STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1913

State of Minnesota,
Respondent,

vs.

Ronald B. Petrin,
Appellant.

Filed May 20, 2008
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 05071738

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

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Ted Sampsell-Jones, Special Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Wright, Judge.

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

PETERSON, Judge

Following a court trial, appellant Ronald B. Petrin was found guilty of third-degree criminal sexual conduct and sentenced under Minn. Stat. § 609.3455, subd. 4 (Supp. 2005), to a term of life imprisonment. On appeal, appellant argues that (1) the district court erred in admitting evidence of two prior sex offenses as *Spreigl* evidence because the prior offenses were not sufficiently similar to the charged offense to qualify as modus operandi evidence and because admitting the evidence influenced appellant's decision to waive a jury trial; (2) the district court committed plain error under *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006), by admitting testimonial hearsay contained in a lab report in violation of his right to confrontation; (3) the prosecutor committed prejudicial misconduct by coaching a key witness and attempting to suppress exculpatory testimony; and (4) the district court erred by denying appellant's petition for postconviction relief without an evidentiary hearing. We affirm.

FACTS

The victim in this case was L.F., the 19-year-old daughter of appellant's girlfriend, H.F. L.F., H.F., and appellant lived together in H.F.'s house. One evening, appellant expressed a willingness to help L.F. with a problem. The next morning, appellant woke L.F., saying that he needed to talk to her, so L.F. got dressed and went into the living room to talk to appellant.

Appellant told L.F. that if she would "go downstairs with him on [her] old bed for 20 minutes, that he would help [her] out with everything." L.F. understood that to mean

appellant wanted to have sex with her, so L.F. grabbed her car keys and walked towards the front door, intending to leave. Appellant blocked L.F.'s path to the door and then used physical force to restrain her. Appellant grabbed L.F. from behind and put his arm around her neck using such force that L.F. could not breathe and began having an asthma attack. L.F. tried to push appellant's arm away but was unsuccessful. Eventually, appellant loosened his grip enough so that L.F. could breathe slightly, and then he released her completely. Very frightened, L.F. walked through the kitchen with appellant close behind her and went to a downstairs bedroom with appellant.

In the bedroom, appellant allowed L.F. a few minutes to catch her breath but stood in the bedroom doorway, blocking it. When L.F. caught her breath, appellant told her to take off her clothes, and, feeling threatened, she did. Appellant laid L.F. on the bed, straddled her, and, ignoring her protests, had vaginal intercourse with her and then lay on the bed between L.F. and the bedroom door. L.F. asked appellant to let her leave, but he did not move. After having vaginal intercourse with L.F. a second time, appellant got up and started getting dressed. Appellant eventually allowed L.F. to leave after she promised not to tell anyone what had happened.

A friend brought L.F. to a hospital, where L.F. was examined by a sexual-assault nurse. The nurse took swabs for DNA tests, and a Bureau of Criminal Apprehension (BCA) lab report admitted into evidence at trial showed that the DNA matched appellant's DNA. The only physical injuries noted were scratches to L.F.'s neck, which L.F. said were from her own fingernails.

Appellant was charged with first- and third-degree criminal sexual conduct. After the district court granted the state's motion to admit evidence of two prior sex offenses committed by appellant, appellant waived his right to a jury trial, and the case was tried to the court.

The following evidence of the prior sex offenses was admitted at trial. In January 1983, wielding a knife and wearing a mask, appellant broke into K.S.'s mobile home. Appellant held a knife to K.S.'s face and throat and tore off her clothes. Continuing to wield the knife, appellant performed several acts of sexual intercourse on K.S. Appellant stipulated that he and K.S. lived in the same trailer park and that he had known her for several years.

