STATE OF MINNESOTA
IN COURT OF APPEALS
A09-825

In the Matter of the Welfare of: C. M. D., Child.

Filed February 23, 2010
Affirmed
Hudson, Judge

Ramsey County District Court
File No. 62-JV-09-1139

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Marie Wolf, Interim Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Kalitowski, 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 challenges his delinquency adjudication as an extended-jurisdiction juvenile (EJJ) on two counts of first-degree criminal sexual conduct. Appellant argues that (1) the district court abused its discretion by admitting *Spreigl* evidence of appellant's participation in sexual conduct in Texas; and (2) the district court erred by refusing to suppress appellant's statement to Texas police because appellant did not

provide a knowing and intelligent waiver of his *Miranda* rights, and the Texas statement was not contemporaneously recorded, as required by *State v. Scales*. Because the district court did not abuse its discretion by admitting the *Spreigl* evidence and did not err by denying the motion to suppress, we affirm.

FACTS

The state filed an amended petition alleging that on the evening of June 27, 2007, appellant C.M.D., a 14-year-old juvenile, committed acts constituting three counts of first-degree criminal sexual conduct: (1) sexual penetration, causing reasonable fear of great bodily harm, in violation of Minn. Stat. § 609.342, subd. 1(c) (2006); (2) sexual penetration using a dangerous weapon to threaten, in violation of Minn. Stat. §§ 609.342, subd. 1(d), and 609.11, subd. 4 (2006); and (3) sexual penetration causing personal injury and using force or coercion, in violation of Minn. Stat. § 609.342, subd. 1(e) (2006). The district court designated appellant an EJJ.

The district court granted the state's motion to admit *Spreigl* evidence of another incident of appellant's sexual conduct, which occurred in August 2007, in Abilene, Texas, concluding that the Texas incident provided evidence of a common scheme or plan. The district court permitted the state to present evidence of the Texas incident through the direct testimony of a Texas police officer, a stipulation of the parties, and an affidavit of the victim in that incident. The district court also denied a defense motion to suppress appellant's statement to Texas police regarding the Minnesota offense, which was taken when appellant was in custody as a result of the Texas incident. The defense argued that appellant's *Miranda* waiver was invalid because it was not knowing,

voluntary, and intelligent, and that there was a substantial violation of the *Scales* recording requirement. The court concluded that appellant's *Miranda* waiver was valid, even though appellant was not informed that the statement might be used in an adult prosecution, and that the circumstances surrounding appellant's statement did not amount to a substantial violation of the recording requirement in *State v. Scales*, 518 N.W.2d 587 (Minn. 1994).

At appellant's jury trial, the complainant, S.B., testified that late one evening, when she was walking alone after smoking a small amount of crack cocaine, she realized that a male, later identified as appellant, was following her. S.B. is a middle-aged woman who has hypochondroplasia, or dwarfism, and asthma. She also has a history of prostitution. S.B. testified that appellant approached her, exposed his erect penis, and offered her ten dollars for sex. She testified that appellant left to go get the money, but then returned, and they walked to the back of a business across the street. S.B. testified that appellant showed her only three dollars, and S.B. declined to have sex. She testified that appellant then grabbed her, held a knife to her throat, and threatened to stab her if she did not comply.

S.B. testified that appellant exposed his penis again and pulled off her clothes against her will. She was upset, scared, and concerned about the knife. She testified that appellant, with his pants halfway down, made her engage in oral sex and forced her to the ground and penetrated her vagina. S.B. testified that appellant told her to moan and call him "daddy." She testified that appellant did not hurt her with the knife and that after

about 30 minutes of sexual contact, appellant ejaculated into her vagina. He then searched her clothes for money and told her not to move until he was gone.

After appellant left, S.B. walked to a gas station, where the clerk called 9-1-1 to report the assault. At a hospital examination, a nurse took DNA swabs from S.B.'s mouth, vagina, and perineal area. Because the DNA did not match any profiles in the Bureau of Criminal Apprehension's (BCA) Minnesota DNA database, the BCA added the DNA information to a national database that searches periodically for matches as new profiles are added.

On April 3, 2008, the BCA contacted the investigating St. Paul officer and told him that a known DNA sample matched the unknown sample in S.B's case. The known DNA sample had been taken from appellant in the course of investigating another sexual assault that occurred in Abilene, Texas, on August 6, 2007.

