STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1018

State of Minnesota,
Respondent,

vs.

Pen Dwaine Standifer,
Appellant.

Filed July 11, 2011
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-09-5576

Lori Swanson, Attorney General, St. Paul, Minnesota; and

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

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Wright, Judge; and Bjorkman, Judge.

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

HALBROOKS, Judge

Appellant challenges his conviction of criminal sexual conduct, arguing that various evidentiary errors deprived him of his constitutional right to a fair trial. In

addition, appellant contends that the district court abused its discretion by denying his request to modify the pattern jury instruction on *Spreigl* evidence. We affirm.

FACTS

Appellant Pen Dwaine Standifer was charged with three counts of criminal sexual conduct in February 2009 based on allegations that he sexually abused his foster child, A.R.F.[1] At trial, A.R.F. testified that he began living with appellant in December 2008. According to A.R.F., appellant offered him marijuana and alcohol when he lived in appellant's home. During A.R.F.'s second week there, appellant told A.R.F. that he used to be a stripper and a prostitute and asked A.R.F. if he wanted to learn how to strip. A.R.F. testified that appellant also said that he taught his son, D.S., how to strip and that D.S. had stripped for him. A.R.F. testified that around this time he told two female friends and his mentor that he was uncomfortable in appellant's home.

A.R.F. testified at trial that on December 24, 2008, appellant asked him if he wanted a massage, which A.R.F. declined. A few days later, appellant called A.R.F. into his room, again asked A.R.F. about a massage, and put his hand on A.R.F.'s leg. A.R.F. moved appellant's hand and walked toward the adjoining bathroom. Appellant stopped him and "sat [him] down on the bed." According to A.R.F., appellant's hand was under a pillow at times, and A.R.F. feared that he was holding a gun. A.R.F. stated that appellant began rubbing his back, his chest, and eventually put his hands down A.R.F.'s pants.

[1] The complaint also charged appellant with sexually assaulting another foster child, S.R., and an amended complaint brought a charge against appellant related to a third child, J.R. In subsequent proceedings, the district court severed the charges; the case at issue pertains only to the allegations related to A.R.F.

Appellant then performed oral sex on A.R.F. Appellant asked A.R.F. to sleep with him that evening, and A.R.F. testified that during the night he felt appellant touching his "behind." A.R.F. spent time with his girlfriend the following day but did not tell her about the incident.

A.R.F. testified that on December 29, 2008, he talked to police because his sister had accused him of sexual abuse. Appellant was in the room with A.R.F. for part of the police interview. A.R.F. said that he did not take that opportunity to tell the police about appellant's actions because he was "scared" and did not know what the reaction would be. But the next day, after appellant talked to A.R.F. about going to Indiana, A.R.F. called his grandmother and his mother and told them about the abuse. A.R.F. subsequently called 911.

The state called J.R., a *Spreigl* witness, at trial. J.R. testified that appellant was his foster parent when he was 15 years old. J.R. stated that appellant gave him marijuana and alcohol while he was living in appellant's home and that they often smoked and drank together. Appellant told J.R. that he used to be an escort and a stripper, but never offered to teach J.R. how to strip. J.R. testified that on February 14, 2005, he went into appellant's bedroom to watch TV. At one point, J.R. fell asleep, and appellant picked him up and put him on his bed. J.R. testified that he felt appellant's hand go down his pants and touch his penis. J.R. did not report the abuse until 2008 because he was embarrassed about it.

In addition, the state called D.S. as a last-minute *Spreigl* witness. D.S. testified that appellant taught him how to strip while he was living in appellant's home. Appellant

asked the district court to strike D.S.'s testimony on the ground that it was not probative. The district court found that D.S.'s testimony was relevant and that, given appellant's chance to cross-examine the witness, the probative value outweighed any prejudicial effect. Appellant testified and denied all allegations, including that he sexually abused A.R.F. and J.R., smoked marijuana with A.R.F., and taught D.S. how to strip.

During preliminary discussions about closing jury instructions, appellant requested that the district court omit the last portion of the pattern jury instruction regarding *Spreigl* evidence. Specifically, appellant wished to eliminate the part of the JIG that states, "to do so might result in unjust double punishment." Appellant argued that it created an incorrect inference that he might have been previously punished for J.R.'s allegation. The district court denied appellant's request.

