the evidence significantly reduces the likelihood that the state will be able to demonstrate a possible pattern of conduct or design that is sexual in nature." *Id.* at 787. Even if K.B. provides fact testimony, therefore, the state still will not be able to demonstrate a possible pattern of conduct or design by Kipp that is sexual in nature.

In sum, we conclude that the state has shown that the exclusion of K.B.'s testimony as a *Spreigl* witness has a critical impact on its ability to prosecute its case.

II. The district court clearly and unequivocally erred in its order suppressing the *Spreigl* evidence.

Having concluded that the critical-impact test is met, we next determine whether the state has shown that the district court erred when it excluded the *Spreigl* evidence of Kipp's alleged sexual abuse of K.B. *See Zanter*, 535 N.W.2d at 630. "We review a district court's ruling on *Spreigl* evidence for an abuse of discretion." *McLeod*, 705 N.W.2d at 787. "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted). We conclude that the district court's decision to exclude the *Spreigl* evidence was both based on an erroneous view of the law and against facts in the record and was therefore an abuse of discretion.

Evidence of other bad acts or *Spreigl* evidence "cannot be used to show a defendant's character for committing those [bad acts], but can be used to show motive, intent, absence of mistake, identity, or a common scheme or plan." *State v. Blom*, 682 N.W.2d 578, 611 (Minn. 2004); *see also* Minn. R. Evid. 404(b)(1). In cases of child sexual abuse, *Spreigl* evidence can include evidence of a defendant's pattern of similar conduct that is sexual in nature. *See McLeod*, 705 N.W.2d at 785-87; *State v. Wermerskirchen*, 497 N.W.2d 235, 240-43 (Minn. 1993).

The supreme court has developed a five-step process to determine the admissibility of *Spreigl* evidence. *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). To be admissible:

- (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 686. “When it is unclear whether *Spreigl* evidence should be admitted, the defendant receives the benefit of the doubt, and the evidence should be excluded.” *Blom*, 682 N.W.2d at 611.

Here, the district court analyzed the *Spreigl* evidence by dividing the evidence into two categories: (1) evidence of Kipp allegedly taking nude photographs³ and (2) evidence of Kipp allegedly having sexual contact with K.B. We address the district court's analysis of each category of evidence in turn.

A. Photographic Evidence

Regarding the photographic evidence, the district court focused its analysis on the first, second, and fourth *Ness* factors. The district court found that the state attempted to introduce the photographic evidence “without specific notice.” The district court further

³ Although the district court's order notes that the state seeks to introduce photographic evidence of both E.K. and K.B., we presume that the exclusion of photographic evidence as *Spreigl* evidence applies only to the evidence involving K.B. We reach this conclusion because the state provided notice to the district court and respondent that it intended to introduce the evidence relating to E.K. (the alleged victim) as relationship evidence. Relationship evidence “is evidence of prior conduct between the accused and the alleged victim” that “may be offered to illuminate the history of the relationship, that is, to put the crime charged in the context of the relationship between the two.” *State v. Zinski*, 927 N.W.2d 272, 278 (Minn. 2019) (quotations omitted); *see also* Minn. Stat. § 634.20. Relationship evidence, even when it is evidence of another bad act, is not subject to the same requirements for admissibility as *Spreigl* evidence. *See State v. Salas*, 306 N.W.2d 832, 836 (Minn. 1981). On remand, the district court should separately address whether the photographic evidence involving E.K. is admissible as relationship evidence.

concluded that the evidence is “not probative of the charged offenses” and therefore had no evidentiary purpose. We conclude that both determinations were erroneous.

Notice

For *Spreigl* evidence to be admissible, the state must first show that it gave notice of its intent to admit the *Spreigl* evidence. *Ness*, 707 N.W.2d at 686. More specifically, the Minnesota Rules of Criminal Procedure require the prosecutor to notify the defendant in writing of any *Spreigl* evidence that may be offered. Minn. R. Crim. P. 7.02, subd. 1. The notice must contain “a description of each crime, wrong, act, or specific instance of conduct with sufficient particularity to enable the defendant to prepare for trial.” *Id.*, subd. 3. The notice requirement can be satisfied when the proffered *Spreigl* evidence is specifically mentioned in the complaint. *See State v. Wahl*, 394 N.W.2d 536, 538 (Minn. App. 1986), *rev. denied* (Minn. Nov. 19, 1986). The underlying purpose of the notice requirement is to prevent surprise and allow the defendant time to prepare a defense. *State v. Riddley*, 776 N.W.2d 419, 427 (Minn. 2009).

