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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A11-2041**

State of Minnesota,
Respondent,

vs.

Darrin Deville Buckhalton,
Appellant.

**Filed November 5, 2012**
**Affirmed**
**Hudson, Judge**

Wright County District Court
File No. 86-CR-10-7682

Lori Swanson, Attorney General, Michael T. Everson, Assistant Attorney General, St. Paul, Minnesota; and

Thomas N. Kelly, Wright County Attorney, Buffalo, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Charles F. Clippert, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Halbrooks, Judge.

## UNPUBLISHED OPINION

**HUDSON**, Judge

Appellant challenges his conviction of two counts of first-degree criminal sexual conduct, arguing that the district court: (1) abused its discretion by advising jurors to

continue deliberating after they indicated that they were deadlocked; (2) abused its discretion by excluding appellant from the courtroom during closing arguments and the jury's questions; (3) abused its discretion by denying appellant's motion to introduce evidence that complainant had been previously sexually abused by her father, appellant's twin brother; and (4) abused its discretion by allowing the state to introduce evidence of appellant's uncharged acts of sexual abuse occurring in Waseca County. We affirm.

## FACTS

The state charged appellant Darrin Deville Buckhalton with two counts of first-degree criminal sexual conduct arising from allegations that appellant sexually abused his 10-year-old niece, B.R.B., on multiple occasions between March and July 2009.

In 2007, appellant moved into a townhouse in Monticello with B.R.B., B.R.B.'s mother, and B.R.B.'s younger sister. While living in the townhouse, B.R.B.'s mother sustained a neck injury requiring surgery, leaving her bedridden for roughly three weeks. B.R.B. testified that the day after B.R.B.'s mother returned from the hospital, appellant allegedly pulled down B.R.B.'s basketball shorts and underwear, inserted his fingers into B.R.B.'s vagina and "then stuck his thing—he stuck his penis up my butt, but he didn't put it inside, but over it." This lasted five minutes until appellant ejaculated onto B.R.B.'s back.

B.R.B. testified that appellant continued to engage in similar conduct after the initial incident, including a similar incident that occurred two days later. She testified that the abuse continued after the family, including appellant, moved to Waseca in July 2009, when the abuse escalated. B.R.B. testified that in addition to continuing his prior

conduct, appellant fondled her breasts, took naked pictures of her, and forced her to stroke his penis with her hand. B.R.B. described the incidents in Waseca as the "major ones." B.R.B. testified that the abuse ended when appellant moved out of the Waseca house in April 2010. In August 2010, B.R.B. reported the abuse to her mother, who immediately reported it to the police.

At trial, appellant sought to introduce evidence of prior acts of sexual abuse of B.R.B. by her father, appellant's twin brother, who was convicted of first-degree criminal sexual conduct for these acts in 2003. The district court excluded this evidence as barred by the rape-shield statute. Appellant also sought to preclude the state and its witnesses from making any reference to the criminal sexual conduct that allegedly occurred in Waseca County. The district court denied this motion without explanation.

After the state presented four witnesses, appellant requested a continuance to seek new counsel because his attorney had failed to call witnesses who appellant believed were critical to his defense. As the motion was being argued, appellant interjected during the prosecutor's argument, and he was warned that he would be removed from the courtroom if he continued to interrupt the court. The district court denied the motion, but appellant continued to argue, and he was once again warned that he would be removed from the courtroom if he continued to interrupt the trial.

The next day, during the state's closing argument, appellant stood up and interrupted the proceedings in the presence of the jury:

> [PROSECUTOR]: . . . It also explains that many times an adult male cannot fit his penis inside a young child, but it's still sexual penetration for obvious reasons.

DEFENDANT: Are you talking about the sexual penetration that her father—

COURT: Sir.

DEFENDANT: —originally did to her—

COURT: Sir.

DEFENDANT: —or the alleged incidents—

COURT: Okay.

DEFENDANT: —that I'm getting accused of?

COURT: You can remove Mr. Buckhalton from—

DEFENDANT: Because they're not being—

COURT: —the room.

DEFENDANT: —told the whole truth here at all about the past—

COURT: You can take the jurors out.

(WHEREUPON, the jurors began to exit the courtroom.)

DEFENDANT: What happened with her father and how everything that happened regarding her. They've only heard one side of the story. And I'm going to get 16 years for something they haven't even heard the whole story for?