The jury found appellant guilty of criminal sexual conduct. Appellant moved for a new trial on the ground that the district court erred by denying his request to modify the standard *Spreigl* jury instruction and erred by allowing the state to introduce evidence alleging that appellant was a stripper or escort. The district court denied appellant's motion. This appeal follows.

D E C I S I O N

I.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was

thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted).

A. Expert Testimony

Appellant argues that the district court abused its discretion by admitting expert testimony about delayed reporting of sexual assaults and grooming behaviors. A district court has broad discretion in admitting expert testimony. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999). "A reviewing court will not reverse a [district] court's determination unless there is an apparent error." *State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984).

To be admissible, expert testimony must be helpful to the finder of fact. *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980). Minn. R. Evid. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

"Expert opinion testimony is not helpful if 'the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions about that subject which is within their experience.'" *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005) (quoting *Helterbridle*, 301 N.W.2d at 547). In *State v. Hall*, the supreme court held that "in cases where a sexual assault victim is an adolescent, expert testimony as to the reporting conduct of such victims and as to continued contact by the adolescent with the assailant is

admissible in the proper exercise of discretion by the [district] court." 406 N.W.2d 503, 505 (Minn. 1987).

Here, the district court ruled before trial that the state would be permitted to introduce expert testimony from Judy Weigman, on the subjects of delayed reporting and a victim's difficulty in reporting abuse when the perpetrator is present. Appellant contends that the proposed testimony was not helpful because those matters are within the comprehension of a jury.

Weigman testified that children generally delay reporting sexual abuse due to fear or the nature of the relationship the child has with the abuser. Weigman also testified that the reporting process is like an "onion peel," with more information coming out over time. Regarding grooming behavior, Weigman described an abuser's escalation of inappropriate conduct over time. Her testimony also addressed why A.R.F. failed to go to the police even though he felt uncomfortable in appellant's home and why he did not talk to the police when he had the opportunity to do so.

We conclude that Weigman's testimony was helpful to the jury in considering A.R.F.'s testimony. The fact that A.R.F. was able to testify about his fear and his reasons for delaying reporting is of no consequence to our analysis. In *Hall*, the victim was also able to testify to those issues, but an expert was permitted to testify about the general reporting characteristics of sexual-assault victims. *Id.* at 505. The district court did not abuse its discretion in admitting Weigman's testimony.

B. Prior Consistent Statements

Appellant argues that the district court abused its discretion by admitting A.R.F.'s prior statements about the abuse. Before a prior consistent statement may be admitted pursuant to Minn. R. Evid. 801(d)(1)(B), the district court must determine whether: (1) there has been a challenge to the witness's credibility; (2) the prior consistent statement would be helpful to the trier of fact in evaluating the witness's credibility; and (3) the prior statement and the trial testimony are consistent with each other. *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997).

Susan Carstens, a juvenile specialist from the Crystal Police Department, testified about her interview with A.R.F. after the assault. Carstens stated that A.R.F. told her that he had become uncomfortable with appellant, that appellant asked if he wanted to learn how to strip, and that appellant made suggestive gestures. Carstens testified that A.R.F. discussed his concern that appellant was holding a gun under a pillow and A.R.F.'s statements that appellant massaged and performed oral sex on him. Carstens also testified that A.R.F. told her that appellant wanted A.R.F. to sleep with him that night. During the night, A.R.F. felt something poking at his back, and appellant started kissing him.

Appellant asserts that Carstens's testimony regarding A.R.F.'s prior statements was inconsistent with A.R.F.'s testimony at trial. Prior statements do not have to be exact in every detail with trial testimony to qualify as prior consistent statements. *Id.*; *see also In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998) (concluding that a

videotaped statement was "reasonably consistent" with the witness's trial testimony and was therefore admissible under rule 801(d)(1)(B)).

