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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2319**

State of Minnesota,
Respondent,

vs.

Robert Floyd Welch,
Appellant.

**Filed May 27, 2008
Reversed and remanded
Poritsky, Judge^{*}**

Crow Wing County District Court
File No. K4-06-1024

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Considered and decided by Shumaker, Presiding Judge; Willis, Judge; and Poritsky, 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.

UNPUBLISHED OPINION

PORITSKY, Judge

Appellant Robert Floyd Welch challenges his convictions of six counts of felony harassment, arguing that: (1) the district court abused its discretion by admitting *Spreigl* evidence of three prior criminal-sexual-conduct convictions; (2) the prosecution committed prejudicial misconduct; and (3) the district court abused its discretion by imposing three consecutive sentences. Because we conclude that the district court abused its discretion by admitting *Spreigl* evidence and that Welch was thereby prejudiced, we reverse and remand.

FACTS

In April 2006, three girls ages 7, 11, and 13 walked to a park in Brainerd. When the girls entered the park, they saw Welch walking near them. Welch had recently finished work, was dirty, had grease on his face, and was wearing a cap and sunglasses. As the girls walked through the park, they believed that Welch was following them and watching them. After further observing Welch, they became convinced that he was following them and watching them. The girls became frightened and ran to a nearby church to call a parent to pick them up. The parent then called the police.

Welch was arrested and initially charged with three counts of felony harassment of a person under age 18 and more than 36 months younger than the defendant in violation of Minn. Stat. § 609.749, subds. 2(a)(2), 3(a)(5) (2004 & Supp. 2005), and one count of failure to register change of address by a predatory offender in violation of Minn. Stat. § 243.166 (2004). The court dismissed the charge of failure to register change of address,

and the state amended its complaint to include three additional counts of felony harassment of a person within ten years of two or more qualified domestic-violence-related convictions in violation of Minn. Stat. § 609.749, subds. 2(a)(2), 4 (2004 & Supp. 2005), and three additional counts of felony harassment of a person under age 18 and more than 36 months younger than the defendant with sexual or aggressive intent in violation of Minn. Stat. § 609.749, subds. 2(a)(2), 3(b) (2004 & Supp. 2005).

Before trial, the state gave notice that it intended to introduce evidence of Welch's three prior criminal-sexual-conduct convictions as *Spreigl* evidence under Minn. R. Evid. 404(b). Welch's counsel filed a motion to preclude the evidence, and the district court heard argument on Welch's motion to preclude the *Spreigl* evidence. The state argued that evidence of Welch's convictions was relevant to show motive, knowledge, intent, and to rebut the defense of absence of mistake or accident. Welch's counsel argued that the evidence was not relevant to the charged conduct, was not probative, and that any probative value was outweighed by the potential for unfair prejudice.¹ The district court denied Welch's motion to prohibit introduction of the *Spreigl* evidence.

Welch's two-day trial was held in July 2006. At trial, two of the girls testified in detail about their observations of Welch at the park and their reactions to his conduct. The arresting officer testified that Welch told him that he was a registered sex offender, but had been released from prison with no conditions. Welch's girlfriend testified that

¹ Welch stipulated that his prior criminal-sexual-conduct convictions qualified as domestic-violence-related convictions for purposes of the charges of harassment within 10 years of two or more qualified domestic-violence-related convictions. See Minn. Stat. § 609.749, subd. 4.

Welch told her that he had arrived at the park at 6:00 or 6:30 after getting off work at 4:00 and that the park was near her daughter's house where they had planned to meet later to drive home together.

At the close of the state's evidence, the state moved to introduce the *Spreigl* evidence of Welch's convictions, and he objected. The district court heard arguments from both parties, granted the state's motion to introduce the convictions, and instructed the jury that the *Spreigl* evidence was offered to assist the jury in determining whether Welch committed the charged offenses. The state then introduced certified copies of the judgments of conviction and portions of guilty-plea transcripts from Welch's three criminal-sexual-conduct convictions, and read aloud from the guilty-plea transcripts.² In its jury instructions, the district court again instructed the jury that the *Spreigl* evidence was offered to assist the jury in determining whether Welch committed harassment, and instructed that Welch "is not being tried for and may not be convicted of any offenses other than the charged offenses. You are not to convict [Welch] on the basis of his prior convictions. To do so might result in unjust double punishment." The district court did not instruct the jury as to the specific purposes for which the *Spreigl* evidence was admitted.

