STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1528

State of Minnesota,
Respondent,

vs.

Marvin Allen Strong,
Appellant.

Filed September 1, 2009
Reversed and remanded
Hudson, Judge

Hennepin County District Court
File No. 27-CR-06-084773

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, Minneapolis, Minnesota 55487 (for respondent)

Marie L. Wolf, Interim Chief Public Defender, Michael F. Cromett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Lansing, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

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

HUDSON, Judge

Appellant Marvin Allen Strong challenges his convictions of second-degree criminal sexual conduct, arguing that the prosecutor committed reversible error by introducing and eliciting inadmissible *Spreigl* evidence, thereby depriving him of a fair trial. Because the prosecutor committed plain error, and because appellant's substantial rights were affected by the error, we reverse appellant's convictions and remand for a new trial.

FACTS

In December 2004, J.T. alleged that she was sexually abused by appellant, her mother's live-in boyfriend. Appellant was arrested and ultimately pleaded guilty to one count of second-degree criminal sexual conduct. The district court sentenced appellant to 25 years of probation with workhouse time and ordered, among other conditions, that appellant have no contact with J.T.

Around June 2005, appellant moved back in with J.T.'s mother. At the time, J.T. was in foster care, but she returned home in December 2005. J.T. reported that appellant began to sexually abuse her again shortly after she returned home. In March 2006, J.T. told her older sister, A.T., about the abuse and the two of them moved out of their mother's home. J.T. eventually moved back home when appellant left for Chicago, but two weeks later, appellant returned and J.T. reported that the sexual abuse resumed. After J.T. told a school social worker about the abuse, appellant was arrested and charged with two counts of second-degree criminal sexual conduct.

At trial, the state introduced evidence of appellant's prior conviction for criminal sexual conduct involving J.T. Additionally, the state, without objection from appellant, introduced detailed evidence of appellant's probation conditions, alleged probation violations, warrants from the alleged violations, and the circumstances of appellant's arrest. Specifically, the prosecutor: introduced appellant's felony probation agreement and predatory-offender registration packet; questioned appellant's probation officer about appellant's probation conditions and sex-offender registration requirements; elicited testimony from the probation officer that appellant allegedly violated his probation by "absconding" or leaving his approved residence without notifying probation, which caused the officer to fill out a violation report and secure a warrant for appellant's arrest; questioned the investigating officer about the circumstances of appellant's arrest, which revealed that appellant had another outstanding warrant for allegedly failing to register as a sex offender and that appellant was arrested by the Violent Criminal Apprehension Team; and questioned appellant about his probation conditions, alleged probation violations, and outstanding warrants.

J.T. testified at length about the sexual abuse. A.T. also testified at trial, stating that she did not approve of appellant living with her mother and J.T. after J.T. was released from foster care. The prosecutor asked A.T. why she felt that way, and A.T. said, "[b]ecause he abused me and my sister." Appellant objected to A.T.'s answer, but did not articulate a basis for his objection or obtain a ruling on his objection. Instead, after a discussion off the record, the prosecutor continued to question A.T., telling A.T. that she was only to testify to "what's charged as having happened to [J.T.]."

S.T., J.T.'s mother, testified about her relationship with appellant. She said that she and her daughters were afraid of appellant. Without objection, S.T. stated that she knew there was an outstanding warrant for appellant's arrest, but did not turn him in to law enforcement because he had threatened her.

Appellant testified and denied that he abused J.T. He stated that J.T., A.T., and S.T. were lying so that they could "get their family back together."

The jury found appellant guilty of both counts of second-degree criminal sexual conduct. The district court sentenced appellant to 88 months of imprisonment. This appeal follows.

D E C I S I O N

Appellant argues that it was reversible error for the prosecutor to: (1) elicit testimony from A.T. that she was also abused by appellant; (2) introduce evidence regarding appellant's probation conditions, alleged probation violations, warrants, and arrest; and (3) elicit testimony from S.T. that she did not turn appellant in because appellant had threatened her. Appellant contends that as a result of the prosecutor's misconduct, he was deprived of a fair trial.

The only objection that appellant raised at trial regarding the alleged prosecutorial misconduct was his objection to A.T.'s testimony. But appellant did not articulate a basis for his objection or obtain a ruling. The failure to obtain a definitive ruling on an objection constitutes a waiver of the objection. *See State v. Word*, 755 N.W.2d 776, 783 (Minn. App. 2008) (requiring parties to obtain "definitive ruling" on objection to preserve issue for appeal). Because appellant failed to properly object to the alleged prosecutorial

misconduct, his claims are reviewed for plain error. *See* Minn. R. Crim. P. 31.02 ("Plain errors or defects affecting substantial rights may be considered by the court . . . on appeal although they were not brought to the attention of the trial court."); *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006) (holding that claims of unobjected-to prosecutorial error are reviewed for plain error).

