STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2134

State of Minnesota,
Respondent,

vs.

James Edmund Rogalla,
Appellant.

Filed October 1, 2012
Affirmed
Harten, Judge[*]

St. Louis County District Court
File No. 69HI-CR-10-64

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

Mark S. Rubin, St. Louis County Attorney, Jeffrey M. Vlatkovich, Assistant County Attorney, James T. Nephew, Assistant County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Harten, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HARTEN, Judge

Appellant challenges his conviction of two counts of first-degree criminal sexual conduct, arguing that the district court abused its discretion by admitting *Spreigl* evidence from two women who said appellant had abused them when they were children and by requiring appellant to wear a stun belt during trial. Appellant also challenges his sentence, arguing that it was prejudicial error to sentence him for both second-degree criminal sexual conduct and first-degree criminal sexual conduct. Because we see no abuse of discretion in the admission of *Spreigl* evidence or in the order that appellant wear a stun belt and because appellant's sentences were based on separate criminal acts, we affirm.

FACTS

Appellant James Rogalla is the father of a daughter, the complainant, born in February 1992. In November 2009, when the complainant was 17, she reported that appellant had sexually abused her almost daily from the early 1990s until about 2008.

In January 2010, appellant was charged with first-degree criminal sexual conduct for "having a significant sexual relationship with the victim, [by engaging] in sexual penetration with another person under the age of 16 years . . . said sexual abuse involving multiple acts committed over an extended period of time," and with second-degree criminal sexual conduct for "having a significant sexual relationship with the victim, [by engaging] in sexual contact with another person under the age of 16 years . . . and the sexual abuse involved multiple acts committed over an extended period of time."

Prior to the August 2011 jury trial, the prosecutor informed the district court that the sheriff's department had recommended that appellant wear a stun belt for security reasons during trial and asked the district court to issue the appropriate order. The district court issued an order granting the prosecutor's request.

At trial, over appellant's objection, respondent State of Minnesota (the state) introduced as *Spreigl* evidence the testimony of two women, N.B. and C.L. N.B., then 36, testified that appellant had abused her in 1987, when she was 12, by touching her without penetrating her on three occasions; C.L., then 23, testified that, in the early 1990s, appellant once abused her by touching her without penetrating her when she had been temporarily left in appellant's care.

After the jury found appellant guilty on both counts, he was sentenced to consecutive executed prison terms of 173 months and 108 months and to a lifetime conditional release period. He challenges the admission of the *Spreigl* evidence, the order that he wear a stun belt, and the consecutive sentencing.

D E C I S I O N

1. *Spreigl* Evidence

The admission of *Spreigl* evidence lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996).

The *Spreigl* evidence, consisting of testimony from C.L. and N.B., occupied less than 20 minutes of the three-day trial. C.L. testified that: (1) appellant was her uncle, and her family lived with him and his family for a time in the early 1990s; (2) when C.L.'s

mother was away and C.L. was playing in a bedroom, appellant came into the bedroom where his contact with C.L. "started out as hugs and then it was touching [her] chest area and then private areas and stuff"; and (3) C.L. was "positive" appellant had committed those acts.

N.B. testified that: (1) when she was 12, she and her mother met appellant through a friend of her mother's; (2) appellant became "more like a father figure" to her; (3) N.B. went by herself to appellant's apartment where, on three occasions, he fondled her breasts and kissed her; and (4) she was certain that this happened.

The admission of *Spreigl* evidence requires that: (1) the state give notice of its intent to use the evidence; (2) the state indicates what the evidence is offered to prove; (3) the evidence is clear and convincing that the defendant participated in the other offenses; (4) the evidence is material to the state's case; and (5) the probative value of the *Spreigl* evidence is not outweighed by its potential for unfair prejudice. *State v. Gomez*, 721 N.W.2d 871, 877 (Minn. 2006).

It is undisputed that the state gave notice of its intent to use the *Spreigl* evidence. Appellant claims that the state failed to indicate what the evidence would be offered to prove, but the testimony at a pretrial hearing indicated that the evidence would be offered to show a common scheme or plan. *See* Minn. R. Evid. 404(b) (evidence of other misconduct may be offered to show a plan).

The *Spreigl* testimony, like the complainant's testimony, had only uncorroborated testimony of what had happened, but this is common with offenses of this type. Thus,

> [i]n criminal sexual conduct cases, particularly in child sex abuse prosecutions, prior acts of sexual conduct are often

> relevant where the defendant disputes that the sexual conduct occurred or where the defendant asserts the victim is fabricating the allegations. Given the secrecy in which such acts take place, the vulnerability of the victims, [and] the absence of physical proof of the crime . . . the prior convictions are relevant to show a common plan or scheme on the part of the defendant, i.e., to establish that the act occurred.

