STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1949

State of Minnesota,
Respondent,

vs.

Charles James Einck,
Appellant.

Filed November 10, 2009
Affirmed
Connolly, Judge

Chippewa County District Court
File No. 12-CR-07-984

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Dwayne Knutsen, Chippewa County Attorney, P.O. Box 514, 102 Parkway Drive, Montevideo, MN 56265 (for respondent)

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Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Harten, Judge.*

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

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

CONNOLLY, Judge

On appeal from his conviction of six felony offenses, appellant argues that (1) the district court improperly admitted *Spreigl* evidence, (2) the court admitted testimony in violation of the marital privilege, (3) the court erred when it prohibited appellant from eliciting reputation evidence from a witness, and (4) the prosecutor committed serious misconduct by improperly commenting on the *Spreigl* evidence during closing argument. We affirm.

FACTS

Appellant Charles James Einck challenges his convictions of criminal sexual conduct, assault, and kidnapping, which arose from his rape of E.J. On November 8, 2007, appellant met E.J. for the first time at the Northern Lights Bar in Montevideo. Appellant drove E.J. to another bar in Watson, and later drove her to a gravel road in an isolated area where they had sexual intercourse. According to appellant, E.J. got out of the truck and the truck hit her. She was then put back into the truck by appellant. Appellant ultimately drove E.J. back to her car, which she had left at the Northern Lights Bar in Montevideo.

Appellant testified that E.J. volunteered to go to Watson with him where they drank and flirted at the bar, that appellant chose to take the back roads home because he had been drinking and wanted to avoid police, and that E.J. knew the way home and directed appellant how to get there. According to appellant, he and E.J. stopped en route and engaged in consensual sex, but then he ordered E.J. to leave his truck when he saw

her preparing to smoke methamphetamine afterward. Appellant testified that he started driving away after he and E.J. argued, but then felt guilty about leaving E.J. "in the middle of nowhere," stopped his truck, and drove back to E.J. to give her a ride home. When appellant got out of his truck, he noticed E.J. lying on the ground. According to appellant, the two argued some more, but E.J. finally threw the methamphetamine on the ground and received a ride home from appellant in return. Appellant testified that when E.J. got out of his truck in Montevideo, she walked to her car apparently without injury.

But E.J. testified that neither the trip to Watson nor the sexual intercourse was consensual. According to E.J.'s testimony, while she was at the Northern Lights Bar in Montevideo, appellant asked her if she wanted to go to Watson; E.J. replied that she needed to go home instead. Appellant offered her a ride home in his truck, but drove her to Watson instead and refused E.J.'s repeated requests to take her home. While they were in Watson, E.J. confided in the bartender that she felt nervous and hoped to get a ride home from somebody other than appellant. By the time the bar closed at around 10:00 p.m., E.J. had not succeeded in finding someone else to give her a ride home and asked appellant to bring her home. Although appellant had taken the main highway into Watson, he took the back roads out of town, telling E.J. that he was less likely to run into police that way.

According to E.J., appellant drove on a gravel road that E.J. was unfamiliar with, and began making sexual comments to her. He then pulled over and stopped the truck. When E.J. asked appellant why he stopped, appellant replied that E.J. owed him for the drinks he bought her. E.J. replied that she did not owe appellant anything and was

willing to buy her own drinks, but appellant responded that one way or another, they were going to have sex. When E.J. refused, appellant then told her to get out of his truck and walk home.

E.J. exited the truck and began walking away. Appellant then drove his truck in reverse and rammed into E.J. hard enough to make her fly forward into the ground. E.J. stood up and told appellant that she was going to turn him in. When E.J. started writing down appellant's license plate number, appellant tried to take her purse. E.J. turned and ran away but fell. Appellant got into his truck and drove "pretty fast" towards her. E.J. tried to roll out of the way, but appellant drove over her leg and the side of her hip. In "excruciating pain," unable to walk, and afraid appellant would run over her again and kill her, E.J. tried to drag herself into the trees to hide. Appellant turned his truck to shine his headlights at her and yelled, "Where are you?" E.J. would not answer, so appellant yelled at her to come out and he would take her home. E.J. responded that she could not walk, so appellant picked her up and put her in his truck.