M.E. met appellant when he was dating a woman who was M.E.'s good friend and coworker. M.E. had contact with appellant through her friend on a couple of occasions. Early one morning in October 1993, appellant called M.E., saying that her friend had been arrested after a traffic stop and he needed M.E. to give him a ride to bail her friend out of jail. When M.E. got to appellant's apartment, he had her come inside. When M.E. entered the apartment, appellant grabbed her and pushed her up against the door. Appellant had a knife, and he had his hand around her neck to hold her against the door. Appellant brought M.E. into the bedroom, where he told her to take off her clothes, but M.E. refused. M.E. ended up on the bed with appellant straddling her. M.E. was able to get off the bed, but appellant followed her around the apartment and prevented her from leaving by blocking the door. At some point, appellant took off his shirt and tied it around M.E.'s neck, preventing her from screaming and making it hard for her to breathe.

Eventually, M.E. was able to get to the door and open it partway, and appellant threw her out into the hallway.

In the current prosecution, appellant claimed consent as a defense. Appellant testified that L.F. initiated the sex on November 7, 2005, in an effort to get appellant to change his mind about not allowing her boyfriend to move in with them. Appellant testified that he and L.F. had previously had consensual sexual relations and that she had performed oral sex on him in exchange for money.

The district court found appellant not guilty of first-degree criminal sexual conduct but guilty of third-degree criminal sexual conduct. Under Minn. Stat. § 609.3455, subd. 4 (Supp. 2005), the district court sentenced appellant to life imprisonment, with a minimum term of 136 months' imprisonment, a double upward departure from the presumptive guidelines sentence. After filing this appeal, appellant moved to stay the appeal pending postconviction proceedings. This court granted appellant's motion and remanded the case to the district court, which denied appellant's postconviction petition without an evidentiary hearing. This court then reinstated this appeal.

D E C I S I O N

I.

> Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Minn. R. Evid. 404(b). Such evidence is known as "*Spreigl* evidence" in Minnesota. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). The admission of *Spreigl* evidence lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996). To prevail, an appellant must show error and prejudice resulting from the error. *State v. Clark*, 738 N.W.2d 316, 345 (Minn. 2007). "When it is unclear whether *Spreigl* evidence is admissible, the benefit of the doubt should be given to the defendant and the evidence should be excluded." *Kennedy*, 585 N.W.2d at 389.

Appellant argues that the district court erred in finding that the *Spreigl* evidence was relevant and material to the state's case and that the probative value outweighed the potential for unfair prejudice; he concedes that the remaining requirements for the admission of *Spreigl* evidence have been met. *See Clark*, 738 N.W.2d at 345 (listing requirements for admission of *Spreigl* evidence).

Relevancy and materiality

> In determining the relevance and materiality of *Spreigl* evidence, the trial court should consider the issues in the case, the reasons and need for the evidence, and whether there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in time, place or modus operandi. The closer the relationship between the events, the greater the relevance or probative value of the evidence and the lesser the likelihood the evidence will be used for an improper purpose.

Kennedy, 585 N.W.2d at 390 (quotations omitted).

In a criminal-sexual-conduct case, "*Spreigl* evidence may be introduced to establish, by showing a common scheme or plan -- that a sexual act occurred." *Clark*,

738 N.W.2d at 346. More specifically, *Spreigl* evidence is admissible to establish that the conduct on which the charged offense was based actually occurred or to refute the defendant's contention that the victim's testimony was a fabrication or a mistake in perception. *State v. Wermerskirchen*, 497 N.W.2d 235, 241-42 (Minn. 1993). "When determining whether past misconduct is admissible under the common scheme or plan exception, the misconduct must have a marked similarity in modus operandi to the charged offense. If the prior crime is simply of the same generic type as the charged offense, it ordinarily should be excluded." *Clark*, 738 N.W.2d at 346 (quotations omitted).

In *Clark*, the supreme court concluded that the district court abused its discretion in admitting *Spreigl* evidence under the common-scheme-or-plan exception when the only similarities between the prior and current offenses were that "(1) both acts involved the use of a gun to threaten the victims; (2) both acts occurred in the victims' bedrooms; and (3) both acts involved vaginal penetration or attempted vaginal penetration." *Id.* The court explained that in previous cases affirming the admission of *Spreigl* evidence, the fact-finder had been "presented with details tending to establish a more distinctive modus operandi." *Id.* at 347.

