STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2338

State of Minnesota,
Respondent,

vs.

Trinidad Perez Carrino,
Appellant.

Filed November 2, 2010
Affirmed
Bjorkman, Judge

Ramsey County District Court
File No. 62-CR-08-18952

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, MN 55102 (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

BJORKMAN, Judge

In this appeal from his convictions of first-degree criminal sexual conduct and kidnapping, appellant argues that the district court abused its discretion by admitting evidence of a subsequent sexual assault. Although the district court abused its discretion, we conclude that appellant was not prejudiced by admission of the evidence. Accordingly, we affirm.

FACTS

In June 2001, 23-year-old B.J. and her friend K.P. went to downtown Minneapolis to drink and dance. Shortly after midnight, they met a man who danced with or near them for approximately one-half hour. When B.J. and K.P. discussed taking a taxi home to K.P.'s mother's home in south Minneapolis, the man offered to give them a ride, explaining that he also lived in that area. They accepted the man's offer.

B.J. got into the front passenger seat of the man's car, and K.P. got into the back seat. After a while, B.J. became concerned that the man had been driving for too long, and she asked him to stop at a gas station. K.P. also asked him to stop, but he did not. He drove for approximately two hours before stopping by a freeway overpass. Although it was raining heavily, B.J. and K.P. immediately exited the car and began running away. The man followed them and began hitting both of them on the back of their heads with an unidentified weapon, causing them to fall. K.P. managed to get up and run to get help. But B.J. was unable to fully regain her feet, because the man kept hitting her. He grabbed B.J. by the hair, dragged her into a ditch, pulled off her skirt and underwear, and

forcibly raped her while continuing to hit her in the head. When bright lights flashed down on them from the road, the man fled.

K.P. meanwhile had managed to flag down a passing vehicle and call 911. While K.P. was on the phone, B.J. climbed out of the ditch naked from the waist down and covered in blood. She was hysterical and repeatedly stated that she had been raped. She was taken to the hospital, where she was treated for multiple physical injuries and given a sexual-assault examination. As part of the examination, semen was collected from B.J.'s body. The bureau of criminal apprehension (BCA) developed a DNA profile of B.J.'s assailant from the semen, but the profile did not match any profiles in the BCA databases. And neither K.P. nor B.J. was able to provide a detailed description of the man. Consequently, the police were unable to identify a suspect at that time.

In 2008, investigation of another sexual assault led Minneapolis police to appellant Trinidad Perez Carrino. Subsequent testing matched appellant's DNA profile to the DNA profile of B.J.'s assailant. The state charged appellant with first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2000), and kidnapping, in violation of Minn. Stat. § 609.25, subd. 1(2) (2000).

Before trial, the state provided notice of its intent to offer evidence of the 2008 sexual assault to prove identity and a common scheme or plan. The district court ruled that the evidence would not be admitted, with the caveat that a consent defense might open the door to reconsideration of that ruling. Appellant subsequently testified that he had engaged in consensual sexual intercourse with B.J., and the district court permitted the state to present rebuttal testimony from the 2008 victim, the officer who investigated

the 2008 case, and a BCA forensic scientist. The jury found appellant guilty on both counts, and this appeal follows.

D E C I S I O N

Evidence of other crimes is not admissible to prove that a person acted in conformity with that act on a particular occasion. Minn. R. Evid. 404(b). But evidence of other crimes or bad acts may be admissible when offered for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* This evidence, known as *Spreigl* evidence,[1] is admissible only if five conditions are met:

> (1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; (2) the prosecutor clearly indicates what the evidence will be offered to prove; (3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; (4) the evidence is relevant to the prosecutor's case; and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Id.; *see also State v. Kennedy*, 585 N.W.2d 385, 390 (Minn. 1998) (stating that the same analysis applies to prior and subsequent crimes or bad acts). The principal consideration is whether the evidence is material and relevant and whether the probative value of the evidence outweighs the potential for unfair prejudice. *State v. Burrell*, 772 N.W.2d 459, 466 (Minn. 2009). If it is a "close call" whether the probative value of *Spreigl* evidence is outweighed by its potential for unfair prejudice, the district court should exclude the evidence. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). We review the district

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

court's admission of *Spreigl* evidence for an abuse of discretion. *State v. Rucker*, 752 N.W.2d 538, 549 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008).