In *State v. Zulu*, we addressed inconsistencies in a prior consistent statement introduced during a criminal trial. 706 N.W.2d 919, 924-25 (Minn. App. 2005). In *Zulu*, the state introduced the victim's Cornerhouse video as a prior consistent statement; the appellant alleged six inconsistencies. *Id.* at 924. Of particular relevance to the issues here, the victim in *Zulu* testified at trial that she wrote about the abuse in a journal entry, tore the page out, hid it, and did not know where it ended up. *Id.* at 925. In her Cornerhouse interview, the victim stated that the journal pages had been found and that the appellant told the victim to stop writing about the abuse. *Id.* The victim also stated in the Cornerhouse interview that the appellant's wife might have seen the appellant with his pants down while the victim was on the couch. *Id.* But the victim did not testify to this fact at trial. *Id.* This court concluded on appeal that neither statement was inconsistent with trial testimony. We reasoned that the victim was subject to cross-examination about the Cornerhouse statement and that the claimed inconsistencies were argued to the jury. *Id.*

Here, A.R.F.'s prior statements included some additional facts about what occurred before the abuse that made A.R.F. uncomfortable. For example, Carstens testified that A.R.F. told her that appellant had guns all over the house; but at trial, A.R.F. testified only that he was afraid that appellant had a gun in his hand during the abuse. While these statements include different information, the facts are not inconsistent with one another. *See id.* at 924-25 (concluding that prior statements were not inconsistent

when the prior statement contained facts that were not testified to at trial). Moreover, the additional facts did not affect the elements of the offense nor add inflammatory information to A.R.F.'s testimony. *Cf. State v. Bakken*, 604 N.W.2d 106, 110 (Minn. App. 2000) (holding that prior statements were not consistent when the prior statements included discussions of a threat and the use of a knife, which would have escalated the degree of the appellant's offense), *review denied* (Minn. Feb. 24, 2000). We therefore conclude that the district court did not abuse its discretion in admitting these prior consistent statements of A.R.F.

C. Improper Vouching

Appellant argues that Carstens improperly vouched for A.R.F. during her testimony. "[T]he credibility of a witness is for the jury to decide." *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). Accordingly, it is improper for a witness to "vouch for or against the credibility of another witness." *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). Vouching includes expression of a personal opinion as to a witness's credibility. *State v. Folkers*, 581 N.W.2d 321, 326 (Minn. 1998).

During Carsten's testimony, she remarked that A.R.F. seemed "very genuine" in his report of the abuse. Appellant objected to the statement, and the district court sustained that objection, admonishing the jury not to consider Carsten's statement. This court presumes that a jury follows the district court's instructions. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). Appellant failed to make a persuasive argument as to why the sustained objection and jury instruction did not cure the error in Carsten's testimony. Therefore, we conclude that this argument is without merit.

D. Cumulative Evidence

Appellant contends that the district court abused its discretion by permitting the state to call eight witnesses. As noted by the state, appellant did not object to the state's witness list. Appellant has therefore waived this issue on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

E. *Spreigl* Evidence

Appellant challenges the district court's decision to allow D.S.'s testimony that appellant taught him how to strip while he lived in appellant's home. Evidence of other crimes or bad acts, commonly known as *Spreigl* evidence, is inadmissible to prove that a defendant acted in conformity with his character. Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). But *Spreigl* evidence may be admissible to prove other things, such as motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. Minn. R. Evid. 404(b); *Spreigl*, 272 Minn. at 491, 139 N.W.2d at 169.

Before a district court may admit *Spreigl* evidence, (1) the prosecutor must give notice of the state's intent to admit the evidence; (2) the prosecutor must clearly indicate what the evidence will be offered to prove; (3) the defendant's involvement in the act must be proven by clear-and-convincing evidence; (4) the evidence must be relevant and material to the prosecutor's case; and (5) the probative value of the evidence must not be outweighed by its potential for unfair prejudice to the defendant. Minn. R. Evid. 404(b); *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). Appellant does not challenge the clear-and-convincing element of this analysis.

Appellant first argues that the state failed to give proper notice of the evidence and failed to clearly indicate its purpose. The record reflects that appellant did *not* object to the evidence on this ground at trial, but instead objected on the ground that it was more prejudicial than probative. In fact, appellant conceded to the district court that "the State provided notice of [the statement] . . . when they got it in the hallway, so it's not a timeliness issue." Because appellant did not raise this argument to the district court and because the district court did not consider this as a reason for excluding the *Spreigl* evidence, this argument is waived. *See Roby*, 547 N.W.2d at 357.