After noting the previous warnings to appellant, the district court excluded appellant from the courtroom for the duration of closing arguments and jury instructions. Appellant was permitted to listen to the remainder of the trial from a holding cell via a one-way telephone link. The district court instructed the jury to ignore appellant's remarks.

After resuming its closing argument, the state discussed the conduct that allegedly occurred in Waseca County.

> As the court also instructed you, there was testimony as to what happened here in Waseca, Minnesota. And the intent there was for you to be able to see the full breadth of the sexual contact between Mr. Buckhalton and [B.R.B.] during the course of their knowing each other. But, obviously, this is Wright County. Only acts in Wright County are to be determined for this case. And that's why during the course of [B.R.B.]'s testimony I kept coming back to asking her what happened in Wright County, digital penetration and anal penetration.

After closing arguments, the district court charged the jury. The district court read CRIMJIG 3.04, the standard jury charge regarding unanimous verdicts, which states, in part, "you should not surrender your honest opinion simply because other jurors disagree or merely to reach a verdict." 10 *Minnesota Practice*, CRIMJIG 3.04 (2006).

The jury began deliberations on June 9, 2011, at 11:07 a.m. At approximately 2:00 p.m., the jury sent the district court a note stating, "[w]e have a couple jurors who don't feel the state provided enough evidence to prove guilt beyond their reasonable doubt. What is standard operating procedure." With the consent of both counsel, the district court responded by writing on the note, "Continue to deliberate. Judge Halsey." The jury was not brought into the courtroom. The jury submitted two additional notes that afternoon regarding evidentiary matters, to which the district court responded by returning a typed response taken directly from the jury instructions.

At approximately 11:30 a.m. the following morning, the jury reached its verdict. Appellant was permitted to return to the courtroom to hear the verdict. The jury found

appellant guilty of both counts. The district court imposed a 156-month prison sentence, followed by a 10-year conditional release period. This appeal follows.

## D E C I S I O N

### I

Appellant argues that the district court abused its discretion by instructing the jury to continue deliberating after the jury sent a note to the district court indicating a lack of agreement regarding the verdict. We review a district court's instructions to a potentially deadlocked jury for an abuse of discretion. *State v. Cox*, 820 N.W.2d 540, 550 (Minn. 2012).

After roughly three hours of deliberation, the jury submitted a note to the district court stating that two jurors did not believe that the state had provided enough evidence to prove guilt beyond a reasonable doubt. With the approval of both parties, the district court returned the note to the jurors, instructing them to continue deliberating.

In a criminal case, the district court may permissibly instruct the jury to "consult and deliberate with a view to reaching an agreement consistent with their individual judgments." *State v. Martin*, 297 Minn. 359, 373, 211 N.W.2d 765, 773 (1973). But "it is reversible error in Minnesota to coerce a jury towards a unanimous verdict. A court, therefore, can neither inform a jury that a case must be decided, nor allow the jury to believe that a 'deadlock' is not an available option." *State v. Jones*, 556 N.W.2d 903, 912 (Minn. 1996) (citation omitted).

The Minnesota Supreme Court has adopted the procedures for instructing a potentially deadlocked jury set forth in ABA Standard Relating to Trial by Jury 5.4 (now

15-5.4). *Martin*, 297 Minn. at 372, 211 N.W.2d at 772. CRIMJIG 3.04 was modeled after ABA Standard 15-5.4. *See Cox*, 820 N.W.2d at 551. Standard 15-5.4(b) provides that, if the district court believes that the jury may be unable to agree, it "may require the jury to continue their deliberations and may give or repeat an instruction [comparable to CRIMJIG 3.04]. The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." ABA Standards for Criminal Justice: Discovery and Trial by Jury 15-5.4 (3d ed. 1996).

Appellant argues that the district court erred by instructing the jury to continue deliberating without rereading CRIMJIG 3.04 because it may have coerced the jury into reaching a unanimous verdict. *See Jones*, 556 N.W.2d at 912. But the Minnesota Supreme Court has explicitly rejected appellant's argument that the district court must read or reread CRIMJIG 3.04 whenever a jury indicates it may be deadlocked. *Cox*, 820 N.W.2d at 551; *State v. Buggs*, 581 N.W.2d 329, 338 n.2 (Minn. 1998).