The district court found that appellant's 1983 and 1993 offenses were relevant and material to the prosecution "because the charges are nearly identical in the prior and current cases, and the factual bases are very similar." The district court explained:

> The prior cases show modus operandi of targeting women he knows, of using force and specifically targeting the neck area. In addition, in the 1993 case, [appellant] lured the

> victim with a pretense and attacked her in his home; these facts are alleged in the present case as well.

We conclude that under *Clark*,[1] the district court's reasoning was incorrect with respect to the 1983 offense. The fact that appellant targeted women that he knew is properly considered as a factor in determining relevancy and materiality. *State v. Gomez*, 721 N.W.2d 871, 878 (Minn. 2006) (considering fact that all victims were elderly in determining relevancy and materiality). But targeting victims that he knew is insufficient by itself to establish a distinctive modus operandi, and using force is common to most sexual assaults. Appellant targeted the neck area in both the charged and the 1983 offenses, but in 1983, he targeted the victim's neck with a knife, while in the charged offense, he choked the victim. The 1983 offense is not sufficiently similar to the charged offense to be relevant to proving common scheme or plan. Therefore, the district court abused its discretion by admitting the 1983 offense as *Spreigl* evidence.

As found by the district court, the 1993 offense had similarities to the charged offense in addition to appellant targeting women that he knew and using force. Appellant argues that there is no evidence that he "lured [L.F.] anywhere on the basis of a false pretense." But appellant woke L.F. and told her to come into the living room, saying that they needed to talk, which would seem reasonable to L.F. given the topic of discussion the night before. As in the 1993 offense, appellant used false pretenses to lure L.F. into a position where she would be vulnerable to an assault. In both the 1993 and charged offenses, appellant used strangulation to subdue his victim and followed the victim

[1] We note that *Clark* was not decided until after this case was tried.

around and blocked a doorway to prevent her from leaving. These facts are sufficient to show a marked similarity between the 1993 offense and the current offense. *See Clark*, 738 N.W.2d at 347 (citing *State v. Wright*, 719 N.W.2d 910, 918 (Minn. 2006) ("both incidents (1) 'involved intrusions into homes of vulnerable victims whom the [defendant] had known for some time'; (2) took place 'in the early morning hours'; (3) 'were preceded by extensive drug use'; (4) were committed with similar weapons; and (5) involved 'markedly similar' injuries to the victims"); *State v. Blom*, 682 N.W.2d 578, 612 (Minn. 2004) ("[b]oth incidents involved the kidnapping of young, petite women to remote, wooded areas . . . [and] also involved subduing the women by applying force at their neck and throat areas"); *Kennedy*, 585 N.W.2d at 391 (both offenses involved the same victim, "nearly identical" advances, and occurred in the victim's bedroom)).

Appellant does not dispute the district court's finding that the time period between the 1993 offense and the charged offense did not preclude admission because appellant had been either in prison or on parole for 20 of the last 23 years. *See Clark*, 738 N.W.2d at 346 (addressing proximity in time). The two offenses are also close in place. *See id.* (rejecting argument that offenses were not close in place when both occurred in same metropolitan area).

Prejudicial effect v. probative value

When balancing the probative value against the prejudicial effect of *Spreigl* evidence, the district court "must consider how necessary the *Spreigl* evidence is to the state's case." *State v. Berry*, 484 N.W.2d 14, 17 (Minn. 1992) (citations omitted). Necessity has been clarified by the supreme court:

> "Need" for other-crime evidence is not necessarily the absence of sufficient other evidence to convict, nor does exclusion necessarily follow from the conclusion that the case is sufficient to go to the jury. A case may be sufficient to go to the jury and yet the evidence of other offenses may be needed because, as a practical matter, it is not clear that the jury will believe the state's other evidence bearing on the disputed issue.

