STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1888

State of Minnesota,
Respondent,

vs.

Mike Cordale Henderson,
Appellant.

Filed October 28, 2013
Affirmed in part, reversed in part, and remanded
Smith, Judge

Hennepin County District Court
File No. 27-CR-08-50567

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

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

David Merchant, Chief Appellate Public Defender, Davi Axelson, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Worke, Judge; and Smith, Judge.

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

SMITH, Judge

We affirm appellant's convictions and sentences for first-degree criminal sexual conduct and kidnapping, rejecting the arguments that (1) the evidence was not sufficient to support the kidnapping (release in an unsafe place) conviction, (2) the prosecutor engaged in misconduct, and (3) the district court erred by admitting *Spreigl* evidence. We reverse the adjudication for third-degree criminal sexual conduct because it is a lesser-included offense of first-degree criminal sexual conduct, and remand to the district court.

FACTS

Fifty-two-year-old J.I. was homeless and staying at a shelter in Minneapolis on May 12, 2007. After lunch she purchased a half pint of vodka and walked to a park where she drank the vodka and fell asleep on a bench near a bus stop. She was awakened several hours later by the presence of a man standing over her and staring at her. It was dark, and J.I. was not wearing her glasses. J.I. could only provide a general description of the man's appearance—a tall, dark black male, who appeared dirty and was wearing dirty clothing.[1] The man, who was later identified as appellant Mike Cordale Henderson, asked her if she wanted to get high. She said no and started to walk away, but he dragged her by her hair deeper into the park toward a brick wall. She tried to fight, but he knocked her to the ground, removed her clothes, forcibly penetrated her vagina with his

[1] At trial J.I. could not identify Henderson, but she recognized his voice. Henderson represented himself at trial, and J.I. recognized Henderson's "harsh" voice.

penis, forced her to perform fellatio, and threatened to kill her if she bit him. When he finished, he told her to get dressed and left her alone in the park.

After J.I. dressed, she walked toward the street and flagged down police, who transported her to HCMC. At this point it was 2:30 a.m. on May 13. The officers described J.I. as a little intoxicated and a little distraught but still able to describe the man who raped her as a tall black male with dark clothing, recounting that he grabbed her hair, dragged her to a brick wall, forced her to suck his penis, forced his penis into her vagina, and ejaculated. Although J.I. was initially confused about the location of the park, the officers determined that it was Franklin Steele Park. A nurse examined J.I. and obtained secretion samples and blood samples from her for later DNA analysis. Neither the nurse nor the officers observed that J.I. had any signs of physical injury or trauma.

Sometime after the incident J.I. moved to Chicago, and the police lost track of her. Over a year later, on July 3, 2008, the BCA conducted serological testing of the samples and noted the presence of semen, from which a DNA profile was obtained. A random DNA database check revealed a match between Henderson's DNA and the DNA in the semen sample obtained from J.I. The police obtained a search warrant for a DNA buccal cell saliva sample from Henderson for further comparison. The DNA in the semen sample obtained from J.I. was determined to match Henderson's DNA profile and would not be expected to occur more than once among unrelated individuals in the world population.

After learning of the match, police located J.I. in Chicago and told her that they thought they had identified the man who raped her. J.I. reacted strongly to this news. At

Henderson's trial, J.I. testified that she was shocked and scared due to the police locating Henderson and related that she had been having nightmares. The jury found Henderson guilty of first-degree criminal sexual conduct, kidnapping, and third-degree criminal sexual conduct, a lesser-included offense. The district court imposed consecutive sentences of 57 months for third-degree criminal sexual conduct, 57 months for kidnapping, and 172 months for the first-degree criminal sexual conduct, for a total sentence of 286 months in prison.