We conclude that the district court's actions did not constitute an abuse of discretion. The district court's instruction to continue deliberating was neither overtly coercive nor did it require the jurors to deliberate for an unreasonable length of time. The supreme court has twice held that it is not an abuse of discretion to instruct the jury to continue deliberating after a full day of deliberation. *Cox*, 820 N.W.2d at 552; *Jones*, 556 N.W.2d at 907. Here, the jury had only been deliberating for three hours when it indicated a split among the jurors. Whether to reread CRIMJIG 3.04 was within the district court's discretion, and the court's decision not to reread the instruction was a reasonable exercise of that discretion, given that the instruction had been read three hours

earlier and the jury had the written instruction during its deliberations. Moreover, both parties were informed of the district court's communications with the jury, and defendant's counsel consented to the district court's instruction. *See Buggs*, 581 N.W.2d at 338. On this record, we conclude that the district court's instruction to the jury to continue deliberating was not an abuse of discretion.

**II**

Appellant argues that the district court abused its discretion by excluding him from the courtroom for closing arguments and jury instructions after he interrupted the prosecutor during closing arguments. "The [district] court has broad discretion in dealing with 'disruptive, contumacious, stubbornly defiant defendants.'" *State v. Richards*, 495 N.W.2d 187, 197 (Minn. 1992) (quoting *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1061 (1970)). A district court's decision to conduct a trial in absentia is reviewed under an abuse-of-discretion standard. *State v. Gillam*, 629 N.W.2d 440, 450 (Minn. 2001). An error in continuing a trial in the defendant's absence "is not a structural error, but is an error that is subject to a harmless error analysis." *State v. Finnegan*, 784 N.W.2d 243, 251 n.6 (Minn. 2010). An error is harmless "only if it can be said that, beyond a reasonable doubt, the error had no significant impact on the verdict." *State v. Hall*, 722 N.W.2d 472, 478 (Minn. 2006).

A defendant's right to be present at trial arises from the Confrontation Clause of the Sixth Amendment and is applicable to the states through the Fourteenth Amendment. *Allen*, 397 U.S. at 338, 90 S. Ct. at 1058. A defendant's presence in the courtroom also implicates his due-process rights, as a defendant has a right to be present "whenever his

presence has a relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the charge." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 2667 (1987) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105–06, 54 S. Ct. 330, 332 (1934)). A defendant can waive this right through conduct:

> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights . . . a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

*Allen*, 397 U.S. at 343, 90 S. Ct. at 1060–61 (citation omitted).

The Minnesota Rules of Criminal Procedure also guarantee the defendant's right to be present at all stages of the trial, including closing arguments, jury instructions, and any jury questions dealing with evidence or law. Minn. R. Crim. P. 26.03, subd. 1(1). But a defendant's right to be present may be waived if "[t]he defendant, after warning, engages in conduct that justifies expulsion from the courtroom because it disrupts the trial or hearing." *Id.*, subd. 1(2).

Here, the district court determined that excluding appellant from the courtroom was warranted given its prior warnings to appellant and because during appellant's outburst, he mentioned the prior abuse of B.R.B. by her father, which the district court had previously determined was inadmissible. Appellant argues that his conduct was insufficiently severe to warrant exclusion. We disagree. In *Allen*, the defendant argued with the judge "in a most abusive and disrespectful manner," threatened to kill the judge,

tore up his attorney's papers, and promised to continue to disrupt the proceedings to prevent the trial from occurring. 397 U.S. at 339–40, 90 S. Ct. at 1059. In *Gillam*, the defendant was repeatedly defiant, yelled obscenities, made obscene gestures, and interrupted the state's opening argument and refused to stop talking. 629 N.W.2d at 447–48.

While appellant's behavior was of a different nature than the behavior exhibited in these cases, it was both disorderly and extremely disruptive, ultimately requiring the district court to have the jury escorted from the courtroom. And appellant was repeatedly warned that continued disruptions would lead to his expulsion from the courtroom. Furthermore, appellant's introduction of inadmissible evidence created a genuine risk that appellant's continued presence could prejudice the state's case. We conclude that the district court did not abuse its discretion in excluding appellant from the courtroom.