In the Texas assault, a 49-year-old homeless woman reported that she was sleeping underneath a highway overpass when she awoke to find a man holding her foot. He asked if he could lie down next to her and she refused. He asked her if she knew where he could find prostitutes or crack cocaine, and she said she did not know. He then left, but returned 30 minutes to an hour later, swinging a heavy metal hook tied to a cloth. He told the woman to "shut up" and get out of her clothes, and that if she did not comply, he would hurt her badly. His actions frightened the woman. The man then took down his pants enough to expose his erect penis and forced her to masturbate him with her hand and mouth. He then put on a condom and put his penis into her vagina. She was crying and told him to stop. He told her to moan, but she refused. He ejaculated into the

condom in her vagina and left. The woman retrieved the condom and the man's wallet, which contained appellant's identification, and gave them to police.

DNA test results received in March 2008 showed the DNA from the condom was a close match to appellant's DNA. Abilene police arrested appellant at his high school on April 3, 2008. That day, following Texas legal procedure, appellant met with a magistrate regarding his rights as to the Texas incident, decided to waive those rights, and gave a statement to an Abilene police officer admitting that he had intercourse with the woman, but asserting that it was consensual.

That same day, the Abilene officer received an email message from the St. Paul officer who was investigating the Minnesota offense stating that appellant's DNA profile also matched the DNA profile in the Minnesota case. The St. Paul officer asked the Abilene officer to interview appellant about the Minnesota offense. The St. Paul officer faxed the Abilene officer some Minnesota documents, including a notice-of-rights form.

The next day, the Abilene officer discussed appellant's *Miranda* rights with appellant regarding the Minnesota case. The Abilene officer reviewed the Minnesota form with appellant, and appellant signed the form stating that he wished to waive those rights. In accordance with Texas legal procedure, the officer then asked if appellant wished to write a statement. Appellant stated that he did, and he wrote out a two-page statement in which he admitted having sexual contact with S.B. After appellant wrote out the statement, the officer recorded appellant's *Miranda* waiver and appellant reading the statement.

The jury found appellant guilty of one count of first-degree criminal sexual conduct, fear of great bodily harm and personal injury; but not guilty of the count of first-degree criminal sexual conduct, armed with a dangerous weapon. The district court issued its EJJ disposition and placement order, adjudicating appellant delinquent, and imposed a 144-month stayed adult sentence. This appeal follows.

D E C I S I O N

I

A district court may admit *Spreigl* evidence of a defendant's prior bad acts for the limited purpose of showing a defendant's motive, knowledge, intent, identity, absence of mistake or accident, or a common scheme or plan. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006); Minn. R. Evid. 404(b). This court reviews the district court's decision to admit such evidence for abuse of discretion. *Ness*, 707 N.W.2d at 685. A defendant claiming that the evidence was improperly admitted has the burden to show error and resulting prejudice. *Id.*

If the state wishes to secure the admission of *Spreigl* evidence, it must (1) provide notice of its intent to use the evidence, (2) indicate clearly what the evidence is being offered to prove, (3) offer clear and convincing proof that the defendant participated in the prior act, (4) show that the evidence is relevant and material to the state's case, and (5) prove that the probative value of the evidence is not substantially outweighed by its potential prejudice to the defense. *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005); Minn. R. Evid. 403, 404(b). Appellant does not contest the applicability of the first three *Spreigl* elements to the Texas incident, but argues that the district court abused

its discretion by admitting the evidence because the Texas incident was not relevant or material to the current charges, and the probative value of the evidence was substantially outweighed by its prejudicial effect.

Relevant and material

The district court admitted the evidence for the purpose of showing common preparation, scheme, or plan. *See* Minn. R. Evid. 404(b). Appellant argues that the facts of the Texas offense were insufficiently similar to those of the current offense to warrant admission on this basis.

When weighing whether evidence of another crime is relevant and material, the district court examines "the closeness of the relationship between the other crimes and the charged crimes in terms of time, place, and modus operandi." *Washington*, 693 N.W.2d at 201 (quotation omitted). These factors are weighed flexibly. *State v. Kennedy*, 585 N.W.2d 385, 390 (Minn. 1998). The abuse-of-discretion standard reflects that the district court is in the best position to evaluate these factors. *Washington*, 693 N.W.2d at 201. The *Spreigl* offense need not be identical to the charged offense. *State v. Cogshell*, 538 N.W.2d 120, 123 (Minn. 1995). But in order to be admissible under the common-scheme-or-plan exception, the prior offense "must have a marked similarity in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688.