Appellant then told E.J. that he was going to "get what he wanted" before he took her home. E.J. again refused, but appellant pulled her pants down from behind, although he was unable to completely remove them because E.J. could not move her legs. E.J. testified that she cried and screamed but was unable to physically resist. Appellant vaginally penetrated E.J. with his penis, assaulting her for three to five minutes until he ejaculated. E.J. testified that it "hurt very bad." When appellant was finished, he told E.J. to pull up her pants and that he was afraid to take her home because he didn't know

what she was going to do. Appellant told E.J. that he wanted to take her to his own house, and E.J. agreed, hoping that appellant would take her into town.

As they drove back, appellant told E.J. that he preferred oral sex; he pulled E.J.'s head down, and forced his penis into her mouth. Later, as they neared Montevideo, E.J. told appellant that she could not go to his house unless she moved her car. Appellant agreed, but told E.J. that he wanted her to follow him to his house. Appellant helped E.J. into her car, but E.J. shut and locked the doors. E.J. then drove home and sought help.

E.J. was brought to the hospital, and diagnosed with a broken pelvis. The doctor who treated E.J. in the emergency room of the hospital, Dr. Martin Umeh, testified that E.J.'s injury was consistent with a compressive fracture of the hip, being hit on the hip "by a force." A fracture of the pelvic bone would immediately cause pain, and walking with that injury would also cause pain. E.J. also had multiple abrasions. A rape kit examination was conducted on E.J., and semen was found on E.J.'s vaginal swab containing a DNA mixture from which neither E.J. nor appellant could be excluded.

County Deputy Sheriff Brian Hanson later questioned appellant about the incident, and appellant told Deputy Hanson that he and E.J. had consensual sex in his truck, and that appellant brought E.J. home after she agreed to throw her methamphetamine on the ground. Police examined the location of the assault with the assistance of a drug-sniffing dog, and found no methamphetamine at the scene. Deputy Hanson later testified that the dog was able to detect even a small amount of controlled substances, and that any rain or moisture between the time of the assault and the time of the search would not have affected the dog's ability to smell methamphetamine.

Appellant was charged with four counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(c), (d), (e)(i), and e(ii) (2006); one count of second-degree assault in violation of Minn. Stat. § 609.222, subd. 2 (2006); and one count of kidnapping in violation of Minn. Stat. § 609.25, subds. 1(2) and 2(2) (2006). At appellant's trial, the prosecution introduced *Spreigl* evidence for the purpose of proving a common plan or scheme. The *Spreigl* evidence was introduced through the testimony of J.E., appellant's ex-wife, that appellant had raped her in February 2004 while she and appellant were separated. Appellant also attempted to introduce evidence of E.J.'s character for truthfulness, but the district court refused to allow this evidence because appellant failed to establish an adequate foundation. Appellant was subsequently convicted of all counts by a jury, and sentenced to 180 months on one count of first-degree criminal sexual conduct.

D E C I S I O N

I. The district court did not abuse its discretion in admitting *Spreigl* evidence.

Evidence of past crimes or bad acts, known as *Spreigl* evidence, is not admissible to prove the character of a person or that the person acted in conformity with that character in committing an offense. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). But *Spreigl* evidence may be admissible to prove other factors, including motive, intent, identity, knowledge, and common scheme or plan. *Id.* *Spreigl* evidence may also be admitted to show whether the conduct on which the charge was based actually occurred or was "a fabrication or a mistake in perception by the victim." *State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993). The admission of *Spreigl* evidence

is reviewed under an abuse-of-discretion standard. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006).

In deciding whether to admit such evidence, a court examines whether (1) the state has given notice of its intent to admit the evidence, (2) the state has clearly indicated what the evidence will be offered to prove, (3) there is "clear and convincing evidence that the defendant participated in the prior act," (4) the evidence is "relevant and material to the state's case," and (5) the probative value of the evidence is "outweighed by its potential prejudice to the defendant." *Id.* at 685-86. To determine the relevance of *Spreigl* evidence to the charged crime, a court must consider its proximity to the charged crime in time, place, or modus operandi. *Kennedy*, 585 N.W.2d at 391. For *Spreigl* evidence to be "admissible under the common scheme or plan exception, it must have a *marked similarity* in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688 (emphasis added).