The district court determined that the *Spreigl* evidence was relevant to the issue of consent. *See State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984) (stating that *Spreigl* evidence "showed a pattern of similar aggressive sexual behavior" and, therefore, was "highly relevant to the issue of consent"). Appellant first argues that the district court abused its discretion by admitting the *Spreigl* evidence because the 2008 incident was too remote in time and not markedly similar to the charged offenses. We need not address this argument because we agree with appellant's second argument—that any probative value was outweighed by the potential for unfair prejudice.

The state's need for *Spreigl* evidence is a principal consideration in balancing the probative value of the evidence against its potential for unfair prejudice. *Ness*, 707 N.W.2d at 690. The state's evidence against appellant on the issue of consent was strong. B.J. gave a detailed description of the incident, which was substantially corroborated. *See id.* at 690-91 (holding that the state's case was "not weak" and the probative value of *Spreigl* evidence was low when there was corroborating evidence on the issue for which the evidence was admitted). Although K.P. did not witness the sexual assault, she was with B.J. immediately before and after the assault and corroborated most of B.J.'s testimony. K.P. also testified about her own injuries, and the state presented a recording of K.P.'s 911 call. Several witnesses testified regarding B.J.'s condition after the incident, detailing her hysterical demeanor and numerous injuries, including head injuries so severe that they required stitches and staples and injuries to her inner thighs and

vaginal area. The doctor who treated B.J. on the night of the incident opined that B.J. had been hit repeatedly with a tool and raped.

Presented with this compelling evidence, there is no reasonable basis for a jury to believe appellant's claim that B.J. engaged in consensual sexual intercourse with him and that someone else injured her and K.P. *See id.* at 690 (explaining that the state may need *Spreigl* evidence, notwithstanding sufficient other evidence to convict, if it is unclear that the jury will believe that evidence). Given the strength of the state's case against appellant, it is, at best, a "close call" whether the probative value of the *Spreigl* evidence was sufficient to outweigh the significant risk it posed of unfairly characterizing appellant as a rapist. Because *Spreigl* evidence should be excluded when the question is close, we conclude that the district court abused its discretion by admitting the evidence.

The district court's error in admitting the *Spreigl* evidence does not entitle appellant to a new trial unless he can demonstrate that there is a reasonable possibility that the evidence significantly affected the verdict. *See State v. Clark*, 738 N.W.2d 316, 347 (Minn. 2007). To determine whether appellant has met this burden, we consider the entire record, including (1) the manner in which the evidence was presented, (2) whether it was a significant part of the trial, (3) whether the district court gave a cautionary instruction, (4) whether the evidence was used in the closing argument, and (5) the strength of the other evidence against appellant. *See id.*; *State v. Bolte*, 530 N.W.2d 191, 198-99 (Minn. 1995).

The record does not support appellant's contention that he was prejudiced by the district court's admission of the *Spreigl* evidence. Although the evidence was presented through live witnesses, including emotional testimony from the 2008 victim, the testimony of the three *Spreigl* witnesses amounted to only 31 pages out of a trial transcript that included nearly 400 transcribed pages of witness testimony. The district court instructed the jury three separate times that it was not to use the *Spreigl* evidence as character or propensity evidence or to find appellant guilty because of the *Spreigl* evidence but should use that evidence only for the limited purpose of determining "whether the Defendant committed those acts with which the Defendant is charged in the Complaint." We presume the jury followed those instructions. *See State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). Also, the prosecutor referred to the 2008 incident only briefly during closing, using that incident primarily to explain how appellant was identified as B.J.'s assailant, while strongly emphasizing the extensive evidence against appellant.

And it is the extensive evidence against appellant that most clearly demonstrates the lack of prejudice from admission of the *Spreigl* evidence. The record overwhelmingly indicates that B.J. and K.P. accepted a ride home from a man who then confined them to his car for a period of two hours, attacked both women as they sought to escape, and dragged B.J. off to a ditch and raped her. When B.J., who was severely injured and distraught, was taken to the hospital very shortly afterward, semen was collected from her body, which subsequently was matched to appellant's DNA profile. On this record, there is virtually no possibility that the *Spreigl* evidence affected the

jury's verdict. Therefore, the district court's error in admitting the evidence was harmless.

Affirmed.