STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2154

State of Minnesota,
Respondent,

vs.

Lynell Dupree Alexander,
Appellant.

Filed December 31, 2012
Affirmed
Hooten, Judge

Hennepin County District Court
File No. 27-CR-10-9661

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Hooten, Judge; and Crippen, 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

HOOTEN, Judge

On appeal from his conviction of criminal sexual conduct in the fourth degree, appellant argues that the district court erred by admitting *Spreigl* evidence of a prior sexual assault and by denying his motions for a mistrial after prosecution witnesses referenced other prior bad acts and appellant's history of incarceration. Because the district court did not abuse its discretion in admitting the *Spreigl* evidence and any erroneous admission of testimony referencing appellant's prior bad acts and incarcerations was harmless, we affirm.

FACTS

On September 18, 2007, W.M., who was 16 at the time, made arrangements by telephone to spend time with a man who identified himself as "Trey" in exchange for $200. W.M. knew that Trey had associated with L.J., a friend of hers, and that Trey had purchased marijuana for her. Trey never mentioned to W.M. that the meeting would involve anything sexual in exchange for the money. W.M. never went through with the arrangement because she "chickened out." Instead, her best friend, D.W., who was 15 years old at the time, agreed to meet Trey. D.W., W.M. and W.M.'s sister went to a parking lot in Minneapolis where D.W., posing as W.M., got into Trey's vehicle. D.W. never disclosed her true identity to Trey.

Trey first drove to a liquor store and bought alcohol, which D.W. turned down. While their conversation at first did not involve sex, Trey eventually asked to see D.W.'s

bra and touched her leg and breasts over her clothing. Trey drove to a secluded lot by the Mississippi River. D.W. felt nervous and scared. She complied with Trey's request to move to the backseat, but refused to perform oral sex and intercourse. Trey also asked if she could "give him oral sex with [her] breasts" and a hand job. Exposing his penis, Trey informed D.W. that she could go if she would "hurry up and do what he wanted to do." Trey then moved on top of her, pushed her shirt and bra up to her neck, put his hands on her chest, placed his penis between her breasts, and ejaculated onto her chest. She stated that Trey did not physically injure or threaten her.

Trey then drove D.W. back to a location in Minneapolis where she met up again with W.M. Trey never paid D.W. any money, explaining that she talked too much. According to W.M., D.W. was trying to hold back tears and appeared depressed, "[l]ike her life got sucked out of her or something." W.M. called Trey after the incident because she was upset and accused him of being a rapist. She denied that she called just to collect the money. On September 19, 2007, the day after the incident, D.W. disclosed what had occurred to the police and provided a physical description of appellant. D.W. also provided the police with her shirt and bra as evidence.

The investigation lay dormant until 2009, when D.W.'s shirt was tested for DNA evidence. A DNA profile was developed from the presence of sperm cells on the shirt and entered into the state database. The profile was found to match a DNA profile belonging to appellant Lynell Dupree Alexander. Based on the match, Sergeant Linda Riemenschneider of the Minneapolis Police Department reopened the case. Sergeant Riemenschneider met with D.W. and arranged a photo line-up. D.W. identified appellant

as "Trey" who assaulted her in 2007. Appellant was charged with criminal sexual conduct in the fourth degree.

At trial, the state's *Spreigl* witness, S.F., testified about a 2005 incident when she was 17 years old and met appellant in a parking lot in Richfield. While they had not known each other previously, the two made plans for appellant to pick her up at her cousin's house and to talk. The arrangement did not include any suggestion of sexual contact. Later that evening, appellant picked up S.F. as planned. Appellant and S.F. drank vodka, which was supplied by appellant. S.F. requested to go home on several occasions, but appellant told her to wait. Appellant then drove into a secluded alley and stopped his vehicle. S.F. again asked to go home and tried to get out of the vehicle. Appellant locked the vehicle, put on a condom, held her down and told her to stop struggling. He did not physically threaten S.F., but stated that something bad might happen to her if she tried to leave. Appellant then forced S.F. to have sex with him. After appellant finished, he offered S.F. $1,500 for her silence. He then drove her home without paying any money. After being dropped off, S.F. went to a hospital where she spoke with a police officer about what had occurred. Appellant went to the hospital after he called S.F.'s cousin and was told that S.F. went to the hospital

