STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1017

State of Minnesota,
Respondent,

vs.

Robert L. Hosley,
Appellant

Filed September 30, 2008
Affirmed
Huspeni, Judge[*]

Hennepin County District Court
File No. 05073277

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Bradford S. Delapena, Special Assistant Public Defender, P.O. Box 40418, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Huspeni, 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

HUSPENI, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that (1) the district court abused its discretion by admitting into evidence his prior conviction for impeachment purposes; and (2) the prosecutor committed misconduct that denied him a fair trial. Appellant also raises several additional arguments in his pro se supplemental brief. We affirm.

FACTS

In the early morning hours of August 10, 1997, appellant Robert L. Hosley entered a Minneapolis duplex through an unlocked kitchen window and sexually assaulted M.M., a female tenant who lived on the ground floor of the building. M.M. was home alone at the time of the assault and had fallen asleep on the living room couch. She suddenly awoke to find appellant, a man she had never seen before, standing over her. She screamed and attempted to escape through a kitchen door, but appellant grabbed her by the neck, tackled her to the floor, and threatened to kill her unless she stopped screaming. M.M. continued to struggle with appellant until he moved her into her bedroom, pushed her onto the bed, sat on her chest, and forced his penis into her mouth. M.M. acted defensively to avoid this contact, but appellant eventually restrained her, removed her shorts, and raped her. After about a minute of penetration, appellant removed his penis

and ejaculated on her back and buttocks. He then ran from the building and left the scene in M.M.'s vehicle.[1]

M.M. immediately called the police to report the crime and provided a description of her vehicle. Shortly thereafter, M.M. was transported to a local hospital for a sexual-assault examination. The examination revealed a small bruise on her right knee, some abrasions and a red mark on her shoulders, and vaginal tenderness typical of forced penetration.

Through lab testing, semen was later found on a swab taken from M.M.'s right buttocks, on the dress and t-shirt M.M. was wearing, and on one of her bed sheets. From this evidence, the Minnesota Bureau of Criminal Apprehension (BCA) developed a DNA profile using the restricted fragment length polymorphism method current at the time. The BCA was unable to match this profile to any potential suspects.

Sometime after 1999, the BCA began a program to develop DNA profiles from evidence in older, unsolved cases using the newer polymerase chain reaction (PCR) method. These new profiles were stored in an unsolved-crimes database. A comparison of appellant's DNA profile, which was created from a DNA sample appellant was required to provide as a result of a previous criminal conviction, to those contained in the unsolved-crimes database returned two matches. One match was to evidence from the sexual assault of M.M. and the second was to evidence from a 1990 sexual assault of T.H., a 15-year-old female.

[1] Police located M.M.'s vehicle nine days after the incident, parked in front of a residence in the Frogtown area of St. Paul, the same neighborhood where appellant resided.

The circumstances surrounding the 1990 assault were markedly similar to the rape of M.M.[2]

After discovering the DNA matches in both assaults, police obtained a warrant and collected a new DNA sample from appellant, which, like the first sample, matched the DNA evidence collected from both crime scenes. M.M. was also presented with a photo lineup from which she identified appellant as her attacker. Appellant was charged with one count each of first- and third-degree criminal sexual conduct and one count of kidnapping involving M.M. During trial, the district court allowed the state to introduce evidence of the 1990 sexual assault of T.H. as other-crimes evidence under *Spreigl*. The state also sought to admit evidence of nine prior convictions to impeach appellant's credibility pursuant to Minn. R. Evid. 609(a). Three of the prior convictions were automatically admissible as crimes of dishonesty, but of the remaining six, only appellant's 2002 conviction for false imprisonment was admitted.

At trial, appellant's version of events wholly contradicted the accounts offered by the state's witnesses. He admitted that he engaged in sexual activity with M.M. and T.H., but claimed that both had consented. Appellant testified that he had a one-time sexual encounter with M.M. after striking up a conversation with her outside her residence. After the encounter, appellant claimed that he borrowed M.M.'s vehicle to complete a

[2] On the night of the assault, T.H. had stayed the night at her sister's Brooklyn Park apartment. While sleeping alone in one of the bedrooms, T.H. awoke at 3:30 a.m. to discover a man she did not know touching her. The man placed his hand over her mouth, told her not to scream or he would kill her, then proceeded to rape her. Police later discovered that the man entered through an unlocked window of the ground-floor apartment.

drug deal. He did not return the vehicle because it failed to start while he was at a residence in St. Paul. With respect to T.H., appellant testified that he had consensual sex with her at a party he attended.