Here, contrary to the district court’s finding, the record establishes that the state provided sufficient written notice that it intended to introduce the photographic evidence as *Spreigl* evidence. Kipp first became aware of the evidence through the criminal complaint, which contains multiple allegations of Kipp taking nude photographs of K.B. (as well as E.K.), including allegations that Kipp took photos of his genitals touching K.B.’s genitals. The state also filed two memoranda in support of its motion to admit *Spreigl* evidence that referenced Kipp forcing K.B. to pose for the camera. From the complaint’s filing to the filing of the state’s *Spreigl* memoranda, Kipp had notice that

evidence of him allegedly taking nude photographs of K.B. was likely to be offered by the state in the prosecution of the counts involving E.K. It would not be a surprise for the state to introduce such evidence at trial. We therefore conclude that the district court abused its discretion by finding that the state failed to notice its intent to offer the photographic evidence as *Spreigl* evidence. On remand, we instruct the district court to regard this *Ness* factor as satisfied by the state.

The Purpose and Relevance of the Photographic Evidence

The second *Ness* factor provides that *Spreigl* evidence is only admissible if the state “clearly indicate[s] what the evidence will be offered to prove.” *Ness*, 707 N.W.2d at 686. In other words, the state must identify a valid purpose within the scope of rule 404(b) for the *Spreigl* evidence. *Id.* And, to meet the fourth *Ness* factor, “[*Spreigl*] evidence must be relevant and material to the state’s case.” *Id.*

Here, the district court excluded the photographic evidence based on its determination that the evidence is “not probative of the charged [CSC] offense[s]” involving E.K. and therefore would not serve any valid evidentiary purpose. In reaching this conclusion, the district court applied an unduly narrow legal standard in determining the purpose and relevance of the evidence.

The record reflects that the state sought to introduce the evidence, in part, to show a common scheme or plan by Kipp involving young female relatives that is sexual in nature. Caselaw recognizes that showing a common scheme or plan is among the “limited, specific purposes” for which evidence of other bad acts may be admissible under rule 404(b). *Ness*, 707 N.W.2d at 685. To be admissible under the common scheme or plan exception, a prior

bad act does not need to be part of, nor even identical to, the charged crime(s). *See Ness*, 707 N.W.2d at 688. Nor does a prior bad act need to be a crime. *McLeod*, 705 N.W.2d at 788. Rather, to be admissible under the common-scheme-or-plan exception, *Spreigl* evidence of other bad acts “must have a marked similarity in modus operandi to the charged offense.” *Ness*, 707 N.W.2d at 688.

In its analysis of the photographic evidence, the district court did not determine whether the photographic evidence involving K.B. bore a marked similarity in modus operandi to the allegations involving E.K. Instead, the district court focused solely on the CSC charges involving E.K. But, as stated in *Ness*, “the 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.” *Id.* And here, the state argued that the photographic evidence was among several pieces of evidence that showed the “striking similarities between [Kipp’s] sexual assaults of E.K. and K.B.” For these reasons, we conclude that the district court erred when it did not analyze whether the photographic evidence fits under the common-scheme-or-plan exception for *Spreigl* evidence as articulated in *Ness*. We further conclude that the district court abused its discretion by summarily dismissing the evidence as irrelevant to the charged offenses.

In reaching this conclusion, we express no opinion as to whether the photographic evidence meets the standard articulated in *Ness* regarding “marked similarity in modus operandi.” Instead, we reverse the district court’s decision to exclude the photographic

evidence and remand to the district court to conduct a revised analysis of the photographic evidence under the *Ness* factors.⁴

B. Sexual-Contact Evidence

Regarding the evidence of Kipp’s alleged sexual contact with K.B., the district court excluded the evidence based on the second and fifth *Ness* factors. The district court first determined that the state did not identify the purpose of the evidence. The district court further determined that the evidence was not admissible because the probative value of the evidence was outweighed by the risk for unfair prejudice. We conclude that both determinations are reversible abuses of discretion.

The Purpose of the Sexual-Contact Evidence

As discussed above, under the second *Ness* factor, the state has the burden to clearly identify a valid evidentiary purpose for the proffered *Spreigl* evidence. *Ness*, 707 N.W.2d at 686. When evaluating the prosecution’s stated purpose, the district court must ensure that the identified purpose is one of the permitted exceptions to rule 404(b)’s general exclusion of other-acts evidence. *Id.*

The district court determined that the proffered evidence did not meet the second *Ness* factor because the state failed to identify how the evidence involving K.B. was

⁴ The district court appears to have contemplated the fifth *Ness* factor, which involves balancing the probative value of the *Spreigl* evidence against its risk for unfairly prejudicing the defendant. *Ness*, 707 N.W.2d at 686. The district court concluded that “[t]he only purpose for [photographic evidence] would be to unduly prejudice and inflame the jury” and also that the photographic evidence appears to be “unfairly prejudicial.” Given our discussion of the purpose and relevance of the photographic evidence above, the district court should reapply the balancing test (the fifth *Ness* factor) to that evidence on remand with those considerations in mind.

relevant to a disputed issue of material fact in the case involving E.K. The district court stated that it could not “determine what specific facts are disputed and how [K.B.’s] testimony would help prove those facts.” The state contends that the district court’s findings and analysis on the second *Ness* factor are contrary to both the record and the law governing *Spreigl* evidence. We agree.