State v. Boehl, 697 N.W.2d 215, 219–220 (Minn. App. 2005) (citations and quotation omitted) (no abuse of discretion in admission of *Spreigl* evidence "to show [the defendant's] intent, and his common scheme or plan" when the defendant "denied that the inappropriate sexual conduct occurred"). Here, appellant testified that he was "trying to understand why they want me to confess to something that I didn't do" and answered "No" when asked: (1) if the events testified to by N.B. and C.L. had occurred; (2) if he committed the offenses with which he was charged; (3) if he penetrated complainant in any way at any time; and (4) if he had sexual contact with her in any way at any time. Thus, because appellant disputed that any sexual contact with the complainant had occurred, the *Spreigl* testimony was relevant under *Boehl*.

Appellant relies on *State v. Ness*, 707 N.W.2d 676, 687–89 (Minn. 2006) (evidence of incidents occurring 35 years earlier, in which the defendant had touched the thighs of two boys, not "markedly similar" to the charged incident, in which the defendant touched a boy's penis outside his clothes), to support his claim that "there is no marked similarity between isolated touching of young, unrelated girls' chests and almost daily digital penetration over a fifteen-year period with one's own daughter." But N.B. testified that appellant repeatedly fondled her breasts in 1987; C.L. testified that appellant touched both her chest and "private areas" in the early 1990s; and the daughter testified

that appellant penetrated her from the mid-1990s until about 2004 and inappropriately touched her until about 2008. Thus, there was no significant time gap between appellant's abuse of the witnesses and his first abuse of his daughter; and the witnesses, like his daughter, were young girls whom he touched inappropriately. While *Spreigl* evidence must be substantially similar to the charged offense, it need not be identical. *State v. Rucker*, 752 N.W.2d 538, 549–50 (Minn. App. 2008), *review denied* (Minn. 23 Sept. 2008). Admittedly, the episodes of abuse appellant's daughter alleged (almost daily for about 15 years) were far more numerous than the one episode reported by C.L. and the three episodes reported by N.B., but appellant's daughter was in daily contact with him, while the *Spreigl* witnesses were not. Particularly in light of appellant's denial that the acts of which he was accused had occurred, the district court did not abuse its discretion in admitting *Spreigl* evidence of similar acts.

2. Stun Belt in Courtroom

The decision to require a criminal defendant to wear restraints during trial is within the discretion of the district court and will not be overturned absent an abuse of discretion. *State v. Chambers*, 589 N.W.2d 466, 475 (Minn. 1999). Factors to consider in deciding whether to restrain a defendant include

> (1) the seriousness of the charge; (2) the defendant's temperament and character; (3) the defendant's age and physical attributes; (4) the defendant's past record; (5) the defendant's prior escapes or attempted escapes; (6) threats made by the defendant to cause a disturbance; (7) the size and mood of the audience; (8) the nature and security of the courtroom; and (9) any less restrictive available alternatives.

Id. Any error in ordering a restraint "is not prejudicial absent evidence that the jury knew [the defendant] was wearing the restraint." *State v. Shoen*, 578 N.W.2d 708, 715 (Minn. 1998).

At the pretrial conference, the prosecutor asked the district court to issue an order requiring appellant to wear a stun belt. The district court replied:

> Well the stun belt is going to be under the clothing, so that the jury cannot see it and nobody should be commenting to the jury about it. It is a limited intrusion because [he] is not going to be [wearing] handcuffs and while I would agree that I am not aware of anything in [his] present or past behavior that would suggest that he is in any immediate danger to creating a riot in the courtroom and in no danger to his attorney or to whoever else might be the next closest people. At the same [time], the intrusion is limited and the charges are very serious; the stakes are high in terms of the potential disposition and how long the defendant is looking at being in prison if he is found guilty. And therefore I don't really see any point in taking any risks whatsoever, so I am going to allow the request. I [am] making a record here that there is sufficient risk in the court's view and the court's discretion to require that safety devise [sic] to be present and that is for the safety of everybody in the courtroom.