Appellant was convicted of all charges. This appeal followed.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by allowing the state to present evidence of his 2002 false imprisonment conviction for impeachment purposes. A district court's ruling on the impeachment of a witness by prior conviction is reviewed under an abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

Minn. R. Evid. 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (1) was punishable by death or imprisonment in excess of one year . . . and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.

In determining whether the probative value of a prior conviction that is offered for impeachment outweighs its prejudicial effect, a district court considers the following five factors: (1) the impeachment value of the prior crime; (2) the date of the conviction and the defendant's subsequent history; (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior

crime to impeach); (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978).

Appellant contends that the district court abused its discretion in applying the *Jones* factors, and argues that his false imprisonment conviction holds little impeachment value because his three convictions for crimes of dishonesty already provided ample evidence for the jury to judge his credibility. We conclude that the district court acted within its discretion in admitting the challenged evidence. Through the admission of the false-imprisonment conviction in conjunction with the three crimes of dishonesty, the jury was in a better position to evaluate appellant's credibility as a repeat offender. Further, the conviction was less than ten years old. Finally, as noted in *State v. Swanson*, if credibility is a central issue "the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." 707 N.W.2d 645, 655 (Minn. 2006). Appellant's credibility was an important issue in this case, and he was not deterred from testifying by admission of the conviction he challenges. By testifying, his credibility was fully presented to the jury for evaluation.[3] *See State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (noting that the fourth *Jones* factor only "support[s] exclusion of the impeachment evidence if by admitting it, appellant's account of events would not be heard by the jury"). The district court did not abuse its discretion in applying the *Jones* factors.

[3] The district court concluded that the similarity between the false-imprisonment conviction and the current charges favored exclusion. Because false imprisonment is a lesser-included offense of kidnapping, and because the state does not challenge the district court's finding under this factor, we agree that the similarity of the crimes weighed against admission.

II.

Appellant next argues that the prosecutor committed misconduct by (1) suggesting that appellant tailored his testimony to evidence produced by the state; (2) eliciting other-crimes evidence by questioning appellant about charges that had been dismissed; and (3) improperly inflaming the passions of the jury. The defense made objections on the record to the tailoring allegation and to questions regarding the dismissed charges.

Appellate courts "review any objected-to prosecutorial misconduct to determine whether the misconduct is harmless beyond a reasonable doubt." *State v. Dobbins*, 725 N.W.2d 492, 506 (Minn. 2006) (quotation omitted). Prosecutorial misconduct is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006).

A. Tailoring

> [T]he prosecution cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, *at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case.* Without specific evidence of tailoring, such questions and comments by the prosecution imply that all defendants are less believable simply as a result of exercising the right of confrontation.

Swanson, 707 N.W.2d at 657-58 (emphasis added) (footnote omitted).

At trial, the prosecutor accused appellant of tailoring his testimony to the state's evidence by noting that appellant reviewed all of the evidence from the assaults on M.M. and T.H. before trial and was present for the testimony of both victims. Appellant claims that there was no evidence that he tailored his testimony. He overlooks, however, the fact

that he initially denied engaging in sexual contact with M.M. in a post-arrest interview with police and first raised the defense of consent at trial.[4] In light of this inconsistency, the prosecutor had evidence of tailoring and could legitimately highlight changes in appellant's story. *See State v. Ferguson*, 729 N.W.2d 604, 617 (Minn. App. 2007), *review denied* (Minn. June 19, 2007) (concluding that it was appropriate for the state to suggest that a defendant tailored his story to the evidence because his story had changed significantly).

B. Other-Crimes Evidence

A witness may be impeached with evidence of a prior conviction if the conviction was a felony or if the conviction involved dishonesty. Minn. R. Evid. 609(a). But in doing so, "[a] prosecutor cannot elicit testimony concerning the facts underlying a defendant's prior convictions unless such testimony would come within a recognized exception such as a defendant 'opening the door' to such an inquiry." *State v. Nunn*, 399 N.W.2d 193, 196 (Minn. App. 1987), *review denied* (Minn. Mar. 13, 1987).

At trial, defense counsel elicited testimony from appellant about his past convictions for crimes of dishonesty and a 2002 conviction for false imprisonment.