The *Spreigl* evidence in this case relates to a February 2004 incident in which appellant allegedly raped his ex-wife. J.E. testified that, during her separation from appellant, he took her car without her consent while she was at work. Later, appellant called and told her that he would pick her up at work and give the car back to her after she dropped him off in nearby Ruthton. Appellant picked J.E. up and drove to a gravel road. Appellant and J.E. began arguing, and appellant turned off J.E.'s cell phone. J.E. got out of the car and tried to get away, but appellant followed her, pushed her, threatened to kill her, and told her to get back into the car. Appellant told her that he had a gun in the car, that he was going to kill himself, and that he wanted to be with her one

last time. He instructed her to get into the back seat of the car; J.E., fearing for her life, did so. Appellant then exposed his penis, grabbed J.E. by the hair, forced her head down, and made her perform oral sex on him. Appellant then took off J.E.'s pants, and despite her refusal had vaginal sex with her until he ejaculated.

J.E. reported the incident, and both she and appellant made statements to police regarding the assault. At some point after the incident, J.E. watched as her boyfriend and her brother damaged appellant's car in revenge. But J.E. told police that she did not see any of the damage done to the vehicle. J.E. testified that she made this false statement to the police because she was afraid she would get into trouble. The fact that J.E. lied about this matter to the police led the prosecutor to dismiss the charges against appellant; in a letter, the prosecutor stated that J.E.'s lie "damaged her credibility with me." The prosecutor stated in this letter that, had J.E. been honest with police, he would have gone forward with prosecuting appellant.

Appellant argues that evidence of this February 2004 incident should not have been admitted as *Spreigl* evidence because the charges against him were dismissed, because the state did not prove his involvement in the 2004 incident by clear and convincing evidence, because the 2004 incident lacked marked similarity to the charged offense, because it was too remote in time, and because the potential for unfair prejudice outweighed the probative value of the evidence.

Appellant notes that the criminal charges arising from J.E.'s allegations were dismissed and argues that this court should extend *State v. Wakefield*, 278 N.W.2d 307 (Minn. 1979), to exclude *Spreigl* evidence stemming from that incident. Acquitted

conduct is not admissible as *Spreigl* evidence. *Wakefield*, 278 N.W.2d at 309. But appellant was never acquitted of the charges arising from the 2004 incident with J.E. The holding in *Wakefield* explicitly applied to acquittals, and the supreme court has consistently refused to extend *Wakefield* beyond acquittals. *See, e.g.*, *State v. Kasper*, 409 N.W.2d 846, 847 (Minn. 1987); *State v. Lande*, 350 N.W.2d 355, 358 (Minn. 1984); *State v. McAdoo*, 330 N.W.2d 104, 106 (Minn. 1983). Accordingly, we decline to extend *Wakefield* to this case. It is not the role of this court to extend existing law. *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).

Appellant also argues that the district court erred in concluding that the 2004 incident was proven by clear and convincing evidence. There must be "clear and convincing evidence that the defendant participated in the prior act" in order to admit evidence of that act as *Spreigl* evidence. *Ness*, 707 N.W.2d at 686. "[A] defendant's participation in a *Spreigl* incident may be considered clear and convincing when it is highly probable that the facts sought to be admitted are truthful." *Id.* (citing *Kennedy*, 585 N.W.2d at 389). A district court's decision that the defendant's participation in the prior act has been proven by clear and convincing evidence is reviewed for an abuse of discretion. *Id.*

Appellant argues that the state did not meet its burden in this case, on the grounds that (1) the criminal charges arising from the 2004 incident were dismissed because J.E. lied to the police, and (2) J.E. also told a defense investigator on April 24, 2008 that she had lied about the 2004 rape and that in fact "nothing happened." Appellant's argument that the state failed to prove his involvement in the 2004 incident by clear and convincing

evidence relies on attacking J.E.'s credibility. "Because the weight and believability of witness testimony is an issue for the district court, we defer to that court's credibility determinations." *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003). The district court found J.E.'s testimony credible. Moreover, as the district court observed, J.E. was not under oath when she lied to the defense investigator, and J.E. testified at appellant's trial that appellant himself had asked her to lie and that she was afraid of placing herself and her family in jeopardy based on her past history with appellant, which included threats and violence. The district court also observed that J.E. had been "consistent with her statements when placed under oath" and found that it was "highly probable that the facts sought to be admitted in [J.E.'s] testimony are truthful." We find no abuse of discretion in the district court's conclusion that appellant's involvement in the 2004 rape was proven by clear and convincing evidence.