In both the Texas offense and this case, the victims were vulnerable, middle-aged women, whom appellant approached at night. In both incidents, appellant initially approached the women and was rejected. He then returned with a weapon, which he used to threaten them if they did not undress. In both incidents, appellant partially lowered his

pants to have sex, forced the women to engage in oral and vaginal sex, and told them to stop crying and make sexual noises. Appellant argues that there are differences between the incidents because in the charged offense, appellant initially approached the victim for prostitution and did not force her to have sex until after she rejected the funds that he offered. He also argues that the weapons used were different. But these differences are minor, and the record supports the district court's determination that the two incidents reflected a common scheme or plan.

Probative value versus prejudicial effect

Appellant also argues that the admission of the *Spreigl* evidence was more prejudicial than probative. Unfair prejudice is defined as "'the capacity of . . . concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.'" *State v. Smith*, 749 N.W.2d 88, 95 (Minn. App. 2008) (quoting *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 650 (1997)). Whether the state has need for the evidence should be addressed in balancing the probative value of the evidence against its potential for unfair prejudice. *Ness*, 707 N.W.2d at 690.

Appellant maintains that the evidence of the Texas incident was particularly prejudicial because the district court allowed the state to introduce both a stipulation relating to the evidence and the affidavit of the victim in the Texas incident. The district court stated that it believed the affidavit to be mostly duplicative, but ultimately admitted it in evidence.

"[C]ourts should not allow the state, when presenting *Spreigl* evidence, to present evidence that is unduly cumulative with the potential to fixate the jury on the defendant's guilt of the other crime." *Ture v. State*, 681 N.W.2d 9, 16 (Minn. 2004). In *Ture*, the supreme court upheld the admission of *Spreigl* evidence when the state presented 24 witnesses who testified as to the details of the other crime, noting that the defense did not object to the testimony or the number of witnesses. *Id*. Here, the defense did object to the introduction of the affidavit, and it was read by a police officer, which may have heightened its prejudicial effect.

But we also consider the state's need for the evidence in our analysis. *Ness*, 707 N.W.2d at 690. As the state points out, the key issue at trial was whether S.B. consented to have sex with appellant. S.B., who had a history of prostitution and drug use, may not have been seen as a credible witness by the jury, so the evidence of the Texas incident was important to the state's case.

Appellant also argues that the evidence should not have been admitted because he was not convicted of the Texas offense. But conduct giving rise to *Spreigl* evidence does not need to have resulted in a criminal conviction or even a criminal charge. *Angus v. State*, 695 N.W.2d 109, 122 (Minn. 2005). The relevant inquiry is, rather, whether the evidence of the actor's participation in the events is clear and convincing. *See* Minn. R. Evid. 404(b). The clear-and-convincing-evidence standard "is met when the truth of the facts sought to be admitted is 'highly probable.'" *Kennedy*, 585 N.W.2d at 389 (citation omitted). Here, the affidavit of the victim in the Texas incident establishes by clear and convincing evidence that appellant committed sexual misconduct in that incident.

The district court also properly instructed the jury twice that the *Spreigl* evidence was not to be used to prove appellant's character or that he was acting in conformity with that character, and not to convict appellant of any offense other than the charged offense. This court may presume that the jury followed the district court's instructions. *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). In addition, the fact that the jury found appellant not guilty of one count of first-degree criminal sexual conduct tends to negate an inference that the jury was unduly prejudiced by the *Spreigl* evidence. Therefore, we conclude that the district court did not abuse its discretion by admitting the evidence of the Texas incident.

II

Appellant argues that the district court erred by denying the motion to suppress the statement appellant gave to police in Texas on the grounds that: (1) he did not voluntarily waive his *Miranda* rights because he was not informed that his statement could be used in an adult prosecution; and (2) his statement was obtained in violation of the recording requirement in *State v. Scales*, 518 N.W.2d 587 (Minn. 1994).

Miranda rights

The state may introduce statements made by a defendant in a custodial interrogation based on a showing that the defendant knowingly, voluntarily, and intelligently waived his rights. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966); *State v. Fardan*, 773 N.W.2d 303, 312 (Minn. 2009). This court reviews factual findings regarding a *Miranda* waiver for clear error and legal conclusions based on those facts de novo. *State v. Farrah*, 735 N.W.2d 336, 341 (Minn. 2007).