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[4] In his pro se supplement brief, appellant also argues that the prosecutor improperly introduced evidence of his post-arrest silence by asking appellant why he failed to mention his consent defense during the post-arrest interview with police. A prosecutor "may not refer to or elicit testimony about a defendant's post-arrest silence." *Dobbins*, 725 N.W.2d at 509. But the prosecutor's questioning did not violate this rule because appellant chose to speak with the police. "[W]here the record clearly shows that the defendant chose not to rely on his right to remain silent, but instead made statements to police, the prosecution may show and comment upon the defendant's failure to relate to police crucial exculpatory statements recited by the defendant at trial." *State v. Darveaux*, 38 N.W.2d 44, 49-50 (Minn. 1982).

Appellant testified that each conviction resulted from a guilty plea. After being asked to explain his decision to accept the plea offers, appellant stated, "I [accepted the pleas] [b]ecause I felt that I shouldn't waste the court's time or the county's time to take them to trial when I know that I was guilty of doing it. So I figured to just go ahead, get it over with and be done."

On cross-examination, the prosecutor's questioning forced appellant to concede that the state's offer to dismiss additional charges also factored into his decision.

Appellant argues that he did not "open the door" on direct examination and facts underlying his guilty pleas were improperly admitted on cross-examination. We disagree. By claiming that he accepted the plea agreement because he was guilty and wished to avoid burdening the court system, appellant's direct testimony was designed to lead the jury to conclude he was the type of person who would admit his guilt if he were in fact guilty. In doing so, appellant created a false impression of his character that subjected him to cross-examination for the limited purpose of exposing his potential motive for accepting each plea. *See id.* at 196.

C. Impassioning the Jury

The prosecutor began her opening statement by saying, "A woman's worst nightmare. To be attacked by a stranger in her own home." The prosecutor then made a similar comment in her final argument: "Good morning. Every woman's worst nightmare. To be home alone and to find a complete stranger standing over you as you sleep. To be assaulted, threatened and raped in the very location that you consider to be your safe sanctity. Every woman's worst nightmare."

We conclude that the prosecutor's commentary was improper. *See State v. Johnson*, 324 N.W.2d 199, 202 (Minn. 1982) ("Generally, arguments that invite the jurors to put themselves in the shoes of the victim are considered improper."). But comments of this nature are considered improper only in form and not in content. *Id.*; *State v. Bashire*, 606 N.W.2d 449, 454 (Minn. App. 2000), *review denied* (Minn. Mar. 28, 2000). And the likelihood of prejudice to appellant was remote in this instance because each of the comments was brief and isolated, and the evidence against appellant, which included DNA evidence, the victim's identification of appellant, and the discovery of the victim's car in appellant's neighborhood, was strong. *See State v. Tate*, 682 N.W.2d 169, 178 (Minn. App. 2004) (holding that jury was not unduly influenced by improper statements in prosecution's closing argument amounting to 13 lines of a closing argument transcript that was 25 pages long), *review denied* (Minn. Sept. 29, 2004); *State v. Martin*, 723 N.W.2d 613, 626 (Minn. 2006) (noting that error does not require reversal where the evidence of a defendant's guilt was strong). Appellant is not entitled to relief on the basis of the prosecutor's brief inappropriate comment.

III.

Appellant raises several arguments in his pro se supplemental brief.

A. Admission of *Spreigl* Evidence

Appellant argues that the district court abused its discretion in allowing the state to present evidence of the 1990 assault on T.H. under *Spreigl*. 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. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Spreigl evidence may be admissible to prove factors such as motive, intent, identity, knowledge, and common scheme or plan. Minn. R. Evid. 404(b). *Spreigl* evidence shall only be admitted if:

> (1) notice is given that the state intends to use the evidence; (2) the state clearly indicates what the evidence is being offered to prove; (3) the evidence is clear and convincing that the defendant participated in the other offense; (4) the *Spreigl* evidence is relevant and material to the state's case; and (5) the probative value of the *Spreigl* evidence is not outweighed by its potential for unfair prejudice.

State v. Kennedy, 585 N.W.2d 385, 389 (Minn. 1998).

Appellant claims that the state failed to provide clear and convincing evidence that he committed the 1990 assault. We disagree. The standard of clear and convincing evidence "is met when the truth of the facts sought to be admitted is highly probable." *State v. Shannon*, 583 N.W.2d 579, 584 (Minn. 1998) (quotation omitted). Based on the DNA evidence, which established that appellant had sexual contact with T.H., and the testimony from T.H., law enforcement, and medical personnel that tended to prove that T.H. was assaulted, the district court did not abuse its discretion by concluding that the state had met its evidentiary burden.