Appellant was interviewed by police the next day. He admitted that he initially approached S.F. in a parking lot, got her phone number, and arranged to pick her up later in the evening at her cousin's home. He also admitted that he offered her $600 for sex, but had no intention of paying. As a result of this incident with S.F., appellant was charged with engaging or agreeing to hire a juvenile to engage in sexual conduct,

criminal sexual conduct in the third degree, and contributing to the delinquency of a minor. He ultimately pleaded guilty to the gross misdemeanor charge of engaging or agreeing to hire a juvenile to engage in sexual conduct under Minn. Stat. § 609.352, subd. 2 (2004).

At trial, appellant admitted that he went by the name "Trey" and that he was the "Trey that's being discussed here." Appellant testified that he had never seen D.W. prior to trial and that instead of D.W., he actually engaged in sexual contact with W.M. on September 18, 2007. He claimed that W.M. voluntarily gave him a "hand job", and that there was contact between his penis and her breasts. He claimed that W.M. never demanded to be taken home, and that he offered W.M. $200 for the sexual contact. Appellant claimed that when he did not pay W.M., she fabricated a story about his sexual contact with D.W., who was younger, because she wanted to get him into trouble. Appellant also denied sexually assaulting S.F. and asserted that the sex with S.F. was consensual.

The jury found appellant guilty of fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(b) (2006), making it a crime to engage in sexual contact with a victim who is "at least 13 but less than 16 years of age" when "the actor is more than 48 months older" than the victim. The district court sentenced him to 45 months in prison with ten years of conditional release. This appeal follows.

D E C I S I O N

I.

Appellant first argues that his conviction must be reversed because the district court erred in admitting evidence of the 2005 incident. "Absent a clear abuse of discretion, evidentiary rulings generally rest within the trial court's discretion." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). In general, evidence of other crimes or misconduct is not admissible to prove the defendant's character for the purpose of showing that he acted in conformity with that character. *Id.*; Minn. R. Evid. 404(b). Such evidence, also known as *Spreigl* evidence, may be admitted for the limited purpose of showing motive, intent, absence of mistake or accident, identity, or a common scheme or plan. *Kennedy*, 585 N.W.2d at 389. *Spreigl* evidence is inadmissible unless:

> (1) notice is given that the state intends to use the evidence; (2) the state clearly indicates what the evidence is being offered to prove; (3) the evidence is clear and convincing that the defendant participated in the other offense; (4) the *Spreigl* evidence is relevant and material to the state's case; and (5) the probative value of the *Spreigl* evidence is not outweighed by its potential for unfair prejudice.

Id. "A defendant who claims the trial court erred in admitting evidence bears the burden of showing the error and any resulting prejudice." *Id.* Appellant argues that evidence of the incident with S.F. was neither relevant nor material to the state's case and that any probative value was far outweighed by the potential for unfair prejudice.

A. Relevancy and materiality

A district court should look to the real purpose for which *Spreigl* evidence is offered and ensure that that purpose is one of the permitted exceptions to the rule's

general exclusion of other-acts evidence. *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006). "This entails isolating the consequential fact for which the evidence is offered, and then determining the relationship of the offered evidence to that fact and the relationship of the consequential fact to the disputed issues in the case." *Id.* The district court determined that the 2005 incident was admissible to prove identity and a common scheme or plan. *Spreigl* evidence pertaining to a common scheme or plan may be admissible to establish that a sexual act occurred or to refute the defendant's contention that the victim's testimony was a fabrication or a mistake in perception. *Id.* at 688; *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007); *State v. Wermerskirchen*, 497 N.W.2d 235, 240–41 (Minn. 1993); *see also State v. Rucker*, 752 N.W.2d 538, 550 (Minn. App. 2008) (upholding the admission of *Spreigl* evidence to rebut the defendant's charge that a witness's testimony was fabricated), *review denied* (Minn. Sept. 23, 2008).