"The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). If the defendant makes the required showing with respect to the first two prongs, the state must prove that the error was not prejudicial by showing that the error did not affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302.

1. Plain error

Appellant asserts that the challenged evidence and testimony constitute inadmissible *Spreigl* evidence, and therefore, it was plain error for the prosecutor to introduce and elicit the evidence and testimony. We agree. Generally, evidence of other crimes or misconduct, known in Minnesota as *Spreigl* evidence, is not admissible to prove a defendant's character in order to show that the defendant acted in conformity with that character. *State v. Lynch*, 590 N.W.2d 75, 80 (Minn. 1999) (citing Minn. R. Evid. 404(b)). But *Spreigl* evidence may be admitted for the limited purposes of showing absence of mistake, intent, knowledge, common plan or scheme, and identity. *State v. Babcock*, 685 N.W.2d 36, 40 (Minn. App. 2004), *review denied* (Minn. Oct. 20, 2004); Minn. R. Evid. 404(b).

Spreigl evidence shall not be admitted unless: (1) notice is given that the state plans to use the evidence, (2) the state clearly indicates what the evidence is being offered to prove, (3) the evidence is clear and convincing evidence that the defendant participated in the other offense, (4) the other-crimes evidence is relevant and material to the state's case, and (5) the probative value of the evidence is not outweighed by the potential for unfair prejudice. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

a. A.T.'s testimony

Appellant argues that A.T.'s allegation of abuse was inadmissible evidence of prior misconduct. In response, the state contends that A.T.'s testimony was not evidence of prior misconduct because she did not indicate whether the alleged abuse was criminal in nature (i.e. sexual or physical) or non-criminal (i.e. emotional or psychological). But *Spreigl* evidence encompasses bad acts in general, and "the prior bad act need not constitute a crime." *State v. McLeod*, 705 N.W.2d 776, 788 (Minn. 2005).

The state also asserts that A.T.'s testimony was not *Spreigl* evidence because it was not offered as evidence of appellant's character; rather, it was offered as evidence of A.T.'s bias against appellant. But evidence of witness bias is admissible only for the purpose of attacking a witness's credibility, and nothing in the record indicates that the state was attempting to attack A.T.'s credibility. *See* Minn. R. Evid. 616 ("For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible."); *State v. Copeland*, 656 N.W.2d 599, 603 (Minn. App. 2003) ("Extrinsic evidence of bias . . . may be properly admitted to attack the credibility of the witness under Minn. R. Evid. 616."), *review*

denied (Minn. Apr. 29, 2003). Nor does the record establish any other grounds for the admissibility of A.T.'s testimony.[1] Accordingly, we conclude that A.T.'s testimony was evidence of prior misconduct by appellant, and because the state cannot show any legitimate purpose for the admission of A.T.'s testimony, the testimony was inadmissible.

We further note that because A.T.'s testimony was evidence of prior misconduct, the state was required to follow *Spreigl*'s procedural safeguards before eliciting the testimony. The state's failure to adhere to *Spreigl*'s procedural requirements also renders the testimony inadmissible. Because A.T.'s testimony was inadmissible, it was plain error for the prosecutor to elicit the testimony.

b. Evidence regarding appellant's probation conditions, alleged probation violations, warrants, and arrest

Next, appellant claims that the evidence relating to his probation conditions, alleged probation violations, warrants, and arrest constitute inadmissible *Spreigl* evidence. The state does not dispute that this evidence is evidence of prior misconduct. Instead, the state argues that the evidence is "immediate episode" evidence, not *Spreigl* evidence. "Immediate episode" evidence is evidence that relates to offenses or misconduct that were a part of the "immediate episode for which [a] defendant is being

[1] Appellant's knowledge, identity, and intent were not at issue in this case, and appellant did not assert a defense of mistake. Moreover, to the extent that appellant's motive was an issue, A.T.'s allegation of prior abuse was entirely unrelated to the question of motive. And the record is insufficient to conclude that the alleged abuse was sufficiently similar to the charged crime. Thus, we cannot say that the alleged abuse was part of a common plan or scheme. *See State v. Montgomery*, 707 N.W.2d 392, 398 (Minn. App. 2005) (holding that for evidence to be admissible as common-scheme evidence, there must be showing of sufficiently similar circumstances between past misconduct and charged crime).

tried." *State v. Townsend*, 546 N.W.2d 292, 296 (Minn. 1996) (quotation omitted). "Immediate episode evidence is a separate category from evidence of other bad acts under Minn. R. Evid. 404(b)," and it is "not subject to the [*Spreigl*] notice requirement." *State v. Kendell*, 723 N.W.2d 597, 608 (Minn. 2006).