Appellant argues that, even if his exclusion was warranted, the district court abused its discretion by not giving him a chance to return to the courtroom. "Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Allen*, 397 U.S. at 343, 90 S. Ct. at 1061. The Minnesota Supreme Court has rejected the proposition that courts "are to continually question an obstreperous defendant to determine whether that defendant is ready to behave." *Gillam*, 629 N.W.2d at 452. "Instead, *Allen* indicates that the defendant has the burden to inform the court when he is ready to physically return and conform his conduct to the requirements of the court." *Id.*

Here, appellant did not satisfy his burden to inform the court that he desired to return or that he was ready to behave. The record contains no evidence that either appellant or his counsel sought to have appellant returned to the courtroom. It was not the district court's obligation to check in with appellant to see if he was ready to return. *Id.* Absent affirmative steps by appellant to demonstrate his readiness to return to the courtroom, his exclusion from closing arguments and jury instructions was not an abuse of discretion.

**III**

Appellant argues the district court abused its discretion by excluding evidence of prior acts of sexual abuse upon B.R.B. by her father, appellant's twin brother. Evidentiary rulings fall within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). A district court's error in excluding defense evidence is harmless only if the reviewing court is "satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, a [reasonable] jury would have reached the same verdict." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). But if a reasonable possibility exists that the verdict might have been different had the evidence been admitted, the error is prejudicial. *Id.*

Under Minn. R. Evid. 412, evidence concerning a victim's past sexual conduct is generally inadmissible in a prosecution for criminal sexual conduct. The term "sexual conduct" includes prior instances in which the victim was sexually abused. *State v. Kobow*, 466 N.W.2d 747, 750 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991).

Rule 412 must yield where admission is required by the defendant's right to due process, right to confront the accuser, or right to offer evidence in one's defense. *State v. Caswell*, 320 N.W.2d 417, 419 (Minn. 1982). Evidence of prior sexual abuse may be admissible "to establish a source of knowledge of or familiarity with sexual matters in circumstances where the jury otherwise would likely infer that the defendant was the source of the knowledge." *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986). In ruling on the admissibility of this evidence, the district court is to balance the probative value of the evidence against its potential for causing unfair prejudice. *Id.*

Appellant argues that the evidence of prior abuse by B.R.B.'s father was relevant to show another source for her sexual knowledge. B.R.B.'s testimony included terms such as "boobs," "vagina," "butt," "handjob," "fingering," "sperm," and "molested." Appellant argues that the jury might have concluded that appellant was necessarily the source of B.R.B.'s sexual knowledge given her age. Appellant further argues that the prior incidents involved vaginal and anal penetration, the acts that appellant is accused of committing.

The state contends that B.R.B.'s knowledge of sexual organs and sexual terms was equivalent to that of most middle-school students. The state further argues that the prior events are not relevant to B.R.B.'s sexual knowledge given that they occurred six to seven years ago, when B.R.B. was five to six years old.

The state's arguments are persuasive. In *Jackson v. State*, we concluded that the district court did not err by excluding evidence of prior sexual abuse because the jury would not likely infer that a 14-year-old victim's knowledge of sexual matters could only

have been obtained from the alleged incidents with the defendant. 447 N.W.2d 430, 435 (Minn. App. 1989). Similarly, here, B.R.B. was old enough that she could be expected to have some knowledge of sexual matters. At the time of trial, B.R.B. was 12 years old and in the sixth grade. A child of that age and education level would likely be familiar with sexual terminology. Furthermore, B.R.B.'s terminology—using terms like "boobs" and "butt" while referring to "his thing"—reflected a level of maturity appropriate for her age. While the probative value of the evidence was limited, evidence of prior sexual abuse is highly prejudicial because it is sexual-conduct evidence, and it has a tendency to confuse the issues. *See Kobow*, 466 N.W.2d at 750 (classifying evidence of prior sexual abuse as sexual-conduct evidence); *see also U.S. v. Tail*, 459 F.3d 854, 861 (8th Cir. 2006) (affirming the district court's exclusion of evidence of prior sexual abuse upon victim because admission would have "triggered mini-trials concerning allegations unrelated to [defendant]'s case, and thus increased the danger of jury confusion and speculation"). The potential for confusion and speculation was especially high here, given that the prior perpetrator is appellant's twin brother. On this record, the district court did not abuse its discretion in refusing to admit evidence of the prior sexual abuse.

