STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1532

State of Minnesota,
Respondent,

vs.

Charlie Lewis,
Appellant.

Filed July 8, 2013
Affirmed
Smith, Judge

Hennepin County District Court
File No. 27-CR-10-7607

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

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

David Merchant, Chief Appellate Public Defender, St. Paul, Minnesota; and

Melissa Sheridan, Assistant State Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Smith, Judge.

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

SMITH, Judge

In this appeal from a conviction of first-degree criminal sexual conduct, appellant argues that the district court abused its discretion by admitting prior bad act, or so-called

Spreigl evidence, regarding a sexual assault charge against appellant three years earlier. In his pro se supplemental brief, appellant alleges a litany of reversible errors committed by the district court, ranging from evidentiary rulings to ineffective assistance of counsel. Because the district court did not abuse its discretion by admitting the *Spreigl* evidence, and because the record does not support appellant's pro se arguments, we affirm.

FACTS

On July 22, 2004, M.L. left her St. Paul apartment to go for a bike ride. Since the early 2000s, M.L. had experienced mental health issues causing her to hear voices. On that date, she noted that "voices [were telling her] to get out of the house and get into the street." Although prescribed Zyprexa and Risperidone to treat her mental health symptoms, M.L. had not been taking her medications for "a couple days."

After arriving at a Minneapolis park, M.L. decided to rest on a park bench. Once seated, she recalled that,

> [a] black man approached [her] and he said, what is your name? I said, my name is [M.L.] He told me to lick his dick . . . And so he put his hand on my head and pushed me to lick his dick. And then . . . he just threw a punch at me and I fell down to the ground. He took my clothes off and raped me.

M.L. alleged that the man took off her pants, removed her shoes, punched her in the eye, and then vaginally penetrated her without a condom. After the attack, M.L. ran into a nearby street. She was nude from the waist down and not wearing shoes. A car stopped and, after M.L. insisted that she did not want to go to a hospital, took her to a Plymouth police precinct. Investigators at the scene of the alleged attack discovered M.L.'s pants, shoes, underwear, and a bag containing her identification.

Despite initial reluctance, M.L. consented to a sexual-assault examination. M.L. provided a narrative version of the attack and noted that the assailant had "started by kissing her" and "told [her] that he loved [her] and wanted to be with [her]." M.L. indicated she was unfamiliar with the assailant. She described him as tall with a medium build, short curly hair, and indicated that he wore glasses.[1] The sexual-assault examination revealed vaginal tearing and exterior abrasions consistent with a sexual assault. The nurse also collected DNA samples.[2] Thereafter, the case apparently went cold.

In 2009, as part of a cold-case initiative, the Hennepin County Sheriff's Office (HCSO) reopened the 2004 assault case and compared the DNA of M.L.'s sexual-assault examination against a DNA database. The comparison matched the DNA between M.L.'s assailant and appellant Charles Lewis. Investigators obtained a new DNA sample from Lewis, which verified the match. On February 19, 2010, the Hennepin County Attorney's Office charged Lewis with two counts of first-degree criminal sexual assault. Lewis was also notified that, if convicted, the state intended to seek an upward departure due to M.L.'s vulnerability and because the attack allegedly included multiple penetrations.

Lewis moved to suppress the DNA evidence, arguing that it was unreliable and that in its absence the state's criminal complaint would fail. Lewis suggested that M.L.'s

[1] At trial, M.L. testified that the assailant was "20 feet tall." When the state attempted to clarify the remark, M.L. indicated that the assailant appeared that tall to her.

[2] The nurse indicated that she did not collect oral samples due to the initial delay in examining M.L.

listed date of birth was inconsistent, contending that three different individuals could have provided the alleged victim's DNA sample. Lewis argued that failing to suppress the evidence would violate his Sixth Amendment right of confrontation because the true identity of the victim was unknown. As a result, Lewis argued that the district court must dismiss the complaint because, without the DNA sample, the state lacked the probable cause to support his arrest. The district court denied Lewis's motion. The district court concluded that the inconsistencies regarding M.L.'s date of birth stemmed from a typographical error combined with the fact that M.L. spoke with an accent and was interviewed close in time to the alleged 2004 assault.

On September 3, 2010, the state notified Lewis of its intent to introduce *Spreigl* evidence at trial.[3] The state sought to introduce evidence that on or about October 2, 2007, Lewis allegedly committed first degree sexual assault against another individual. The state argued that the 2007 incident demonstrated a common scheme that corroborated the facts of the 2004 rape. Lewis contended that the evidence was inadmissible prior act evidence, arguing that it was irrelevant and prejudicial. The district court ultimately concluded that:

> Any time you leave in Spreigl evidence, I think, there is a tendency to have prejudice against the defendant, and I think that the writers who wrote the decision in the Spreigl case and their offspring subsequent, I think, realized that. I'm going [to] let it in. I think it shows common plan, scheme, purpose. I certainly will give the jury a cautionary instruction on that.