Appellant further argues that evidence of the 2004 rape did not have "a *marked similarity* in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688 (emphasis added). The 2004 incident was not markedly similar in modus operandi to the charged offense, appellant argues, in that it involved appellant's ex-wife, with whom appellant was involved in a property dispute, while the charged offense involved a stranger whom appellant met at a bar. Appellant likens this case to *State v. Clark*, 738 N.W.2d 316, 345-47 (Minn. 2007), where evidence pertaining to a prior rape was found not to be markedly similar in modus operandi to a charge of rape committed during a robbery because the only similarities between the incidents as presented to the jury were

that the defendant used a gun to threaten his victims, both acts occurred in the victims' bedrooms, and both acts involved vaginal penetration or attempted vaginal penetration. The *Clark* court noted several differences between the charged offense and the prior incident, including that in the prior incident, the offense "did not involve a robbery"; the defendant and "two others broke into the victim's home"; and the offense "involved oral as well as vaginal penetration." *Id.* at 346 n.15.

But the differences appellant describes relate to his different relationships with the victims of the two incidents, and ignores the similarities between the incidents including that: (1) appellant used deception to get both J.E. and E.J. into the car with him; (2) appellant drove both J.E. and E.J. down back roads; (3) both J.E. and E.J. left the car, but they returned after appellant's forceful threats of violence; (4) appellant grabbed both J.E. and E.J. by their heads and forced them to perform oral sex on him; (5) appellant vaginally penetrated both women and ejaculated; (6) sexual assault of both women occurred in appellant's car in an isolated area; and (7) appellant claimed both encounters were consensual. Unlike *Clark*, this case involved the same types of sexual activity, and sexual assault appears to have been the sole motivation in both incidents. Moreover, appellant is incorrect in asserting that the two incidents are simply "generic type rapes occurring in a rural area." Appellant assaulted both women in his car after using deception to lure them into his car, and in both instances drove out of his way to isolated back roads to assault the women, forcing them to first perform oral sex on him in the same manner and then vaginally penetrating them. Unlike *Clark*, the facts of this case show a marked similarity between the *Spreigl* incident and the charged offense.

Appellant also argues that the 2004 incident was irrelevant because it was separated from the charged offense by over three-and-one-half years. In order for *Spreigl* evidence to be relevant, it must be proximate in time to the charged offense. *Kennedy*, 585 N.W.2d at 390-91. But the fact that the two incidents were separated by over three and one-half years does not necessarily render the *Spreigl* evidence irrelevant. Rather, a reviewing court balances time, place, and modus operandi to determine whether *Spreigl* incidents are relevant, and Minnesota courts have not firmly established how old an act must be before it is inadmissibly remote. *Ness*, 707 N.W.2d at 688-89. Generally, "prior acts become less relevant as time passes. Thus, the greater the time gap, the more similar the acts must be to lessen the likelihood that the *Spreigl* evidence will be used for an improper purpose." *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005) (quotation omitted). We conclude that the 2004 incident was not so remote in time as to be irrelevant, especially given the similarity in modus operandi between the two incidents. *See State v. Rucker*, 752 N.W.2d 538, 550-51 (Minn. App. 2008) (ruling that, where place and modus operandi between two instances of child sexual abuse were similar, the earlier incident was admissible as *Spreigl* evidence even though it occurred ten years prior to the charged offense), *review denied* (Minn. Sept. 23, 2008).