First, the record reflects that the state identified a valid evidentiary purpose for the *Spreigl* evidence that is tied to a disputed issue of material fact—namely, whether Kipp actually engaged in sexual contact with E.K. It is undisputed that Kipp claims that E.K.’s allegations were fabricated or the result of improper influence by E.K.’s mother. As a result, the veracity of E.K.’s allegations is a disputed issue of material fact. Before the district court, the state specifically noted its intent to introduce the sexual-contact evidence involving K.B. as evidence of a common scheme or plan that would tend “to disprove the defense that E.K. was fabricating or imagining or improperly influenced in reporting the occurrence of sexual contact.” And, in its order, the district court appeared to identify the exact fact in dispute: “The only defense so far is that the offenses did not occur and that the allegations are not credible.” Considering this finding by the district court, it is unclear why the district court concluded that the state had not met its burden to identify a valid evidentiary purpose for the proffered *Spreigl* evidence.

Second, the district court’s analysis of whether the state met its burden to identify a valid evidentiary purpose of the *Spreigl* evidence was also based on an erroneous view of the law. Supreme court precedent establishes that *Spreigl* evidence of a defendant’s pattern of sexually abusing children can be extremely relevant in cases of child sexual abuse.

Wermerskirchen, 497 N.W.2d at 241-42. In *Wermerskirchen*, the supreme court held that evidence of the defendant’s “ongoing pattern of opportunistic fondling of young girls within the family context” was admissible under the common-scheme-or-plan exception for the purpose of disproving the defendant’s claim that the alleged offenses did not occur. *Id.* at 242. The supreme court added that evidence showing a common scheme or plan is “highly relevant” on the issue of fabrication. *Id.* at 241-42. Here, the district court identified that Kipp planned to assert a defense at trial “that the offenses did not occur and that the allegations are not credible.” It follows, then, that the excluded *Spreigl* evidence of Kipp’s alleged abuse of K.B. is highly relevant and serves the purpose of showing a common scheme or plan.

Based on the record, caselaw, and the district court’s own findings, it is apparent that the state was offering the *Spreigl* evidence to show a common scheme or plan of sexual contact by Kipp and to overcome claims by Kipp that E.K.’s allegations were fabricated or the result of improper influence. We therefore conclude that the district court abused its discretion in its analysis of the second *Ness* factor when it concluded that the state failed to identify a valid purpose for the *Spreigl* evidence.

Balancing Test

The fifth *Ness* factor requires the state to show that the probative value of the *Spreigl* evidence is not outweighed by its potential for unfair prejudice. *Ness*, 707 N.W.2d at 686. In analyzing this factor, the district court found that the state’s evidence of Kipp engaging in sexual contact with K.B. has “low probative value” and introduction of “any evidence of other bad acts would unfairly prejudice [Kipp].”

(Emphasis added.) We conclude that the district court’s application of the balancing test constitutes an abuse of discretion based on its erroneous determinations regarding both probative value and unfair prejudice.

With regard to probative value, caselaw establishes that *Spreigl* evidence can be “highly relevant” to the issue of fabrication when the occurrence of the offense “truly is in issue.” *Wermerskirchen*, 497 N.W.2d at 241-42; *see also* Minn. R. Evid. 401 (providing that “[r]elevant evidence” is evidence that tends to make a material fact more or less probable). Here, the district court observed that “[Kipp’s] only defense so far is that the offenses did not occur and that the allegations are not credible.” Because the occurrence of the alleged CSC offenses “truly is in issue,” *Spreigl* evidence tending to disprove Kipp’s defense of fabrication could be “highly relevant” in this case. *See id.* The district court’s opposite determination—that evidence tending to show that Kipp abused K.B. has “low probative value”—therefore warrants reconsideration on remand.

Likewise, the district court’s conclusion that “any” *Spreigl* evidence would unfairly prejudice Kipp is based on an erroneous view of the law. Unfairly prejudicial evidence “is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage.” *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). The state delineated several purposes for offering the *Spreigl* evidence, including to show a common scheme or plan by Kipp involving young female relatives that is sexual in nature. *Spreigl* evidence meant to show a common scheme or plan in child sex abuse cases is not unfairly prejudicial because it is not offered “to persuade the jury to convict on some improper basis.” *Wermerskirchen*,

497 N.W.2d at 241-42. Thus, the district court’s conclusion that “any” *Spreigl* evidence would be *unfairly* prejudicial is legally erroneous. We therefore remand to the district court with instructions to reapply the balancing test and the other *Ness* factors to the sexual-contact evidence.

In sum, we conclude that the district court abused its discretion in analyzing whether to admit the *Spreigl* evidence involving K.B. Consequently, we reverse the district court’s order excluding the *Spreigl* evidence and remand to the district court for further consideration under the *Ness* factors in a manner consistent with this opinion.

Reversed and remanded.