[3] *See State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965).

On September 12, 2011, the district court granted Lewis's motion to produce M.L.'s psychological records. The district court concluded that, due to M.L.'s mental health, her recollection of events could be subject to distortion and therefore impeachable. Lewis was granted access to these records to ensure a fair trial.

Trial commenced on March 19, 2012. The state's case included the testimony of M.L. and the victim of the 2007 *Spreigl* assault. Before questioning the 2007 victim, the district court informed the jury that it could not use the 2007 incident to convict Lewis of the 2004 assault. Lewis's sole witness was a DNA expert who generally explained DNA evidence and specifically questioned the validity of the DNA samples due to M.L.'s inconsistently listed date of birth.

Before closing arguments, the district court reiterated the limited purpose of the 2007 sexual assault:

> Now, the State has introduced evidence of an occurrence on October 2, 2007. As I told you at the time this evidence was offered, it was admitted for the limited purpose of assisting you in determining whether the defendant committed those acts with which defendant is charged in the complaint. This evidence is not to be used of proof of character of the defendant or that defendant acted in conformity with such character. The defendant is not being tried for and may not be convicted of any offense other than that charged offense. You are not to convict the defendant on the basis of any occurrence on October 2, 2007. To do so might result[] in unjust double punishment.

The state reiterated this instruction during its closing argument, informing the jury that it should "consider [the 2007 rape] because it is evidence of [Lewis's] MO, his modus operandi, his plan, his course of conduct. Not character evidence, but course of conduct

evidence." The jury found Lewis guilty of one count of first-degree criminal sexual conduct.

Following the verdict, the district court presented the jury with six questions intended to aid the district court at sentencing. The jury returned an affirmative response to five of the six questions. The affirmative responses determined that Lewis engaged in vaginal and oral penetration of M.L., that M.L. suffered from a mental illness and experienced auditory hallucinations, and that her mental illness inhibited her cognitive ability. However, the jury remained deadlocked on whether Lewis knew or should have known that M.L. was suffering from a mental illness at the time of the attack. Based on the jury's determination that multiple forms of penetration occurred, the district court departed upward and sentenced Lewis to 240 months' imprisonment, followed by five years of supervised release. This appeal followed.

D E C I S I O N

We first address Lewis's *Spreigl* assertion that the district court abused its discretion by admitting evidence relating to the 2007 rape as demonstrating a common scheme or plan and concluding that it was not prejudicial character evidence. We then discuss the arguments raised in Lewis's pro se brief.

I.

"The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42,

45-46 (Minn. 1997) (quotation omitted). In the absence of arbitrary or capricious reasoning, we are bound by the district court's determination. *Id.* at 46.

We review the admission of evidence of other crimes or bad acts, so called *Spreigl* evidence, for an abuse of discretion. *State v. Clark*, 738 N.W.2d 316, 345 (Minn. 2007). *Spreigl* evidence is not admissible to prove that a defendant acted in conformity with his character. Minn. R. Evid. 404(b); *Spreigl*, 272 Minn. at 490, 139 N.W.2d at 169. "The overarching concern behind excluding such evidence is that it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts." *State v. Fardan*, 773 N.W.2d 303, 315 (Minn. 2009) (quotations omitted). However, the evidence may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, *plan*, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b) (emphasis added).

Minnesota courts utilize a five-part test to determine whether *Spriegl* evidence is admissible:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ness, 707 N.W2d 676, 685-86 (Minn. 2006). If evidence is erroneously admitted, we must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *Fardan*, 773 N.W.2d at 320. If such

a possibility exists, then the error is prejudicial and a new trial required. *State v. Rucker*, 752 N.W.2d 538, 549 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). Lewis challenges only the final two *Ness* factors. We address each one in turn.

A. Relevance

A district court should not "simply take the prosecution's stated purpose for the admission of other-acts evidence at face value" but "must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *Ness*, 707 N.W.2d at 686 (quotation omitted). Lewis asserts that the 2007 rape was irrelevant to the state's case.

"In criminal sexual conduct cases, prior sexual conduct convictions are often probative where the defendant disputes that the sexual conduct occurred or where the defendant asserts the victim is fabricating the allegations." *State v. Duncan*, 608 N.W.2d 551, 557 (Minn. App. 2000) (citing *State v. Wermerskirchen*, 497 N.W.2d 235, 241-42 (Minn. 1993)), *review denied* (Minn. May 16, 2000).[4] Upon disputing the veracity of the victim's allegations, the "prior convictions are relevant to show a common plan or scheme on the part of the defendant." *Duncan*, 608 N.W.2d at 557.