D E C I S I O N

Henderson raises several issues on appeal, arguing that (1) he should not receive a separate conviction and consecutive sentence for kidnapping involving unsafe release; (2) his convictions must be reversed because the prosecutor engaged in misconduct in opening statement and closing argument; (3) his conviction should be reversed because it was prejudicial error to admit *Spreigl* evidence, including the fact that he was convicted of the *Spreigl* incident; and (4) he cannot receive a separate conviction and sentence for first- and third-degree criminal sexual conduct. Henderson also filed a pro se supplemental brief raising several issues. We address each issue in turn.

I.

Minnesota law permits multiple convictions and sentences for kidnapping and criminal sexual conduct committed with force and violence. Minn. Stat. §§ 609.035, subd. 6, .251 (2012); *State v. Smith*, 669 N.W.2d 19, 31 (Minn. 2003), *overruled on other grounds by State v. Leake*, 699 N.W.2d 312 (Minn. 2005). But to be convicted of and sentenced for both kidnapping and the crime facilitated by the kidnapping, the

"confinement or removal must be criminally significant in the sense of being more than merely incidental to the underlying crime." *Smith*, 669 N.W.2d at 32. A defendant is guilty of kidnapping if, for the purpose of facilitating the commission of any felony, he "confines or removes from one place to another, any person without the person's consent." Minn. Stat. § 609.25, subd. 1(2) (2012). "[W]here the confinement or removal is completely incidental to the perpetration of a separate felony, it does not constitute kidnapping." *Smith*, 669 N.W.2d at 32. In order to determine whether the kidnapping was completely incidental to the facilitated crime, we review the evidence in the light most favorable to the verdict and assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *See State v. Huss*, 506 N.W.2d 290, 292 (Minn. 1993).

Henderson argues that his case is identical to *Smith* and *State v. Welch*, 675 N.W.2d 615 (Minn. 2004), two cases in which the supreme court held that the kidnapping was completely incidental to the facilitated crime. In *Smith*, the court held that the momentary blocking of a doorway was completely incidental to a murder. 669 N.W.2d at 32-33. In *Welch*, the court held that "the confinement that form[ed] the basis of the kidnapping [was] the very force and coercion that support[ed] the attempted second degree criminal sexual conduct conviction" where the defendant threw the victim to the ground, straddled her, and slammed her head against the sidewalk. *Id.* at 617, 620.

Henderson's case is not like *Smith* or *Welch*. J.I. was dragged by her hair from a bench to a different location in the darker part of the park before Henderson sexually assaulted her. The removal certainly facilitated the crime, but it was also more than

merely incidental to the criminal sexual conduct because Henderson could have sexually assaulted J.I. at the park bench without moving her to a different location in the park. The evidence is sufficient that the removal was more than merely incidental to the criminal sexual conduct, and Henderson can be separately convicted of and sentenced for kidnapping.

Henderson also argues that the evidence is insufficient that he left J.I. in an unsafe place. The question of whether a victim is released in an unsafe place is significant because kidnapping with unsafe release is ranked at a severity level VIII on the Minnesota Sentencing Guidelines grid, but kidnapping with safe release is ranked at a severity level VI. Minn. Sent. Guidelines IV, V (2006). The jury was given a special verdict form and asked to decide if J.I. was released in a safe place. The district court instructed the jury that "[a] victim of kidnapping is released only if released with the consent of the kidnapper. A victim who escapes is not released." The pattern jury instruction does not define "safe place." 10 *Minnesota Practice*, CRIMJIG 15.02 (2012). Nor does the statute. *See* Minn. Stat. § 609.25, subd. 2(2) (2012). The jury had a question about the definition of "safe place," and the district court told the jury that, because there is no legal definition, they should rely on their experience and common sense. Henderson did not object to the instruction. The jury found that J.I. was not released in a safe place.

In considering Henderson's argument, we view the evidence in the light most favorable to the jury's finding and determine whether the jury could reasonably have found that the victim was not released in a safe place. *Geer v. State*, 406 N.W.2d 34, 37

(Minn. App. 1987), *review denied* (Minn. July 15, 1987). Henderson relies on unpublished opinions, which are not precedential. *See* Minn. Stat. 480A.08, subd. 3 (2012).