Finally, appellant argues that the district court erroneously determined that the probative value of the *Spreigl* evidence outweighed the risk of unfair prejudice. *Spreigl* evidence is not admissible unless the probative value of the evidence outweighs its potential for unfair prejudice. *State v. Doughman*, 384 N.W.2d 450, 454 (Minn. 1986). Appellant's argument that the probative value of the *Spreigl* evidence was outweighed by

the risk of unfair prejudice relies on his mere assertion that the 2004 incident lacked probative value because there was no common plan or scheme. Because we have concluded that a marked similarity in modus operandi exists between the two incidents, we reject this argument and conclude that the district court did not err in admitting *Spreigl* evidence of the 2004 rape.

II. The district court did not abuse its discretion in concluding that the marital privilege did not bar J.E.'s testimony.

Appellant also argues that the district court erred in denying his attempt to bar J.E.'s testimony on the ground that it violated the marital privilege statute, which provides that a spouse cannot, "during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage." Minn. Stat. § 595.02, subd. 1(a) (Supp. 2007). The marital privilege should be narrowly construed so that it does not interfere with the process of determining the truth. *State v. Hannuksela*, 452 N.W.2d 668, 676 (Minn. 1990). "The burden of proving the applicability of the marital privilege rests on the spouse who invokes the privilege." *State v. Palubicki*, 700 N.W.2d 476, 483 (Minn. 2005). The marital privilege statute "provides two distinct privileges: (1) the privilege to prevent a spouse from testifying against the other during the marriage; and (2) the privilege to prevent a spouse from testifying at any time concerning confidential interspousal communications made during the marriage." *Id.* We review the district court's ruling on the availability of a privilege for an abuse of discretion. *Id.* at 482.

The supreme court has defined the word "communication," as used in section 595.02, subdivision 1(a), to include "all written or spoken words, acts, and gestures which were intended by one spouse to convey a meaning or message to the other – such communication usually being denominated assertive conduct." *Id.* at 483 (quotation omitted). Oral statements are not necessarily privileged communications unless they were intended to "convey a message" to the spouse or unless the speaker intended the spouse to "acquire some knowledge" from the words. *Id.* at 484. In *Hannuksela*, the supreme court underscored the importance of the intent element: the act or statement at issue must be intended to convey a meaning to the other spouse, rather than being committed or said for its own sake. 452 N.W.2d at 677. Here, appellant identifies no statements that he alleges were intended to "convey a message" to J.E. or were spoken so that J.E. could "acquire some knowledge" from them. Rather, according to J.E's testimony, appellant's statements were apparently intended either to deceive J.E. into allowing him to drive her to the location of the rape or to effectuate the rape. Under the facts of this case, we reject appellant's argument that statements he made to J.E. leading up to and during the 2004 rape were privileged marital communication. Finally, appellant's suggestion that the rape itself was a form of privileged communication, because it was meant to convey a message of dominance over J.E., is both offensive and without merit.

III. The district court did not abuse its discretion in prohibiting any evidence of E.J.'s reputation for truthfulness because of inadequate foundation.

During his trial, appellant attempted to introduce character evidence of E.J.'s reputation for truthfulness in the form of the testimony of E.J.'s friend J.D. upon cross-examination. The district court upheld the prosecution's objection that appellant failed to establish an adequate foundation for this evidence, and appellant now argues that the district court abused its discretion in doing so. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *Id.* If "there is a reasonable possibility" that the verdict would have favored the defendant if the evidence had been admitted, then the erroneous exclusion of the evidence was prejudicial. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994).

Minnesota Rule of Evidence 404(a)(3) provides that character evidence may be introduced against a witness as allowed by rule 608(a), which provides that the credibility of a witness may be attacked with evidence of the witness's character for untruthfulness.

> The general rule is that to successfully impeach the testimony of a witness it is necessary that the impeaching witness first be asked if he is acquainted with the reputation of the witness as to truthfulness in the community in which the latter resides. If he is, he should next be asked what that reputation is, and, finally, if the answer is that the reputation is bad, he should be asked whether from his knowledge of such reputation he would believe the witness under oath.

State v. Palmersten, 210 Minn. 476, 482, 299 N.W. 669, 672 (1941). Testimony about the witness's reputation as to truthfulness must be that of a general consensus of opinion on the part of those witnesses' community. *Id.* at 483, 299 N.W. at 672.