² In 1994, Welch was convicted of second-degree criminal sexual conduct for engaging in sexual contact with his juvenile step-sister at some time between 1987 and 1993. In 1997, Welch was convicted of second-degree criminal sexual conduct for engaging in sexual contact with an eight- or nine-year-old female in 1992 or 1993 and first-degree criminal sexual conduct for engaging in sexual penetration with an eight- or nine-year-old juvenile in 1988 or 1989.

Following trial, the jury found Welch guilty of three counts of harassment of a victim under age 18 and more than 36 months younger than the defendant, guilty of three counts of harassment within 10 years of two or more qualified domestic-violence-related convictions, and not guilty of aggravated harassment with aggressive or sexual intent. Welch was sentenced to consecutive terms of imprisonment of 43 months, 18 months, and 18 months for his convictions of harassment within 10 years of two or more qualified domestic-violence-related convictions. This appeal follows.

DECISION

I.

Welch contends that the district court abused its discretion when it allowed the state to introduce evidence of his three prior criminal-sexual-conduct convictions. The admission of evidence of prior crimes or prior bad acts 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, Welch must show error and prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Evidence of prior 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. Minn. R. Evid. 404(b); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). *Spreigl* evidence 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); *State v. Wermerskirchen*, 497 N.W.2d 235, 239 (Minn. 1993).

A. *Admissibility of the Spreigl evidence.*

Minnesota has established a five-step process to determine the admissibility of *Spreigl* evidence: (1) the prosecutor must give notice of an intent to admit the evidence consistent with the rules of criminal procedure; (2) the prosecutor must clearly indicate what the evidence will be offered to prove; (3) the defendant's involvement in the act must be proven by clear and convincing evidence; (4) the evidence must be relevant to the prosecutor's case; and (5) the probative value of the evidence must not be outweighed by its potential to unfairly prejudice the defendant. *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). "[T]he 'overarching concern' over the admission of *Spreigl* evidence is that it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts." *Id.* at 685. Accordingly, "[w]hen 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. In this case, admission of appellant's prior convictions turns on two steps in the *Spreigl* analysis set out above: examining the relevance of the *Spreigl* evidence, and weighing the probative value against the prejudicial effect

1. *Relevance.*

Welch argues that the *Spreigl* evidence was not relevant to the charged conduct. When assessing the relevance of *Spreigl* evidence, the district 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.” *Ture v. State*, 681 N.W.2d 9, 15 (Minn. 2004) (quoting *State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984)). “The reason for this is that the closer the relationship, the greater is the relevance or probative value of the evidence and the lesser is the likelihood that the evidence will be used for an improper purpose.” *State v. Frisinger*, 484 N.W.2d 27, 31 (Minn. 1992).

Minnesota’s criminal harassment statute provides: “A person who harasses another by committing any of the following acts is guilty of a gross misdemeanor: . . . stalks, follows, monitors, or pursues another, whether in person or through technological or other means.” Minn. Stat. § 609.749, subd. 2(a)(2) (2004). “Harass” means “to engage in intentional conduct which: (1) the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated; and (2) causes this reaction on the part of the victim.” Minn. Stat. § 609.749, subd. 1 (2004). In order to convict a defendant of harassment, “the state is not required to prove that the actor intended to cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated, or except as otherwise provided in subdivision 3, paragraph (a), clause (4), or paragraph (b), that the actor intended any other result.” Minn. Stat. § 609.749, subd. 1a (2004). The harassment statute elevates the crime of harassment to a felony upon proof of certain aggravating elements. Minn. Stat. § 609.749, subs. 3-5 (2004 & Supp. 2005).³

³ Welch was charged with three counts each of the following aggravated harassment crimes: harassment of a person within ten years of two or more qualified domestic-violence-related convictions, Minn. Stat. § 609.749, subs. 2(a)(2), 4; harassment of a person under age 18 and more than 36 months younger than the defendant, with sexual or

Welch argues that the *Spreigl* incidents were too remote in time to be relevant. But there is no bright-line rule as to how recent a *Spreigl* incident must be in order to be relevant. *Ness*, 707 N.W.2d at 688. Rather, we balance time, place, and modus operandi to determine whether *Spreigl* incidents are relevant. *Id.* at 688-89.

As to time, we consider the time between the instant conduct and the conduct underlying Welch's *Spreigl* convictions. *Id.* at 684 n.1. 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). Here, all of Welch's *Spreigl* offenses were committed between 1987 and 1993, even though he was convicted in 1994 and 1997. Thus, 13 years passed between Welch's most recent *Spreigl* conduct and the conduct at issue here. As a result, the time factor does not support a finding of relevance.