Angus v. State, 695 N.W.2d 109, 120 (Minn. 2005) (quotation omitted). To accomplish this task, the district court "must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *Id.* at 120.

The district court found, "Because the only two witnesses to the presently-charged incident are [appellant] and his accuser, evidence of [appellant's] modus operandi will help the factfinder to determine the credibility of the defense of consent, regardless of whether the defendant testifies." The district court's finding supports admission of evidence of the 1993 offense. The probative value of *Spreigl* evidence is heightened when there is scant physical evidence and the case may turn on testimony and credibility. *See State v. Sebasky*, 547 N.W.2d 93, 98 (Minn. App. 1996) (admitting evidence of prior sexual offenses in subsequent sex-offense trial in part because subsequent case rested solely on testimony of two teenage complainants), *review denied* (Minn. Jun. 19, 1996). Also, the admission of *Spreigl* evidence is less prejudicial when the trial is to the court rather than to a jury. *Irwin v. State*, 400 N.W.2d 783, 786 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987).

The district court did not abuse its discretion in admitting the evidence about the 1993 offense.

Because the district court erred in admitting the evidence regarding the 1983 offense, we must examine the record to determine whether a reasonable possibility exists that the wrongfully admitted evidence significantly affected the verdict. *Clark*, 738 N.W.2d at 347. The modus operandi of the 1993 offense was markedly similar to the charged offense and very probative with respect to whether the victim in the charged offense consented. We, therefore, conclude that there is not a reasonable possibility that the evidence about the 1983 offense significantly affected the verdict.

Appellant cites no evidence in the record supporting his claim that the admission of the *Spreigl* evidence influenced his decision to waive a jury trial. Appellant argues that if the prior offenses had been admitted only for impeachment purposes, he could have avoided their admission by declining to testify and exercised his right to a jury trial. But at the pretrial hearing addressing the admissibility of the prior convictions, defense counsel stated:

> [Their admission] would have a disastrous, chilling effect. . . . This is going to be a consent defense and the accused needs to testify in a consent defense, and letting that kind of impeachment in would be a grave, chilling effect on that for very little value.

II.

Appellant argues that under *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006), he is entitled to reversal based on the admission of a BCA lab report without the testimony of the analyst who prepared the report.

A BCA report stating that the DNA profile obtained from appellant matched the DNA profile in the sperm cell fractions obtained from the swab [from L.F.] was admitted

into evidence without the testimony of the analyst who prepared the report. When offering the exhibit, the prosecutor stated, "[P]ursuant to stipulation from defense and in lieu of testimony, the State would be offering this." Defense counsel replied, "We don't have any objection to that exhibit . . . ."

The parties dispute whether appellant preserved his objection to the admission of the report. The state argues that because appellant's stipulation was an affirmative act by appellant, the stipulation should not be treated like a failure to object, which may be reviewed under the plain-error standard. We agree. By stipulating, through his counsel, to the admission of the lab report without the analyst's testimony, appellant waived his right to object to the admission of the report. *State v. Cavegn*, 294 N.W.2d 717, 723-24 (Minn. 1980); *see also State v. Bellcourt*, 312 Minn. 263, 265, 251 N.W.2d 631, 633 (1977) (stating that when defendant "specifically stated that he did not object to the admission of the photographs," he could not argue on appeal "that he should be granted a new trial on the ground that this evidence prejudiced him").

III.

Appellant argues that the prosecutor committed misconduct by coaching a witness and attempting to suppress potentially exculpatory evidence.

"A defendant alleging prosecutorial misconduct generally will not be granted a new trial if the misconduct was harmless beyond a reasonable doubt." *State v. Lasnetski*, 696 N.W.2d 387, 396 (Minn. App. 2005). "An error is harmless beyond a reasonable doubt only if the verdict rendered was surely unattributable to the error." *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005) (quotation omitted).