Miranda's due-process rights apply to juveniles. *State v. Burrell*, 697 N.W.2d 579, 592 (Minn. 2005). "When a juvenile's *Miranda* waiver is at issue, we examine the totality of the circumstances to determine whether the suspect understood his rights and the consequences that may arise if he waives them." *Id*. at 592–93. The factors involved in evaluating the totality of the circumstances include the juvenile's age, intelligence, maturity, education, prior criminal experience, physical deprivation, length and legality of detention, presence or absence of parents, adequacy of warnings, and nature of interrogation. *Id*. at 595. When, as here, a juvenile may be tried as an adult for a crime, a "heightened concern" exists that he understand his *Miranda* rights, and "the best course is to specifically warn the minor that his statement can be used in adult court, particularly when the juvenile might be misled by the protective, nonadversary environment that juvenile court fosters." *Id*. at 591–92 (quotation omitted). But the supreme court has rejected the creation of a per se rule that would require an explicit warning. *State v. Ouk*, 516 N.W.2d 180, 185 (Minn. 1994).

Appellant argues that his *Miranda* rights waiver was ineffective because he was not informed that his statement could be used in an adult prosecution. But knowledge that a defendant may be tried as an adult may be imputed to a defendant based on the seriousness of the crime and the circumstances surrounding the waiver. *Burrell*, 697 N.W.2d at 592. In *Burrell*, the supreme court concluded that knowledge of possible adult prosecution could be imputed to a 16-year-old defendant when he was placed in handcuffs and investigators told him, before giving him his *Miranda* rights, that "we're looking at that little girl that got shot." *Id*.; *see also State v. Williams*, 535 N.W.2d 277,

287 (Minn. 1995) (concluding that defendant could have reasonably foreseen adult prosecution when police cars surrounded his vehicle, using felony-arrest maneuvers); *Ouk*, 516 N.W.2d at 185 (concluding that awareness of adult prosecution could be imputed to juvenile defendant when his residence had been surrounded by 25 to 30 armed police officers).

Here, the district court concluded that, under the totality of the circumstances, appellant's *Miranda* waiver was valid. The district court found that, based on appellant's mother's testimony, appellant had at least some indication that he could be prosecuted as an adult. That testimony suggested that appellant was aware that he could receive a significant prison sentence if he was found to have committed the charged offense.

Appellant points out that, unlike the defendant in *Burrell*, he was not handcuffed, he was calmly picked up from school by an officer in street clothes, and the officer did not know whether appellant would be tried as an adult. Appellant also notes that the Texas notice-of-rights form presented to appellant specifically indicated that it was a juvenile court document. In addition, although the officer told appellant's mother that he might be prosecuted as an adult and could receive a prison sentence, the officer did not provide appellant with that information.

But the record shows that when appellant was interviewed regarding the Minnesota assault, he was fully aware that he was a suspect in that offense. At that time, appellant had already been processed into the detention center and was wearing prison clothing. The Texas notice-of-rights form concerning the St. Paul offense, which appellant signed, although labeled a juvenile statement, stated that appellant was alleged

to have committed aggravated sexual assault. While it is possible that appellant did not understand that he could be prosecuted as an adult for the Minnesota assault, the circumstances surrounding appellant's *Miranda* waiver indicate that the district court did not err by imputing to appellant knowledge of possible adult prosecution for that offense.

Appellant also argues that his intellectual limitations adversely affected his ability to exercise his *Miranda* rights. Appellant's mother testified that he has attention-deficit disorder and may not fully understand new information given to him. But the officer who took appellant's statements testified that appellant appeared lucid and intelligent when he spoke to the officer. The officer testified that, apart from some spelling problems, appellant "[did] very well articulating his thoughts" in appellant's written statement. The officer testified that during the interview on the St. Paul charges, he asked appellant about all of his rights, and appellant seemed to understand what he was doing as he went through the form and signed his initials four times and then his signature. Therefore, the district court did not err by failing to determine that appellant's learning disability precluded him from making a valid *Miranda* waiver. *See, e.g.*, *Fardan*, 773 N.W.2d at 315 (concluding that defendant's fetal alcohol syndrome did not affect his ability to make a valid *Miranda* waiver).