In this case, during direct examination by the prosecution, J.D. testified that E.J. called her on the evening of November 8, 2007, but that she could not understand E.J. because E.J. was "crying hysterically." A friend of E.J.'s, who was present with E.J., took the phone and told J.D. that E.J. had "gotten ran over" and was raped. During cross-examination, appellant's counsel asked J.D. about E.J.'s reputation in the community for truthfulness, and J.D. replied that she was aware of E.J.'s reputation but that whether people thought she was truthful "depends on who you talk to." Appellant's counsel intended to present J.D. with the transcript of an interview she gave to a defense investigator in April 2008 in which J.D. stated that she had talked with others about E.J.'s reputation for truthfulness. The prosecution objected on foundational grounds, arguing that J.D. had already testified that she could not answer the question about E.J.'s reputation in the community for truthfulness.

Appellant's counsel attempted to establish a proper foundation, and upon further examination J.D. acknowledged that she had conversations with other people about E.J.'s reputation for truthfulness. The district court then allowed the prosecutor to lay the foundation for an objection. J.D. explained that she had talked with three people about E.J.'s reputation for truthfulness: her boyfriend's brother, and two other people she did not know. The district court ruled that adequate foundation had not yet been established, and appellant's counsel questioned J.D. further. J.D. explained that the two people she

did not know were from Pipestone, and that she did not know how long they had known E.J. The district court then sustained the prosecution's objection to her testimony for lack of foundation.

The question of whether adequate foundation for testimony about a witness's reputation for truthfulness has been established "lies largely within the discretion of the trial court." *Id*. Character evidence as to reputation "must be that of a general consensus of opinion on the part of those" in the witness's community and must be based upon "what has been heard and said amongst the members" of that community. *Id.* Here, while J.D. testified that she was familiar with E.J.'s reputation for truthfulness in the community, she did not establish that her familiarity reflects a general consensus of E.J.'s reputation based on what J.D. heard among members of E.J.'s community. First, J.D. appeared to testify that there was no general consensus as to E.J.'s reputation for truthfulness; rather, her reputation depended "on who you talk to." Second, J.D. failed to establish that her sources were members of E.J.'s community. We conclude that the district court did not abuse its discretion in ruling that there was inadequate foundation to admit J.D.'s testimony as character evidence of E.J.'s reputation for truthfulness in the community.

IV. The prosecutor did not commit misconduct in closing argument.

During closing arguments, the prosecutor said to the jury, "If you need for the corroboration of [E.J.'s] testimony you should then consider the testimony of [J.E.], remember the last witness, his ex-wife, who testified regarding the similarity, the common scheme, um, that had occurred with her back in 2004." Appellant argues that

this statement improperly invited the jury to misuse *Spreigl* evidence, although there was no objection to this statement at trial. Relief will be granted in the absence of a timely objection only if this court concludes that the state's conduct constituted plain error affecting substantial rights, *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); Minn. R. Crim. P. 31.02. Plain-error analysis asks whether (1) the prosecutor's unobjected-to argument was error; (2) the error was plain; and (3) it affected the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006). When there is an accusation of prosecutorial error, the prosecution has the burden of persuasion on the third prong. *Id.* at 302. For the reasons set forth below, we conclude that appellant has not even satisfied the first prong of the analysis.

Appellant describes the prosecutor's statement that J.E.'s testimony could corroborate E.J.'s testimony as an attempt to convince the jury that appellant had bad character and acted in conformity therewith. Generally, *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). But the essence of the prosecutor's statement was not to convince the jury of appellant's character; rather, it was to ask the jury to consider J.E.'s testimony as proof of a common scheme or plan, which was the reason for which the *Spreigl* evidence was properly admitted by the court. Appellant takes particular issue with the word "corroborate" as used by the prosecutor. But the supreme court has described admissible *Spreigl* evidence as "other-crimes evidence . . . that tends to corroborate evidence of the charged offense." *State v. Bartylla*, 755 N.W.2d 8, 20 (Minn. 2008). The prosecutor's statement that the

Spreigl evidence here could be used to corroborate E.J.'s testimony, which was evidence of the charged offense, was simply not error.

Affirmed.