Viewing the evidence in the light most favorable to the verdict, the jury's finding of unsafe release is reasonable. J.I. was released in a darker part of the park away from the street, it was the middle of the night, J.I. was unsure of her surroundings, and she could not call for help because she did not have her cell phone. The most persuasive evidence that the park was unsafe came from Henderson, who pointed out that this was an area frequented by drug users, robbers, prostitutes, and rapists. Because the evidence supports a finding of kidnapping with unsafe release, the 57-month sentence is not erroneous. Minn. Stat. § 609.25, subd. 2; Minn. Sent. Guidelines IV, V (2006).

Henderson also argues that even if he can receive separate sentences for kidnapping and criminal sexual conduct, he should receive concurrent sentences because the imposition of consecutive sentences unduly exaggerates the criminality of his conduct. Consecutive sentences for kidnapping and criminal sexual conduct are permissive. Minn. Stat. § 609.035, subd. 6; Minn. Sent. Guidelines II.F.2., VI (2006). Nonetheless, permissive consecutive sentences may still be reviewed for an abuse of discretion. *State v. Yang*, 774 N.W.2d 539, 563 (Minn. 2009). "The district court abuses its discretion in imposing consecutive sentences when the resulting sentence unfairly exaggerates the criminality of the defendant's conduct." *Id.* This is usually accomplished by comparing the defendant's sentence with other similarly situated defendants. *See Neal v. State*, 658 N.W.2d 536, 547-48 (Minn. 2003) (comparing

defendant's 480-month kidnapping sentence to other cases involving kidnapping and determining that the sentence was excessive and unreasonable). But Henderson does not cite any caselaw that shows his consecutive sentences for first-degree criminal sexual conduct and kidnapping to be excessive in length. Instead, he simply argues that the evidence of kidnapping "is barely sufficient" to support a separate conviction, so the consecutive sentences exaggerate the criminality of his conduct.

In light of our decision to vacate the adjudication for third-degree criminal sexual conduct as set forth below, the sentence of 172 months for first-degree criminal sexual conduct and consecutive sentence of 57 months for kidnapping, for a total sentence of 229 months, is not excessive.

II.

The prosecuting attorney began her opening statement: "A woman's worst nightmare, to be attacked in the middle of the night and raped." The prosecuting attorney repeated a similar argument in closing: "Alone at night, attacked and raped by a total stranger. [J.I.] lived that nightmare on May 13, 2007 when this defendant raped her." Henderson did not object.

We analyze unobjected-to prosecutorial misconduct under a modified plain-error analysis. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). This three-pronged analysis requires an (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. If an appellant establishes the first two prongs of the *Ramey* test, the burden shifts to the state to

establish a lack of prejudice by showing that the misconduct did not affect the outcome of the case. *Id.* This burden is met if the state can show that there is no reasonable likelihood that the misconduct had an effect on the jury's verdict. *Id.*

"A prosecutor's closing argument should be based on the evidence presented at trial and inferences reasonably drawn from that evidence." *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990). A prosecutor must avoid inflaming the jury's passions and prejudices against the defendant. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). This is particularly true in criminal sexual conduct cases. *See State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). "Generally, arguments that invite the jurors to put themselves in the shoes of the victim are considered improper." *State v. Bashire*, 606 N.W.2d 449, 454 (Minn. App. 2000) (quoting *State v. Johnson*, 324 N.W.2d 199, 202 (Minn. 1982)), *review denied* (Minn. Mar. 28, 2000).