M.C., a friend of L.F., told a defense investigator that at times, L.F. seemed "really relaxed and cavalier" about the sexual assault. On cross-examination at trial, M.C. testified that one of the reasons that she felt L.F.'s attitude was "relaxed and cavalier" was that L.F. had not told her mother about the sexual assault. M.C. testified that shortly before trial, the prosecutor told her that a detective had instructed L.F. not to tell her mother and that the information learned from the prosecutor changed M.C.'s perception about L.F.'s attitude.

Appellant moved for a mistrial based on the prosecutor advising M.C. that a detective had instructed L.F. not to tell her mother about the sexual assault until appellant could be apprehended. The district court denied the motion for a mistrial, explaining that while the demeanor of a victim may have some relevance, opinion testimony about a victim's credibility, or about the consistency of the victim's demeanor with her allegations, is inadmissible. *See Van Buren v. State*, 556 N.W.2d 548, 552 (Minn. 1996) (concluding that defendant had been denied a fair trial when prosecutor elicited improper "vouching" testimony from a number of witnesses, or testimony that others believed the victim's allegations of sexual assault); *State v. Saldana*, 324 N.W.2d 227, 231 (Minn. 1982) (stating that expert opinions concerning a witness's capacity to perceive the world around him or her "are generally inadmissible because such opinions invade the jury's province to make credibility determinations"). The district court admitted as demeanor evidence M.C.'s out-of-court statements to the defense investigator, the state's investigator, and the detective who told L.F. not to tell her mother about the sexual assault.

In addressing a claim of witness tampering,

> the critical questions are whether (1) the witness was important to the defense, and (2) as a result of the prosecutor's action, the defendant was denied the witness's testimony or the witness changed his testimony so as to be less favorable to the defense.

LaFave, *Criminal Procedure* § 24.3(h) (4th ed. 2004).

Because the information provided by the prosecutor related only to inadmissible opinion evidence, appellant's witness-tampering claim fails. But even if there was misconduct by the prosecutor, it was harmless error because defense counsel's interview of M.C., which contained the information about M.C.'s doubts about L.F.'s allegations against appellant and the reasons for those doubts, was admitted into evidence.

IV.

Appellant argues that the district court erred by denying his postconviction petition without an evidentiary hearing.

Appellate courts address the denial of a postconviction petition without an evidentiary hearing only to determine whether sufficient evidence exists to support the district court's findings. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). We will reverse only on proof that the district court abused its discretion. *Id.*; *Ives v. State*, 655 N.W.2d 633, 635 (Minn. 2003).

Postconviction courts are required to schedule a hearing to address a postconviction petition, unless the petition, files, and record "conclusively show that the petitioner is entitled to no relief . . . ." Minn. Stat. § 590.04, subd. 1 (2006). As a general rule, "a convicted defendant is entitled to at least one right of review by an appellate or

postconviction court." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). Any doubts about whether an evidentiary hearing is required should be resolved in favor of the petitioner. *Patterson v. State*, 670 N.W.2d 439, 441 (Minn. 2003); *see also* Minn. Stat. § 590.04, subd. 1. But allegations of disputed fact must be more than mere assertions or conclusory allegations without factual support. *Beltowski v. State*, 289 Minn. 215, 217, 183 N.W.2d 563, 564 (1971).

Appellant did not request an evidentiary hearing but rather submitted the "petition on the basis of the existing record, including the attached affidavits." In his petition for postconviction relief, appellant sought relief on the ground that his attorney misrepresented to him that the district court "could not impose a life sentence for either charge" and that if he "had known that he was even arguably eligible for a life sentence he would not have waived his right to a jury trial." But at trial, when asked if he understood the consequences of a conviction, he replied, "Life in prison. And if I don't get life in prison, I'll get life in a sex offender treatment program, Moose Lake or St. Peter." The district court did not err in denying appellant's postconviction petition without an evidentiary hearing.

Affirmed.