Turning to place and modus operandi, there is little similarity between the *Spreigl* incidents and the charged conduct. Each of the *Spreigl* incidents occurred in the victims' homes, and, given the delayed reporting and the nature of the offenses, presumably occurred when no one other than the victim was present. Here, the conduct was in a public park with other people nearby. Each *Spreigl* incident involved sexual contact or penetration. There was no sexual contact, penetration, exposure, or overt sexual behavior of any type here. Each of the *Spreigl* victims was known to Welch and was related to

aggressive intent, Minn. Stat. § 609.749, subds. 2(a)(2), 3(b); and harassment of a person under age 18 and more than 36 months younger than the defendant, Minn. Stat. § 609.749, subds. 2(a)(2), 3(a)(5).

Welch or his then-girlfriend. Here, the girls were unknown to Welch. Although the age of the victims in the *Spreigl* incidents is similar to that of the victims in the charged conduct here, this similarity alone is insufficient to overcome the substantial intervening years and the lack of any other similarity in place or modus operandi. *See State v. Casady*, 392 N.W.2d 629, 633 (Minn. App. 1986) (finding that *Spreigl* evidence was insufficiently relevant where the “only similarity between the two incidents is that they involved sexual misconduct with young females”), *review denied* (Minn. Sept. 24, 1986). Here, the lack of similarity between the *Spreigl* evidence and the charged conduct further undercuts a finding of relevance with respect to any of the offenses with which Welch was charged.

The only relevance that exists between the *Spreigl* convictions and the charged conduct relates to the three counts of felony harassment done with sexual or aggressive intent, specifically whether Welch followed and monitored the girls with sexual intent. But the district court did not instruct the jury that it should consider the *Spreigl* evidence only in connection with those three counts and only on the element of sexual intent. Thus, the jury was free to consider the *Spreigl* cases in connection with the six other counts before this court, which do not require proof of sexual intent. To make such use of the *Spreigl* evidence would turn it into improper character evidence.

We conclude that evidence of Welch’s *Spreigl* convictions was relevant only to the three counts involving sexual intent and had no relevance to the other six charges, which are the convictions on appeal.

2. *Probative value versus prejudicial effect.*

Welch further argues that the *Spreigl* incidents had no probative value, and that any probative value they may have had was outweighed by the potential for unfair prejudice. We agree. As we have determined above, the only relevance of the *Spreigl* convictions to the charged conduct relates to the three counts of felony harassment done with sexual or aggressive intent, specifically whether Welch followed and monitored the girls with sexual intent. But as we have noted above, the court's instructions allowed the jury to consider the *Spreigl* evidence in connection with the offenses not involving sexual intent, to which the evidence had no relevance. Moreover, the probative value of the *Spreigl* convictions to all nine counts is significantly attenuated by the differences between the conduct underlying the *Spreigl* convictions and the charged conduct here; specifically, the lack of similarity in time, place, and modus operandi. On the other side of the balance is the characterization of Welch as a pedophile and a person with an inappropriate interest in young girls. Given the "inherently prejudicial nature of . . . allegations of child sexual abuse," and the lack of meaningful relevance in time, place, and modus operandi, we conclude that the probative value of the *Spreigl* convictions was outweighed by the potential for unfair prejudice to appellant. *See Ness*, 707 N.W.2d at 689 ("[B]ecause the evidence was not relevant, the inherently prejudicial nature of additional allegations of child sexual abuse could only have worked to [the appellant's] prejudice.").

3. *Conclusion.*

Based on the above analyses, we conclude that the district court abused its discretion in admitting evidence of the *Spreigl* offenses.

B. *Reversible Error.*

Having determined that the district court erred in admitting the *Spreigl* evidence, we must determine whether that admission constituted reversible error. “[A] new trial is not required unless there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *State v. Stewart*, 643 N.W.2d 281, 298 (Minn. 2002).

Our review of the record leads us to conclude that there is a reasonable probability that the wrongfully admitted *Spreigl* evidence significantly affected the verdict. The non-*Spreigl* evidence offered against Welch at trial consisted of the testimony of the two girls, the police officer, and one parent. Considering the distances at which the girls and the parent observed Welch’s conduct in the park, as well as the witnesses’ descriptions of his conduct, this testimony is open to differing inferences as to whether Welch was intentionally following and monitoring the girls. Thus, this direct testimony provides a weak foundation to support Welch’s convictions of harassment. Taken together with the highly damaging nature of Welch’s child-sex-abuse convictions, we conclude that there is a reasonable probability that the *Spreigl* evidence influenced the jury’s verdict.