We therefore consider only whether the district court abused its discretion in reasoning that the *Spreigl* evidence was more probative than prejudicial. The state argues that this evidence was relevant and probative as to appellant's grooming process and "break[ing] down barriers with these kids." We agree that evidence that appellant had taught D.S. how to strip could be relevant to the "common scheme" of appellant's sexual assaults. But the district court ruled before trial that the state had not demonstrated by clear-and-convincing evidence that D.S. had been assaulted by appellant and denied its motion to introduce D.S. as a *Spreigl* witness. Thus, when his testimony was subsequently offered by the state, D.S. was not permitted to testify about any abuse. Without that testimony, evidence that appellant had taught D.S. how to strip is not relevant to any "grooming" process that may have occurred, nor is it relevant to any common scheme or plan utilized by appellant. Moreover, evidence that appellant taught another minor how to strip is highly prejudicial. We therefore conclude that the district court abused its discretion in permitting this *Spreigl* testimony.

But we must also determine whether the district court's error resulted in prejudice to appellant. Appellant must demonstrate that the "wrongfully admitted evidence significantly affected the verdict." *Ness*, 707 N.W.2d at 691. Appellant's trial lasted more than five days, and the evidence at issue is one brief exchange where D.S. says "Yes" to the prosecutor's question, "Did [appellant] ever teach you how to strip." The jury had already heard A.R.F.'s testimony that appellant told A.R.F. that he taught D.S. how to strip. In addition, the evidence against appellant was very strong. As a result, we conclude that any error in admitting this *Spreigl* evidence was harmless.

F. Cumulative Effect of Alleged Evidentiary Errors

An appellant is "entitled to a new trial if the errors, when taken cumulatively, had the effect of denying appellant a fair trial." *State v. Jackson*, 714 N.W.2d 681, 698 (Minn. 2006) (quotation omitted). When determining whether the cumulative effect of the errors denied a defendant the right to a fair trial, a reviewing court also considers the strength of the evidence presented against the defendant. *See State v. Erickson*, 610 N.W.2d 335, 340-41 (Minn. 2000). Because the only evidentiary error that occurred at trial was harmless, we conclude that appellant was not denied his right to a fair trial.

II.

Appellant asserts that the district court abused its discretion by denying his motion to modify the standard jury instruction pertaining to *Spreigl* evidence. "A district court's refusal to give a [requested] jury instruction is evaluated using an abuse of discretion standard." *State v. Swanson*, 707 N.W.2d 645, 653 (Minn. 2006). A court abuses its discretion when it refuses to give an instruction on the defendant's theory of the case if

there is evidence to support that theory and if the requested instruction is an accurate statement of the law. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006); *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005).

The district court twice read the following instruction to the jury—at the outset of trial and after the *Spreigl* evidence was admitted:

> This evidence is not to be used to prove the character of the defendant or that the defendant acted in conformity with such character. The defendant is not being tried for and may not be convicted of any offense other than the charged offense.
>
> You are not to convict the defendant on the basis of occurrences on February 14, 2005. To do so might result in unjust double punishment.

See 10 *Minnesota Practice*, CRIMJIG 2.01 (2008). Before the jury received its final instructions, appellant requested that the district court omit the final sentence of the standard jury instruction, arguing that it created an inference that appellant had been punished for the *Spreigl* act. The district court denied his request on the ground that it had already provided the standard instruction to the jury and that it was a correct statement of the law.

In support of his argument, appellant cites no cases directly on point, but does refer to *State v. DeYoung*, a case in which this court held that it was error not to instruct the jury as to the limited purpose for which it could consider *Spreigl* evidence. 672 N.W.2d 208, 212 (Minn. App. 2003). In *DeYoung*, the defendant requested that the jurors be instructed on the permissible use of the *Spreigl* evidence, specifically that they could use the evidence only to prove motive and identity. *Id.* at 211. The district court

denied that request, and this court held that the district court erred. *Id.* at 212. Reasoning that Minn. R. Evid. 105 requires a district court to explain to the jury when evidence is admissible for one purpose and not another purpose, we concluded that when a defendant requests that the jury be specifically instructed as to the permissible uses of evidence, it is error to deny that request. *Id.* at 212.

Unlike in *DeYoung*, the instructions as provided by the district court here did not permit the jury to consider the evidence for an improper purpose. The instructions fully and accurately stated the law with respect to *Spreigl* evidence. Furthermore, as noted by the state, the instruction states that convicting on the basis of *Spreigl* evidence "may" result in unjust double punishment, which does not lead to an automatic inference that appellant was criminally charged with his *Spreigl* offense. Because there is no authority in support of appellant's argument and because the instruction does not create an automatic inference that appellant had been convicted of the *Spreigl* act, the district court did not abuse its discretion in denying appellant's request for a modified *Spreigl* instruction.

Affirmed.