We disagree that this evidence is "immediate episode" evidence. The contents of appellant's probation agreement and predatory-offender registration packet were not part of the immediate episode for which appellant was being tried, nor was the testimony regarding appellant's outstanding warrant for allegedly failing to register as a sex offender. The same is true of the testimony that appellant allegedly violated his probation by "absconding" or leaving his residence without notifying probation. And while the details of appellant's arrest may have been part of the immediate episode for which appellant was being tried, the testimony that appellant was arrested by the Violent Criminal Apprehension Team was irrelevant to any fact of consequence in this case and was, therefore, inadmissible. *See* Minn. R. Evid. 401 (defining relevant evidence as "evidence having 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. 402 (stating that irrelevant evidence is inadmissible).

Accordingly, we agree with appellant that the evidence in question is *Spreigl* evidence. The state argues that even if the evidence was *Spreigl* evidence, it was admissible to prove motive. But we fail to see any connection between appellant's motive and the details of his probation conditions, alleged probation violations, and warrants. Additionally, appellant's arrest occurred subsequent to the charged crime; thus,

the details of appellant's arrest were wholly irrelevant to the question of motive. Further, as *Spreigl* evidence, the evidence in question was subject to several procedural safeguards with which the state failed to comply. Thus, the evidence in question was inadmissible and it was plain error for the state to introduce and elicit the evidence.

c. S.T.'s testimony

Appellant contends that S.T.'s testimony, too, was inadmissible *Spreigl* evidence. Again, the state does not dispute that this testimony is evidence of misconduct. The state argues, however, that the testimony was admissible to explain S.T.'s failure to take action in regard to appellant's conduct—a credibility issue that the state characterizes as "a substantial issue in [a]ppellant's trial."

Evidence of threats against a witness may be admissible to show a witness's fear of a party or bias, which "is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness's testimony." *State v. Clifton*, 701 N.W.2d 793, 797 (Minn. 2005) (quoting *United States v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 469 (1984)). Threat evidence can also be relevant to repair a credibility problem with a witness or a witness's inconsistent statement. *Id.*

But threat evidence, although relevant, has the potential to be highly prejudicial and may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Vance*, 714 N.W.2d 428, 441 (Minn. 2006). "Direct testimony of threats offered by the prosecution to 'boost' the [witness's] overall credibility in the absence of need can amount to a prejudicial attack on the defendant." *Clifton*, 701

N.W.2d at 797. Even if threat evidence is admissible, "the trial court must still provide safeguards including cautionary instructions to prevent the evidence from being misused." *Id.* (quotation omitted).

Although S.T.'s testimony may have been relevant to show her fear of appellant and to explain her failure to contact the police, we conclude that it was improper for the prosecutor to elicit this testimony. First, threat evidence is admissible to bolster a witness's credibility only after the witness's credibility has been attacked. *See Vance*, 714 N.W.2d at 442 (holding that threat evidence was admissible where "offered only in response to defense counsel's attacks on the witnesses's credibility."); *Clifton*, 707 N.W.2d at 797–98 (concluding that threat evidence was admissible because district court "restricted the use of the evidence to redirect examination for purposes of repairing the credibility problem brought about by defense counsel's cross-examination"). But here, the prosecutor elicited the threat testimony from S.T. on direct examination, prior to any attack on S.T.'s credibility.

Second, the district court did not instruct the jury on the proper use of the threat evidence. Without an instruction to caution against misuse of the threat evidence, the probative value of the evidence was likely outweighed by its potential for unfair prejudice.[2] Third, as evidence of prior misconduct, the threat evidence was subject to

[2] We note that because appellant did not properly object to the challenged evidence or the prosecutor's misconduct, the district court was not asked to take action with respect to any of the inadmissible *Spreigl* evidence. And generally, a district court's failure to intercede sua sponte is not plain error. *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001). But as we discuss below, the inadmissible *Spreigl* evidence in this case was so inherently prejudicial—and there was so much of it—that, when combined, the prosecutor's

Spreigl's procedural safeguards, which were not followed by the prosecutor before eliciting S.T.'s testimony. Therefore, S.T.'s testimony was inadmissible and, as such, it was plain error for the prosecutor to elicit the testimony.

2. Substantial rights

Because appellant has shown that the prosecutor committed misconduct by introducing and eliciting inadmissible *Spreigl* evidence, the state must prove that the error did not affect appellant's substantial rights. *See Ramey*, 721 N.W.2d at 302. Even if each instance of prosecutorial misconduct is considered separately, the state failed to show that appellant was not prejudiced. For example, the state argues that appellant was not prejudiced by A.T.'s testimony because A.T.'s allegation of prior abuse was brief and in passing. Although A.T.'s allegation was brief, the prosecutor implicitly emphasized the allegation during closing argument when she told the jury:

> Now, I'm not here to tar and feather [S.T.]. And let's not get off and running on what she did, because while what she did was inexcusable, it's not what he did. She didn't sexually abuse her *children*; she didn't harass her *children* sexually every day; she just looked the other way.