We note that when the *Spreigl* convictions were introduced into evidence, there was very little detail about the conduct underlying Welch’s convictions. The *Spreigl* evidence consisted of small portions of Welch’s criminal-sexual-conduct guilty-plea transcripts, which established only that Welch had engaged in sexual penetration and

sexual contact with minors. There was very little detail given to the jury to assist the jury in assessing whether and how Welch's prior conduct proved any of the elements in dispute in the harassment trial. Such an introduction of evidence, without pertinent detail to assist the jury in assessing Welch's guilt for the charged conduct, could only have reinforced the jury's temptation to consider the convictions as bearing on Welch's character and propensity.

We also take note of the district court's broad and generic jury instruction. This court has held that a district court errs when it denies a defendant's request for a specific limiting jury instruction regarding *Spreigl* evidence. *See State v. Babcock*, 685 N.W.2d 36, 41 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004). Here, Welch asked that the district court instruct the jury that it must consider the *Spreigl* conduct as probative of only the four purposes cited by the prosecution pretrial, but the district court refused. While we generally presume that jurors follow the district court's instructions, the instructions the district court gave here failed to limit the jury's consideration of the *Spreigl* evidence to only the *Spreigl* purposes at issue in this case. Further, as we have pointed out above, the district court did not limit the *Spreigl* evidence to only the charges involving sexual intent, and thus allowed the jury to improperly consider the evidence in connection with the other charges. The court's instructions allowed the jury to consider Welch's prior convictions as evidence of his character and propensity to prey upon children.

For the foregoing reasons, we conclude that the erroneous admission of the *Spreigl* evidence requires that the convictions be reversed. Accordingly, Welch's convictions are reversed, and we remand for further proceedings.

II.

Welch next argues that the prosecution committed a number of errors and denied him his right to a fair trial when it (1) elicited testimony that he was a registered sex offender; (2) stated that Welch had recently been released from prison; and (3) argued in closing that the jury should consider as a "circumstance" that Welch had been convicted three times for sexual assaults involving children. Because we are remanding this for further proceedings, which may include a new trial, we will address Welch's claims of misconduct.

This court will reverse a conviction if prosecutorial error, considered in light of the whole trial, impaired the defendant's right to a fair trial. *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). Before trial, defense counsel asked that the district court preclude any testimony by the officer that Welch told him that he was a registered sex offender. The district court instructed the prosecutor that the issue of Welch's status as a registered sex offender "is not to be approached in any fashion" and urged the prosecution to inform the officer that he should not refer to Welch's status. In spite of the court's ruling, the prosecutor elicited testimony that Welch was a registered sex offender. Although defense counsel did not object at trial to the prosecution's line of questioning, the admission of that evidence was in direct violation of the court's instruction. We

conclude that the prosecution's questioning of the officer about appellant's status as a registered sex offender was misconduct.

In its closing argument, the prosecution argued that

when you look at all of the circumstances surrounding this incident at the park, one of those circumstances has to be the fact that he has been convicted three prior times for sexual assaults involving children. And one of those circumstances has to be that in November a few months before this incident he had been released from prison and made it clear to Officer Dooley that was with no conditions.

The prosecution's reference to Welch's recent incarceration and release is not relevant to any element of the harassment crimes charged. And the prosecution's argument that the jury should consider as a "circumstance" that Welch had been convicted three times for sexually assaulting a child is erroneous. *Spreigl* evidence may only be admitted for certain limited purposes. Minn. R. Evid. 404(b). Generally stating that three sexual-assault convictions are a "circumstance" of these crimes is impermissible character evidence suggesting that it is more likely that Welch committed the crimes charged because he had sexually assaulted children in the past, and was misconduct.

Considered alone, such misconduct may not have been sufficient for us to conclude that Welch was denied a fair trial. However, the misconduct served to reinforce the notion that Welch's prior convictions for engaging in criminal sexual conduct with a child implied a heightened propensity to commit the conduct charged. We therefore conclude that the misconduct, together with the erroneous admission of *Spreigl* evidence, denied Welch his right to a fair trial.

III.

Welch contends that the district court abused its discretion when it sentenced him to three consecutive sentences totaling 79 months. But in light of our reversal of Welch's convictions, we decline to reach this argument in this appeal.

Reversed and remanded.