We conclude that the 2005 incident was relevant to rebut the assertion that D.W. and W.M. fabricated the charges against appellant. At trial, appellant contended that D.W.'s testimony about the sexual contact in his vehicle was a fabrication. According to appellant, he had consensual sexual contact with W.M., and D.W. and W.M. wanted to get him in trouble. Cross-examination of D.W. and W.M. implied that the girls fabricated the charges against appellant because appellant never paid them $200. W.M. admitted that she asked D.W. to "hang out" with appellant because they needed the money, and D.W. testified that they planned on splitting the money. W.M. also admitted that she told the county attorney's office that she spoke with Trey after his encounter with D.W. "to try and set him up." And while there was DNA evidence on D.W.'s clothes

consistent with her description of the sexual contact, there was at least one insinuation that D.W. and W.M. shared clothes. Without knowledge of the 2005 incident, but with the allegation of fabrication, the jury may have been in a position to consider whether D.W. participated in the encounter with appellant without the alleged sexual contact necessary for a conviction, but later lied about what had occurred because she was never paid. Thus, the evidence of the prior act was relevant to rebut appellant's assertion that the girls' testimonies were fabricated and to bolster their credibility.

B. Marked Similarity

"The use of *Spreigl* evidence to show a common scheme or plan has been endorsed repeatedly, despite the particular risk it poses for unfair prejudice." *Ness*, 707 N.W.2d at 687. "[I]n determining whether a bad act is admissible under the common scheme or plan exception, it must have a marked similarity in modus operandi to the charged offense." *Id.* at 688. "[T]he 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 and the lesser the likelihood that the evidence will be used for an improper purpose." *Id.*

In support of his claim that the district court erred in admitting *Spreigl* evidence relating to the sexual act with S.F., appellant relies, in part, upon *Clark*, 738 N.W.2d at 316. In *Clark*, the defendant requested drugs and money from a male victim at gunpoint, and later murdered him and raped and attempted to murder this victim's girlfriend. 738 N.W.2d at 322–23. At trial, the state read a transcript into the record as *Spreigl* evidence that the defendant admitted to, 12 years earlier, entering the bedroom of a female victim

in her Minneapolis home, showing her a gun, causing her to fear that he might hurt her, and attempting to penetrate her with his penis. *Id.* at 345–46. While acknowledging that the issue was close, the supreme court held that the defendant's prior act was not markedly similar to the charged offense. *Id.* at 346–47. The court explained that the defendant's past misconduct was remote in time and that, other than the facts that a gun was utilized to threaten female victims in their rooms and involved vaginal penetration or attempted vaginal penetration, there were no details "tending to establish a more distinctive modus operandi." *Id.* at 347–48.

In contrast to *Clark*, the current crime and the 2005 incident share numerous similarities of a distinctive character. Both instances, separated by a period of approximately two years, involved unwelcome sexual advances inside appellant's vehicle with teenage women whom he had only recently met and invited into his vehicle without explicit sexual pretense. Each involved appellant drinking alcohol in his vehicle and offering alcohol to his victims, driving his vehicle to a relatively secluded location in Minneapolis later in the day and refusing to take the victims home, and each involved appellant's empty promise to pay his victims in connection with the encounters. The fact that there were differences between the incidents does not necessarily render *Spreigl* evidence inadmissible. There is no requirement that *Spreigl* evidence be identical in every way to the charged crime—rather, there must be a marked similarity to the charged offense. *Ness*, 707 N.W.2d at 688. We conclude that the 2005 incident was markedly similar to the charged crime.

C. Prejudice

We further conclude that the probative value of the *Spreigl* evidence was not outweighed by its potential for unfair prejudice. Courts must balance the probative value of relevant *Spreigl* evidence against the concern that such evidence might be used to suggest that the defendant has a propensity to commit the crime or is a proper candidate for punishment for past acts. *State v. Wright*, 719 N.W.2d 910, 918 (Minn. 2006). As set forth above, in light of appellant's claims that D.W. and W.M. were fabricating the charges against him, the *Spreigl* evidence, which was indicative of markedly similar modus operandi, was highly probative. We conclude that admission of the *Spreigl* evidence was not unduly prejudicial or that such prejudice was outweighed by its probative value. The district court properly gave a cautionary instruction prior to the admission of the evidence and at the end of trial.