Lewis disputed the veracity of M.L.'s allegations of sexual assault and, in so doing, elevated the relevance of the 2007 incident. In both his response to the state's motion to introduce *Spreigl* evidence and in his discovery motion for M.L.'s psychological records, Lewis contended that M.L.'s mental illness may have affected her

[4] Lewis is not challenging the *Ness* prong that other-act evidence must be proven by clear and convincing evidence. Even though *Duncan* references past sexual assault convictions, it appears undisputed that the parties accept that clear and convincing evidence existed that Lewis committed the 2007 assault.

recollection. In granting Lewis's motion to discover M.L.'s psychological records, the district court specifically noted that Lewis made a "plausible showing" that the records were vital to Lewis's defense and that M.L.'s "perceptions of the evening and recollections of the incident may not be accurate." This is precisely the type of argument that triggers the relevance of past sexual assaults in a *Spreigl* analysis. *See id.*

B. Permissible Use

Although the 2007 occurrence was relevant based on Lewis's defense, it still must qualify as a permissible use of past-conduct evidence. *See* Minn. R. Evid. 404(b) (identifying motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident as relevant and admissible character evidence stemming from prior actions). In weighing the admissibility of the 2007 rape, the district court's only explanation was "I'm going [to] let it in. I think it shows common plan, scheme, purpose."

To establish a common scheme or plan, the prior act must "have a marked similarity in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688 (quotation omitted). The state urges that the 2004 and 2007 incidents establish a common scheme or plan because they bore significant similarities. Namely, the state posits that (1) the occurrences were three years apart, establishing a "close in time" connection; (2) both instances occurred in north Minneapolis; (3) both victims were in their twenties and were relative strangers to Lewis; (4) both victims were in vulnerable positions; (5) Lewis attempted to befriend each victim, became upset when they denied

his advances, and then hit the victims on their heads; and finally (7) Lewis vaginally penetrated each victim without wearing a condom after removing their clothing.[5]

Given the deferential standard of review, we cannot conclude that the district court abused its discretion when it determined that the similarities of the 2004 and 2007 sexual assaults bore sufficient similarities to establish a common scheme. Lewis, by questioning the recollections of M.L., established the relevance of the 2007 incident and the district court accepted the proposed similarities as establishing a common scheme or plan. We do not find such reasoning arbitrary or capricious and are bound by the district court's conclusion that the evidence was admissible. *See Kroning*, 567 N.W.2d at 46. Because we conclude that the district court did not err by admitting the *Spreigl* evidence, we need not address whether the evidence was prejudicial. *See Fardan*, 773 N.W.2d at 320; *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995) (holding that despite dissimilar nature of the *Spreigl* act, defendant could not demonstrate prejudice to warrant a new trial).

II.

In his pro se supplemental brief, Lewis raises a number of additional arguments, which he contends warrant reversal. As a threshold matter, the state contends that, because Lewis does not link his arguments to legal authority, we should decline to review his challenges. However, we traditionally extend some latitude to pro se litigants. *Liptak v. State ex rel. City of New Hope*, 340 N.W.2d 366, 367 (Minn. App. 1983). The state also overstates our standard for reviewing arguments not connected to legal authority.

[5] The victim of the 2007 rape was an individual whom Lewis befriended outside of a homeless shelter and invited to live with him. He attacked her the first night after she had moved in.

We will decline appellate review when an issue is raised without citation to legal authority *or* a logical argument connected to a possible remedy. *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006), *aff'd*, 728 N.W.2d 243 (Minn. 2007). Because Lewis logically connects his arguments to potential remedies, we review his asserted errors.

First, Lewis contends that the district court erred by denying his motion to exclude the DNA evidence due to the inconsistencies in M.L.'s listed date of birth. Lewis suggests that the district court should have excluded the evidence or required that M.L. submit to DNA testing to verify she was the actual victim of the alleged assault. Probable cause exists to believe a person is guilty of the crime charged if "facts have been submitted to the district court showing a reasonable probability that the person committed the crime." *State v. Lopez*, 778 N.W.2d 700, 703 (Minn. 2010). We review factual findings underlying a probable cause determination using a clear error standard, but review de novo the district court's application of the legal standard to those facts to establish probable cause de novo. *Id.*

The district court determined that the date of birth discrepancy stemmed from a typographical error, combined with the closeness of M.L.'s injury to the trauma of the attack. The district court also reasoned that M.L.'s accent exacerbated the likelihood of a transcription error. Such a conclusion was well within the district court's discretion. *See Kroning*, 567 N.W.2d at 45-46. Regarding probable cause, the district court considered the facts submitted and noted that DNA evidence directly linked Lewis to the crime and that Lewis matched the physical description provided by the victim. The district court's

conclusion that this evidence gave rise to a probability that Lewis was guilty of the alleged offense was sound.