**IV**

Appellant argues that the district court abused its discretion by allowing introduction of testimony from B.R.B. regarding the uncharged acts of sexual abuse by appellant in Waseca County. 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 for other purposes, such as to prove 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, five requirements must be met: (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) 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 state'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. Brown*, 815 N.W.2d 609, 619 (Minn. 2012). Decisions to admit *Spreigl* evidence are reviewed for an abuse of discretion. *Id.* If the admission of rule 404(b) evidence is erroneous and there is a reasonable possibility the erroneously admitted evidence significantly affected the verdict, the court must reverse. *State v. Ness*, 707 N.W.2d 676, 691 (Minn. 2006).

Appellant was charged with sexually abusing B.R.B. from March 2009, when the family lived in Wright County, until July 2009, when B.R.B. and appellant both moved to Waseca County. The abuse is alleged to have continued until appellant moved out of B.R.B.'s house in April 2010. At trial, appellant moved to preclude the state and its witnesses from making any reference to the alleged criminal sexual conduct by appellant in Waseca County, arguing that the district court lacked jurisdiction to consider these acts. The jury was instructed not to convict appellant on the basis of any occurrence in

Waseca County. The state responded that the evidence was relevant to explain "the full story and scope of what occurred." The district court denied appellant's motion to exclude the evidence without explanation.

Appellant now argues that introduction of this evidence was erroneous because the state failed to satisfy the *Spreigl* procedural safeguards. Appellant further argues that the evidence was prejudicial and irrelevant because B.R.B. was able to testify exclusively about the specific incidents in Wright County, and the Waseca County testimony mentioned several additional acts of sexual abuse not alleged to have occurred in Wright County. Appellant argues that this prejudice was exacerbated during the state's closing argument, when the prosecutor invited the jury to punish appellant for the Waseca County acts by stating that the testimony regarding the events in Waseca County was provided for the jury "to see the full breadth of the sexual contact between Mr. Buckhalton and [B.R.B.] during the course of their knowing each other."

The state does not contest that, if the Waseca County acts constitute *Spreigl* evidence, the *Spreigl* procedural requirements were not satisfied. In the alternative, the state contends that evidence of the Waseca County acts was admissible as an integral part or "res gestae" of the charged offense. *State v. Wofford*, 262 Minn. 112, 118, 114 N.W.2d 267, 271 (1962); *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997). To be admissible under this exception, "[s]uch evidence must show a causal relation or connection between the two acts so that they may reasonably be said to be part of one transaction." *Wofford*, 262 Minn. at 118, 114 N.W.2d at 271–72. Such evidence may

also be admitted where the acts show a motive for the alleged crime, or prove an element of the charged offense. *Nunn*, 561 N.W.2d at 908.

We conclude that the Waseca County acts constitute *Spreigl* evidence and that the *Spreigl* procedural requirements were not satisfied.[1] The state's res gestae argument is unpersuasive. The incidents in Waseca County and Wright County occurred at separate times and in separate locations. The incidents did not illustrate motive for the alleged crime nor were they part of the charged offense. Accordingly, the district court abused its discretion in admitting the Waseca County acts.

While we are concerned about the state's complete failure to satisfy the *Spreigl* procedural requirements, and the district court's lack of analysis in its ruling, we conclude that admission of evidence of the Waseca County acts did not significantly affect the verdict. In examining B.R.B., the state was careful in its questioning to distinguish the acts taking place in Wright County from those occurring in Waseca County. B.R.B. testified convincingly regarding the Wright County incidents, and her testimony remained largely consistent from her initial Corner House interview to the trial. The district court instructed the jury not to convict appellant on the basis of any occurrence in Waseca County. The instructions stated that a required element of each charged offense was that the offense took place in Wright County. It is presumed that a jury follows the district court's instructions. *State v. Taylor*, 650 N.W.2d 190, 207

[1] Evidence of the Waseca acts appears admissible as relationship evidence for which *Spreigl* notice is not required. *See* Minn. Stat. § 634.20 (2010); *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004). But we do not consider this argument because it was not raised either at the district court level or on appeal.

(Minn. 2002). And we disagree with appellant's contention that the state's closing argument encouraged the jury to punish appellant for acts occurring in Waseca County. The state's closing argument simply emphasized that the jury should focus its inquiry on the acts allegedly taking place in Wright County. We conclude that the admission of evidence of acts outside Wright County did not significantly affect the verdict.

**Affirmed.**