(Emphasis added.) By using the term "children" in reference to the sexual abuse charged in this case, the prosecutor suggested that both A.T. and J.T. were abused by appellant, which is exactly what A.T. alleged.

But more troubling is the inherently prejudicial nature of A.T.'s testimony. Appellant was accused of sexually abusing J.T., and for A.T. to testify that she was also

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misconduct and the district court's failure to intercede sua sponte, resulted in appellant being deprived of a fair trial.

abused by appellant was inherently prejudicial and created an impermissible risk that appellant would be convicted for reasons other than those relevant to the specific crime charged. The same is true for the threat evidence that the prosecutor elicited from S.T. As explained above, threat evidence has the potential to be highly prejudicial, and if such evidence is admitted, the district court must provide instructions to prevent the evidence from being misused. Because the jury was not instructed on the proper use of the threat evidence, the probative value of the evidence was likely outweighed by its potential for unfair prejudice.

Additionally, the state contends that appellant was not prejudiced by the evidence relating to his probation conditions, alleged probation violations, warrants, and arrest because appellant relied on this evidence in presenting his theory of defense to the jury. *See Vick*, 632 N.W.2d at 686–87 (holding that defendant was not prejudiced by improperly admitted evidence where defendant's theory of defense was not affected by admission). During closing argument, appellant argued that if he was abusing J.T., it would not make sense for him to return to Minneapolis from Chicago because he knew there was an outstanding warrant for his arrest. Appellant also made similar statements on direct examination.

Despite appellant's minimal reliance upon the evidence in question, his theory of defense—that J.T.'s allegation of abuse was fabricated—was severely compromised by the volume of inadmissible *Spreigl* evidence that the state introduced here. In addition to questioning several witnesses about appellant's probation conditions, alleged probation violations, and warrants, the prosecutor introduced physical copies of appellant's

probation agreement and predatory-offender registration packet. The prosecutor also elicited detailed, highly prejudicial evidence of appellant's arrest by the Violent Criminal Apprehension Team. The few references that appellant made to his arrest warrants in no way justified the introduction of evidence relating to his probation agreement, predatory-offender registration requirements, or arrest.

Individually, the instances of prosecutorial misconduct might not warrant reversal. But we conclude that the cumulative effect of the misconduct prejudiced appellant and deprived him of a fair trial. *See State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006) (concluding that cumulative effect of prosecutorial misconduct and evidentiary errors denied defendant right to fair trial); *State v. Underwood*, 281 N.W.2d 337, 344 (Minn. 1979) (reversing conviction where cumulative errors at trial prejudiced defendant). And on this record, we cannot say that appellant's conviction was surely unattributable to the error at trial. *See State v. Washington*, 725 N.W.2d 125, 133 (Minn. App. 2006) (stating that prosecutorial misconduct is harmless beyond reasonable doubt, and new trial is not warranted, if verdict was surely unattributable to error), *review denied* (Minn. Mar. 20, 2007).

We recognize that certain factors mitigate the prejudicial effect of the prosecutor's misconduct. The evidence against appellant was somewhat strong, and generally a defendant is not prejudiced by errors at trial where there is otherwise strong evidence of the defendant's guilt. *See, e.g., State v. Hall*, 764 N.W.2d 837, 843 (Minn. 2009) (holding that defendant was not prejudiced by error at trial where evidence of guilt was overwhelming). Also, appellant was able to cross-examine S.T. regarding her testimony

that appellant had threatened her. *See Woodruff v. State*, 608 N.W.2d 881, 886 (Minn. 2000) (holding that defendant could not demonstrate prejudice from state's failure to disclose witness's statement where defendant thoroughly cross-examined witness about statement). Nevertheless, given the volume and the extremely prejudicial nature of the inadmissible *Spreigl* evidence, we conclude that the prosecutor's misconduct deprived appellant of a fair trial.

Finally, the state argues that it should not be held responsible for the errors at trial because the inadmissible evidence was unintentionally elicited. We disagree. Much of the inadmissible evidence—such as all of the evidence relating to appellant's probation conditions, alleged probation violations, warrants, and arrest—was intentionally elicited by the prosecutor. *See State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978) ("[I]f the prosecutor intentionally elicits other-crime evidence knowing that it is inadmissible, we will reverse more readily."). Further, the state's argument ignores authority holding that even when inadmissible evidence is unintentionally elicited, appellate courts will reverse if the appellant was prejudiced by the evidence. *See id*. ("[E]ven when the elicitation is unintentional, we will reverse if the evidence is prejudicial.") Because appellant was prejudiced by the inadmissible *Spreigl* evidence in this case, we reverse appellant's convictions and remand for a new trial.

Reversed and remanded.