Next, Lewis alleges that he did not receive notice that the state would seek an upward departure. The record does not support Lewis's contention. The state filed notice of its intent on August 26, 2011, and explained that it sought an upward departure due to the vulnerable nature of the victim and the alleged multiple penetrations of the attack. Even if Lewis did not receive or carefully review this notice, he explicitly acknowledged the state's request to seek an upward departure on the record through his own attorney:

> Q: Mr. Lewis, you and I talked about this case many, many times; correct?
>
> A: Yes.
>
> Q: And I've advised you that the State is seeking what's called an upward departure in this case, if you were to be convicted?
>
> A: Yes.
>
> Q: And it's your wish to still proceed and go with the jury trial?
>
> A: Yes.

Lewis's argument that he was uninformed of the potential upward departure is unavailing and unsupported. Therefore, he is not entitled to relief on this ground.

Third, Lewis contends that he never received various documents during the discovery process and that the absence of these documents prevented him from adequately preparing his defense. The record does not support Lewis's assertions. Lewis asserted this argument at the district court level, which prompted the state to provide a

detailed outline of disclosures and documents. The state, Lewis's defense counsel, and the district court undertook a concerted effort to ensure that Lewis received all documents. However, the district court cautioned Lewis that he could only request and receive documents that actually existed. Without a more detailed explanation of the documents that Lewis now contends were unavailable, the record does not support his argument that discovery was flawed.

Fourth, Lewis argues that the district court improperly calculated his criminal history score by including two felony convictions from 1988 and 1996 in his sentencing calculation. At sentencing, the state requested 240 months' imprisonment based on "[t]he presumptive guidelines sentence [of] 146 with a range of 141 to 151. [The probation officer] calculated 5.5 points, which would be rounded down to 5, that creates the presumptive sentence so this is less than a double departure." Lewis contends that, because his criminal history score should have only been 3, the applicable guidelines range should be lower.

Prior felony convictions are included in calculating an offender's criminal history score for a period of fifteen years following the date of discharge or expiration of the previous conviction and the date of the charged offense. Minn. Sent. Guidelines 2.B.(1)(f) (2011). Based on the limited documents available to review Lewis's claim, it appears that his 1988 felony conviction discharged on February 13, 1998, and his 1996 conviction discharged on September 23, 2000. Both discharge dates fall within the 15 year timeframe of the 2004 offense. Therefore, Lewis's argument fails.

Finally, Lewis argues that he received ineffective assistance of counsel. At the district court level, Lewis suggested that his attorneys were "helping the State," came to court unprepared, did not interview specific witnesses, failed to file particular motions or raise certain objections, and failed to question witnesses in the way he specified. Most troubling is Lewis's assertion that his attorneys did not allow him to testify on his own behalf.

A claim of ineffective assistance of counsel involves mixed questions of fact and law, which we review de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his or her counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984). The defendant must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). Matters of trial strategy presumptively fall within the discretion of trial counsel and will not be second-guessed on appeal. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). Allegations for post-conviction relief must be "more than argumentative assertions without factual support." *Boitnott v. State*, 631 N.W.2d 362, 370-71 (Minn. 2001) (quotation omitted).

Lewis's claims that his counsel was unprepared, inexperienced, did not pursue the correct course of investigation, and did not call the correct witnesses are all claims not fit for appellate review. Tactical decisions to not pursue a particular theory of defense do

not constitute ineffective assistance of counsel. *See Leake*, 737 N.W.2d at 536*; State v. Grover*, 402 N.W.2d 163, 166 (Minn. App. 1987) (what, and how much, investigation to pursue is often a strategic decision and, so long as reasonable, does not constitute ineffective assistance); *see also Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008) (stating that trial strategy includes thoroughness of counsel's investigation). Absent Lewis's assertions, he provides no evidence or transcript references to establish that his attorney's conduct fell below that of reasonable assistance. *Gail*, 732 N.W.2d at 248. As a result, Lewis's allegations of unpreparedness and inexperience "do not reach the level of proof necessary to show ineffective assistance of counsel" and rest on mere assertions. *State v. Bock*, 490 N.W.2d 116, 123 (Minn. App. 1992), *review denied* (Minn. Aug. 27, 1992). Accordingly, Lewis is not entitled to relief on this ground.

Lewis's claim that his attorney prevented him from testifying on his own behalf is unsupported by the record. It is clear that a defendant's attorney cannot waive the defendant's right to testify, but a defendant is able to do so as long as the waiver is knowing and voluntary. *State v. Walen*, 563 N.W.2d 742, 751 (Minn. 1997). A review of the transcripts from Lewis's proceedings demonstrates that Lewis affirmatively waived his right to testify in open court. Lewis's attorney specifically inquired whether he was aware that he had a right to testify and the district court received Lewis's affirmation that he knew of this right and was choosing to not utilize it. As a result, Lewis knowingly and voluntarily waived his right to testify.

Affirmed.