Appellant also argues that the district court erred by admitting evidence of the 2005 incident, which was charged in part as criminal sexual conduct in the third degree, because this charge was dismissed as part of his plea agreement with the state. He argues that his plea to a lesser offense arising out of the 2005 incident precludes the introduction of accusations of more serious conduct from the same incident as *Spreigl* evidence. Appellant relies upon the holding of *State v. Wakefield*, 278 N.W.2d 307, 309 (Minn. 1979), for the maxim that acquitted conduct is not admissible as *Spreigl* evidence, and Minn. Stat. § 609.035, subd. 1 (2004), which provides that when "a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a

bar to prosecution for any other of them." Without specific citation, appellant argues that the resolution of the criminal proceedings arising out of the sexual assault against S.F. operated as a de facto admission by the state that he would have been acquitted of the charge of third-degree criminal sexual conduct.

Appellant concedes, however, that the supreme court has explicitly refused to extend *Wakefield* to cases in which "the defendant was not prosecuted or for which the defendant was prosecuted but the prosec[u]tion dismissed." *State v. Kasper*, 409 N.W.2d 846, 847 (Minn. 1987). We find no principled basis upon which to apply section 609.035, subdivision 1, to the admission of *Spreigl* evidence of conduct that resulted in a plea bargain to a lesser charge. The *Spreigl* evidence at issue does not implicate "proof that a defendant committed a specific crime which a jury . . . has concluded he did not commit." *Wakefield*, 278 N.W.2d at 309 (quoting *Wingate v. Wainwright*, 464 F.2d 209, 215 (5th Cir. 1972)).

Under these circumstances, admission of the *Spreigl* evidence to show common scheme or plan was not erroneous.[1] The probative value of such evidence outweighed its prejudicial effect, and the district court did not err in allowing S.F. and the investigating officer to testify about the 2005 incident, even if this evidence was supportive of a more serious charge than that to which appellant pleaded guilty.

[1] In light of our conclusion that the *Spreigl* evidence was properly admitted to show a common scheme or plan and rebut appellant's assertion that the girls fabricated their story, we need not address appellant's argument that the 2005 incident was not relevant to the issue of identity.

II.

Appellant also argues that the district court erred by denying his motions for a mistrial after three prosecution witnesses testified about other prior bad acts and his history of incarceration. We review the denial of a motion for a mistrial for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). The district court should deny a mistrial motion unless there is a reasonable probability that the outcome of the trial would be different had the event prompting the motion not occurred. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006).

A. D.W.'s Reference to Appellant Purchasing Marijuana

Appellant argues that he was prejudiced by D.W.'s response to an inquiry on cross-examination asking what she knew about Trey and L.J.'s relationship. D.W. testified that L.J. informed her that Trey bought "weed" for L.J. and that L.J. smoked it while she and Trey talked. D.W. explained that this was why she and W.M. did not think anything would go wrong when they arranged to meet Trey.

While the reference to appellant purchasing marijuana for a minor female constitutes a prior bad act implicating his character, appellant's trial attorney elicited this particular testimony while discussing a subject relevant to the alleged crime, namely, the circumstances under which W.M. and D.W. agreed to meet with Trey. The reference to appellant purchasing marijuana was not specifically solicited and was not referenced or insinuated in the questioning. *See State v. Harris*, 521 N.W.2d 348, 354–55 (Minn. 1994) (remanding for new trial because the prosecution's questioning sought to elicit or insinuate inadmissible and prejudicial character evidence); *State v. Hagen*, 361 N.W.2d

407, 413 (Minn. App. 1985) (noting that unintended responses under unplanned circumstances ordinarily do not require a new trial), *review denied* (Minn. Apr. 18, 1985). Further, the district court ordered the jury to disregard this testimony and struck it from the record after denying appellant's motion for a mistrial. Thus, appellant was not prejudiced by this testimony, and the district court did not abuse its discretion by denying his motion on this basis.

B. References to Appellant's Prior Incarcerations

Appellant argues that the district court erred in denying his motion for a mistrial on the grounds that he was unduly prejudiced by the inadmissible references made by law enforcement about his prior incarcerations. References to the prior incarceration of a defendant can be unfairly prejudicial. *Manthey*, 711 N.W.2d at 506. The supreme court has "not enunciated a general rule that it is prejudicial for the jury to learn that a defendant is in jail for the crime for which he or she is on trial." *Id.*

Appellant asserts that Sergeant Riemenschneider implied that appellant had been in police custody by testifying that lineups can involve using pictures of individuals who have been previously arrested and have a booking photograph in the system. Appellant objected and the district court instructed the state to ask a different question. The prosecutor then asked if Sergeant Riemenschneider had a photograph of appellant when compiling the lineup. Sergeant Riemenschneider stated that she did, and that she also had a physical description provided by D.W.