Henderson argues that it was plain error for the prosecuting attorney to argue that rape is a woman's worst nightmare because we have previously held that such argument is improper. *See id.* at 453-54. In *Bashire*, the prosecutor argued that sexual assault "was the worst nightmare of everyone" and invited the jurors to think "[w]hat it must have been like" to be sexually assaulted "in that way." *Id.* Bashire did not object. *Id.* at 454. We noted that these comments were improper in form but not in content, and that if the prosecutor had changed a few words, such as asking the jurors to imagine what it was like for the victim, the argument would have been a proper comment on the evidence. *Id.*

Ultimately, we determined that, because the comments occurred briefly in three places, they were not unduly prejudicial. *Id.*

We are not persuaded that the prosecuting attorney's argument here was plain error. The comment in opening statement that rape is "a woman's worst nightmare" was improper in form but not content because J.I. testified that she has experienced nightmares as a result of being raped. Given the testimony, it would have been proper to argue that rape was J.I.'s nightmare. Finally, the prosecutor's closing argument that J.I. lived the nightmare of being alone at night and raped by a stranger was not improper because it was a reasonable inference from J.I.'s testimony.

Henderson alternatively argues that we should reverse his convictions under our supervisory powers because the county attorney's office is on notice that this argument is improper. But we decline to employ those powers that are reserved for the Minnesota Supreme Court. *See State v. Gilmartin*, 535 N.W.2d 650, 653 (Minn. App. 1995), *review denied* (Sept. 20, 1995). Therefore, Henderson is not entitled to relief on this ground.

III.

The state sought to introduce evidence of an attempted-criminal-sexual offense from August 20, 2007, by Henderson against A.L. to prove "intent, identity, absence of mistake or accident, and common scheme or plan." The district court allowed the state to use the August 20 incident over Henderson's objection, finding that there was clear and convincing evidence and that "it has to show either identity, intent, the absence of mistake or a common scheme or plan, and that there is, I guess, what I would view a

marked similarity and it occurred close in time." The district court gave cautionary instructions to the jury before A.L. testified and again in its final instructions to the jury.

A.L. testified that she went to the bus stop on the lower part of Portland Avenue to meet her fiancé, who was working late. A.L. testified that a tall black male wearing a plaid shirt and a hoodie and carrying a big black bag approached her at the bus stop and asked for a light. While she was looking for a lighter, he grabbed her, mumbled something about killing her if she screamed, and held a box cutter to her neck. He dragged her toward the darker part of the park, attempted to pull her pants down, threatened to kill her, and then grabbed his bag and ran away. A.L. positively identified Henderson as the person who attempted to rape her and also testified that Henderson was convicted of attempted criminal sexual conduct and kidnapping for that incident. The prosecuting attorney asked A.L. if she has nightmares, and she confirmed that she does, that she is still very much affected by what happened, that she has flashbacks and suffers from posttraumatic stress disorder, and that she won't go anywhere at night without her husband.

Evidence of a person's character is generally inadmissible to prove that the person acted in conformity with that character. Minn. R. Evid. 404(a), (b). But there are exceptions: "Evidence of another crime, wrong, or act . . . may be, however, 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). Other-crimes evidence is also known as *Spreigl* evidence. *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). To qualify for admissibility, the other-crimes evidence must

legitimately show a relevant noncharacter purpose. *State v. Smith*, 749 N.W.2d 88, 92 (Minn. App. 2008). Additionally, the state must satisfy procedural safeguards before other-crimes evidence will be admitted: (1) provide notice, (2) clearly indicate what the evidence will be offered to prove, (3) offer clear and convincing evidence that the defendant participated in the offense, (4) prove that the *Spreigl* evidence is relevant and material to the state's case, and (5) prove that the probative value of the evidence is not outweighed by its potential for unfair prejudice. Minn. R. Evid. 404(b); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). "A district court's decision to admit *Spreigl* evidence is examined for abuse of discretion and the defendant bears the burden of proving that an error occurred and that the error was prejudicial." *State v. Washington*, 693 N.W.2d 195, 200 (Minn. 2005).