Appellant claims that the district court abused its discretion by ordering the stun belt without making findings as to the essential state interest that required it. For this claim, he relies on *State v. Jones*, 678 N.W.2d 1, 22 (Minn. 2004) (finding error because the district court's order for the leg restraint was based solely on the severity of the offense and holding that severity of the offense "cannot be the only factor" considered). But the *Jones* defendant admitted that "the error was harmless because the jury never saw the restraint," *id.* at 21, and the supreme court neither stated nor implied that this harmless error could have been the basis for a new trial.

Here, appellant claims "there is evidence . . . that the jury could see the stun belt bulging under the back of [appellant's] shirt." But the only evidence is a comment by appellant's attorney before the potential jurors entered the courtroom for jury selection:

> I just want to renew my objection relative to [the stun belt] given the fact that it is still somewhat visible as the shirt puffs out in the back where the stun belt is and there may [] be, at least in some point in time, when the jury is going to be able to see that.

An attorney's statement that there might be a time when the jury would see a bulge under appellant's shirt is speculative and incompetent evidence that the jury could see the stun belt; absent competent evidence, any error is harmless. *See Shoen*, 578 N.W.2d at 715. The prosecutor's statement that "there is only a slight bump around [appellant's] back" is similarly not evidence that the jury saw the stun belt. *See id.*

Appellant is not entitled to a new trial on the basis of the stun belt.

3. Sentencing

Appellant was sentenced consecutively on the count of first-degree criminal sexual conduct and the count of second-degree criminal sexual conduct. He claims that he could be convicted and sentenced only for first-degree criminal sexual conduct because second-degree criminal sexual conduct is a lesser included offense.[1]

> One may not be convicted of both the crime charged and "[a] crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1 (4) [2006]. To determine whether an offense is an included offense falling under this statute, a court examines the elements of the

[1] Appellant did not raise this argument at the pretrial hearing when the state said it would seek separate jury instructions on first-degree and second-degree criminal sexual conduct, ask the jury to consider them separately, and seek consecutive sentences, nor did he raise it at any point during the trial or at the sentencing hearing.

> offense instead of the facts of the particular case. An offense is necessarily included in a greater offense if it is impossible to commit the greater offense without committing the lesser offense. . . .
>
> But even if a person pleads guilty to or is found guilty of a greater offense and an included offense, the protections of section 609.04 will not apply if the offenses constitute separate criminal acts. The inquiry into whether two offenses are separate criminal acts is analogous to an inquiry into whether multiple offenses constituted a single behavioral incident under Minn. Stat. § 609.035 [2006].

State v. Bertsch, 707 N.W.2d 660, 664 (Minn. 2006) (quotations and citations omitted). When the facts are not in dispute, the decision whether multiple offenses are part of a single behavioral incident presents a question of law that we review de novo. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

In his opening statement, the prosecutor told the jury that it would be asked to find "if there are separate incidents . . . separate acts of penetration, separate acts of contact." The complainant testified that she remembered penetration "happening a few times when I was bathing" and that she was "about 12" the last time it happened; she testified that penetration also occurred elsewhere in the house; that she was older than 12 or 13 the last time she was penetrated; that most of what happened while she was bathing was "just touching," and that this occurred after puberty. She also testified that appellant started "not doing so much" when she was 16; "[i]t was more of just touching my breasts in the mornings, whatever," but when asked if there were times of sexual penetration when she was 16, "there [were] very few . . . but yes." Thus, the complainant clearly testified that at times appellant digitally penetrated her vaginally and at times just touched her. Her

testimony describes many separate criminal acts, some of penetration and some of sexual contact.

The jury was instructed that the difference between first-degree and second-degree criminal sexual conduct was that the former involved penetration and the latter involved sexual contact. On separate verdict forms, the jury found appellant guilty of first-degree and of second-degree criminal sexual conduct throughout the period from 1995 to 2008.

Appellant relies on *State v. Kobow*, 466 N.W.2d 747, 752 (Minn. App. 1991) (holding that "[t]estimony regarding sexual penetration is sufficient to raise an inference of sexual contact") to argue that "second-degree criminal sexual conduct is a lesser-included offense of first-degree criminal sexual conduct." But this argument ignores the fact that criminal acts of second-degree criminal sexual conduct may occur separately from criminal acts of first-degree criminal sexual conduct, as the jury found happened here, and the bar against sentencing a lesser-included offense does not apply when there are separate criminal acts. *See Bertsch*, 707 N.W.2d at 665.

The district court did not abuse its discretion in admitting *Spreigl* evidence or in ordering that appellant wear a stun belt; appellant's sentence was lawful.

Affirmed.