Sergeant Riemenschneider also testified that, prior to interviewing appellant, she obtained a search warrant to get a known DNA sample by presenting a statement of

probable cause to the judge. Over appellant's objection, she explained that, "[o]nce the person in question is in custody, after we question them, we execute the search warrant and then we ask them if they want a buccal swab or a blood." The district court noted that this testimony made no specific reference to appellant's arrest record and that appellant declined an offer for a curative instruction on both instances. We also note that the explanation was relevant to explaining to the jury the circumstances under which law enforcement obtained the "cold hit" identifying appellant as a suspect in the case.

We agree that the objected-to statements implicitly referenced prior occasions on which appellant was incarcerated or arrested, but there was no specific reference to appellant's incarceration or arrest. The testimony appeared to be inadvertent and somewhat vague, and was not emphasized or again referred to during trial. *See State v. Haglund*, 267 N.W.2d 503, 505–06 (Minn. 1978) (affirming denial of motion for new trial where indirect reference to the defendant's prior imprisonment was passing and inadvertent, and other evidence overwhelmingly pointed to guilt); *State v. Anderson*, 391 N.W.2d 527, 532 (Minn. App. 1986) (concluding that references to custody of defendant were not reversible error because they were not emphasized, were inadvertent, and the trial court offered corrective instructions). Where "a reference to a defendant's prior record is of a 'passing nature,' or where evidence of guilt is 'overwhelming,' a new trial is not warranted because it is extremely unlikely that the evidence in question played a significant role in persuading the jury to convict." *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (quotation omitted). Again, we conclude that the district court did not abuse its discretion by denying appellant's motion for a new trial. The evidence in

support of appellant's guilt was strong, given the physical evidence and D.W.'s testimony, and there is no indication that this testimony played a significant role in the guilty verdict.

Finally, appellant argues that he was prejudiced when the police officer who investigated the 2005 incident stated on direct examination that she asked appellant if he understood that he was arrested "in this particular case for PC, probable cause." Appellant's trial attorney objected, and the district court instructed the jury to disregard any testimony about anyone being arrested. The inquiry which brought about the statement at issue was inappropriate because the jury already had information pertaining to the circumstances under which S.F. and appellant ended up at the hospital.

However, an intentional elicitation of impermissible testimony, although erroneous, will warrant reversal only when it is likely that the impermissible testimony substantially affected the jury's decision. *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695–96 (1974). On this record, where evidence of appellant's guilt was strong, we conclude that it was very unlikely that any passing, though erroneous, references to the prior incarcerations of appellant substantially impacted the jury's verdict.

C. Cumulative Error

Appellant also asserts that repeated references to prior criminal behavior constituted cumulative error. "Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operates to the defendant's prejudice . . . ." *State v. Johnson*, 441 N.W.2d 460, 466

(Minn. 1989) (quotation omitted). When the evidence against a defendant is very strong and the errors did not affect the jurors' deliberations or their assumptions about the defendant's innocence or guilt, the cumulative effect of the errors does not prejudice the defendant. *State v. Erickson*, 610 N.W.2d 335, 340–41 (Minn. 2000).

Again, the strength of the state's case supports the conclusion that cumulative errors, if any, were not prejudicial. The reference to the purchase of marijuana was not elicited by the prosecutor and was in response to a question calling for relevant evidence posed by appellant's attorney. The testimony from the investigating police officers regarding appellant's prior incarcerations, while erroneous, was not elaborated upon, was immediately followed by either a corrective jury instruction or an offer for such instruction, and constituted a small portion of an otherwise extensive trial transcript containing strong evidence of guilt. Based upon our review of the record as a whole, any errors did not, even cumulatively, prejudice appellant.[2]

Affirmed.

[2] Appellant submitted a pro se supplemental brief merely stating that he does not waive any federal or constitutional issues not raised by his attorney. He does not present any substantive legal arguments or cite any supporting legal authority. Thus, we decline to address it. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002).