Henderson first argues that the *Spreigl* evidence was irrelevant because the district court did not explain the reasons for which it was admitted. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. "The relevancy of 404(b) evidence can be assessed through an identification and analysis of the purpose for which the evidence is to be offered." *Smith*, 749 N.W.2d at 94. But a "talismanic invocation of an item from the rule 404(b) list" does not count as a demonstration of the purpose for which the evidence is offered. *Id.* Rather, a district court "must ascertain the purpose for which the evidence is truly offered." *Id.*

The state's memorandum supporting its motion identified all of the rule 404(b) purposes for admitting the August 20 incident and analyzed how it would use the incident to demonstrate a legitimate rule 404(b) purpose. *See State v. Montgomery*, 707 N.W.2d 392, 398 (Minn. App. 2005) (noting that it is not sufficient to simply recite a rule 404(b) purpose without demonstrating at least an arguably legitimate purpose).

Further, the record reflects that the district court considered the consequential fact for which the evidence was offered and determined the relationship of the evidence to the issue in dispute. *See State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006). Identity was an issue because J.I. could not visually identify Henderson, and Henderson maintained that he was not the perpetrator. The district court stated on the record that the August 20 incident was admissible because it was markedly similar and occurred close in time to the charged offense. Considering the factual similarities between the sexual assault involving J.I. and the attempted sexual assault of A.L., including the closeness in time and location between the two incidents, the August 20 incident was relevant to show a common scheme or plan and corroborated J.I.'s testimony. *See Ness*, 707 N.W.2d at 688 (discussing common scheme or plan and noting that the closer the relationship between the other act and the charged offense in terms of time, place, or modus operandi, the greater the relevance and probative value, but also requiring that there be "marked similarity"). Accordingly, the district court did not abuse its discretion in admitting the August 20 incident for a proper *Spreigl* purpose.

Alternatively, Henderson argues that, even if the August 20 incident were admissible under *Spreigl*, it was improper for the district court to permit the state to

introduce evidence that Henderson was convicted for the August 20 incident because it allowed the state to vouch for A.L.'s credibility. We agree with the basic premise that *Spreigl* evidence should be limited to exclude extraneous details to avoid the potential for unfair prejudice. *See Washington*, 693 N.W.2d at 198. But Henderson relies solely on the plain language of rule 404(b) for this argument, and we are not persuaded that introducing the August 20 incident, of which Henderson was convicted, was error.

Finally, Henderson argues that the prejudicial effect of the August 20 incident substantially outweighed any probative value. In balancing the probative value of *Spreigl* evidence against its potential for unfair prejudice, courts are to consider the need for the evidence. *Ness*, 707 N.W.2d at 690. Unlike *Ness*, where the state had a witness to the sexual abuse, *id.* at 690-91, there were no witnesses in this case. J.I. was the only person who could testify about what happened to her. Although there was DNA evidence connecting Henderson to the crime, J.I. could not visually identify Henderson, and she could not provide specific details. J.I.'s credibility was attacked during the trial, with Henderson insinuating that this was a false report of rape by a homeless person to get a place to stay for the night. Given the similarities between the August 20 incident and the charged offense, the probative value of the evidence outweighed its potential for prejudice. It was not an abuse of discretion for the district court to admit the evidence.

IV.

Minnesota's double jeopardy statute prohibits the conviction of a crime charged and a lesser-included offense or lesser degree of the same crime. Minn. Stat. § 609.04 (2012). The state does not dispute that third-degree criminal sexual conduct is a lesser-

included offense of first-degree criminal sexual conduct. We agree. Appellant cannot be convicted of both first- and third-degree criminal sexual conduct, and the adjudication of third-degree criminal sexual conduct must be vacated. Therefore, we reverse the district court's adjudication of third-degree criminal sexual conduct and remand to the district court with directions to vacate the adjudication.

V.

Henderson's pro se issues appear to be the same issues he raised at the trial: J.I. could not identify him; J.I. was intoxicated and uninjured so she is not credible; and concerns about the reliability of the DNA evidence. The district court fully considered Henderson's arguments on these issues, and we see no error. Because Henderson merely asserts error in his pro se brief without any legal authority and there is no obvious error, his arguments are waived and will not be considered on appeal. *See State v. Bartylla*, 755 N.W.2d 8, 22-23 (Minn. 2008) (stating that appellate court "will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority")

Affirmed in part, reversed in part, and remanded.