Scales violation

Appellant also argues that because his statement relating to the Minnesota offense was not recorded in its entirety, its admission violated the rule in *State v. Scales* that certain custodial statements must be electronically recorded. 518 N.W.2d at 592. In *Scales*, the supreme court mandated that all custodial interrogation of suspects be

recorded when feasible and that the interrogation must be recorded if the questioning occurs at a place of detention. *Id*. The purpose of the *Scales* requirement is "to prevent factual disputes about the existence and context of *Miranda* warnings and any ensuing waiver of rights." *State v. Miller*, 573 N.W.2d 661, 674 (Minn. 1998). The penalty for a "substantial" violation of the *Scales* requirement is suppression of the suspect's statements made during the custodial interrogation. *Scales*, 518 N.W.2d at 592. Whether there was a substantial violation of the *Scales* requirement presents a legal question, which this court reviews de novo. *State v. Inman*, 692 N.W.2d 76, 79 (Minn. 2005).

At the outset, we note that the parties have not raised the issue of whether the recording requirements of *Scales* apply to appellant's custodial interrogation in Texas. Moreover, the Minnesota Supreme Court has not resolved the issue of whether the *Scales* recording requirements apply to an out-of-state interrogation. *See State v. Sanders*, 775 N.W.2d 883, 888 (Minn. 2009) (concluding that guilty verdict was surely unattributable to any error in admitting defendant's statements allegedly made during unrecorded, out-of-state custodial interrogation). But we need not address this issue because we conclude that, even if *Scales* applies to appellant's Texas interrogation, any violation of *Scales* was not substantial, so as to warrant suppressing appellant's statement to police. Factors relevant to considering whether a violation is substantial include

> the extent to which the violation was willful, the extent to which the exclusion will tend to prevent future violations, the extent to which the violation is likely to have influenced the defendant's decision to make the statement, and the extent to which the violation prejudiced the defendant's ability to support his motion to suppress or to defend himself at trial.

Inman, 692 N.W.2d at 80 n.3 (citing *Scales*, 518 N.W.2d at 592; *Model Code of Pre-Arraignment Procedure* § 150.3).

According to the Model Code, as cited in *Scales*, a violation is always deemed to be substantial if one or more of three conditions exist. First, "[t]he violation [will be deemed substantial if] gross, willful, and prejudicial to the accused. A violation shall be deemed willful regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized by a high authority within it." *Model Code of Pre-Arraignment Procedure* § 150.3(2)(a), *cited in Scales*, 518 N.W.2d at 592 n.5. A violation will also be deemed substantial if it was likely to have led the accused to misunderstand his legal rights and influenced him to make the statement, or if it "created a significant risk that an incriminating statement may have been untrue." *Id*., § 150.3(2)(b), (c).

Appellant argues that the violation was "willful" under the applicable provision of the Model Code, because, by following Texas law, the officer was engaging in a practice adhered to by the Texas law-enforcement agency, which did not necessarily comply with *Scales*. But the violation is not "gross, willful, and prejudicial" to appellant, who was given the chance to review his statement with a magistrate and was also informed of his rights by the officer who took his statement.[1] Appellant argues that appellant's mother

[1] Texas law provides that a child's statement is admissible in certain circumstances, including when, after being advised of his rights by a magistrate and waiving those rights, the child makes a written statement or an oral, recorded statement. Tex. Fam. Code Ann. § 51.095 (Vernon 2008). The district court concluded that the April 3 notice of rights given to appellant by the magistrate was relevant to whether appellant understood what

may have unduly influenced him to cooperate with the officer. But appellant's mother was not present during the interview about the Minnesota offense. And the fact that the statement was not contemporaneously recorded was not likely to have led appellant to misunderstand his legal rights or influenced him to make the statement. Further, because appellant does not claim that his statement was inaccurate, there is not a significant risk that appellant's statement to police was untrue.

As to the additional considerations, excluding the statement would not likely discourage future violations because it involved a Texas officer and would not implicate future Minnesota procedures. And it is not likely that the failure to record appellant's statement prejudiced appellant's ability to challenge the statement at a suppression hearing or defend himself at trial because appellant was told repeatedly what his rights were and had several conversations with police regarding the exercise of those rights. Therefore, we conclude that any *Scales* violation is not substantial, and the district court did not err by denying the motion to suppress appellant's statement to police.

Affirmed.

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was happening on April 4, when appellant waived his rights relating to the Minnesota offense.