Next, appellant argues that evidence of the 1990 assault was irrelevant and immaterial to the state's case.

> 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). A *Spreigl* offense need not be identical to the charged crime but "must have a marked similarity . . . to the charged offense." *State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006).

The offenses in this case share several distinct characteristics. In both instances, (1) appellant did not know the victims, (2) appellant surreptitiously entered ground level apartments through unlocked entry points, (3) the crimes were committed at night or in the very early morning hours when the victims would normally be asleep; (4) and appellant achieved sexual contact by force and threats of force.

These similarities are sufficient to permit admission of the 1990 assault. *See, e.g.*, *State v. Blom*, 682 N.W.2d 578, 612 (Minn. 2004) (affirming admission of *Spreigl* evidence for common scheme or plan where "[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."). And because appellant claimed that M.M. consented to the sexual contact, the *Spreigl* incident was also relevant to show appellant's intent to act without consent. *State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984) (stating that *Spreigl* evidence "was highly relevant to the issue of consent" in a sexual assault case because it demonstrated "a pattern of similar aggressive sexual behavior by defendant against other women in the community").

Finally, appellant contends that the probative value of the evidence was outweighed by its potential for unfair prejudice. The district court, in admitting evidence of the 1990 assault, noted that such evidence would only "damage [appellant's] case [through its] legitimate probative force." *See State v. Gomez*, 721 N.W.2d 871, 879 (Minn. 2006) (examining the risk of unfair prejudice requires a court to focus on "the capacity of the evidence to persuade by illegitimate means"). And the logical inference to be drawn from the record is that the balancing test favored admission because (1) both crimes had similar characteristics and (2) the evidence tended to discredit appellant's consent defense, which turned largely on the credibility of appellant and the victim. The risk of unfair prejudice was also diminished by the district court's limiting instruction to the jury. *See State v. Waino*, 611 N.W.2d 575, 579 (Minn. App. 2000) (stating that the prejudicial effect of evidence of similar prior conduct was mitigated by the district court's instruction to the jury). Therefore, the district court did not abuse its discretion in admitting this evidence.

B. Admissibility of Exhibits

Appellant next argues that photographs of M.M.'s injuries and a diagram of the floor plan of M.M.'s apartment should not have been admitted into evidence because the state did not establish a proper foundation for their authenticity. To be admissible, a visual image must be authenticated, which, under Minn. R. Evid. 901, is accomplished if the evidence is "sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). The testimony of a witness with personal knowledge that an image is a fair and accurate representation of "what it is claimed to be"

is a suitable authentication method. Minn. R. Evid. 901(b)(1). Here, the record reveals that before offering these exhibits into evidence, witnesses for the state testified that they fairly and accurately represented M.M.'s injuries and the floor plan of her apartment. Therefore, there was proper authentication.

C. *Schwartz* Hearing

Appellant also contends that the district court abused its discretion in denying him a *Schwartz* hearing. A criminal defendant who suspects a guilty verdict was tainted by juror misconduct may make a posttrial motion for a *Schwartz* hearing. *State v. Pederson*, 614 N.W.2d 724, 730 (Minn. 2000). "To establish a prima facie case, a defendant must submit sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *Id.* (quotation omitted). Denial of a *Schwartz* hearing is reviewed for an abuse of discretion. *Id.*

Appellant requested a *Schwartz* hearing on the basis that "as many as four jurors" were overheard stating that appellant was guilty during recesses of the trial and before deliberations. A summary hearing was held to investigate appellant's accusations, and three witnesses testified that they overheard jurors remark that appellant was guilty before the close of trial. The district court denied appellant's request, and noted that the evidence presented by appellant was "not compelling or credible," and "even if credible . . . does not support a finding of juror misconduct."

We conclude the district court did not abuse its discretion in denying the *Schwartz* hearing. That decision was based primarily on the credibility of the witnesses. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003)

(stating that this court defers to the district court's assessment of witness credibility). Moreover, as the district court noted, the alleged comments that formed the basis for appellant's request, while improper, did not rise to the level of jury misconduct because they were not based on outside influence and would otherwise be permissible during deliberations. *See Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 341, 191 N.W.2d 418, 423 (1971) (noting that [i]t would be totally unrealistic to expect a juror . . . to purge his consciousness of any and all reflections upon the trial at hand—an event which to him is an extraordinary and rare occasion.").

D. Constitutionality of Minn. R. Evid. 404(b)

Finally, appellant alleges for the first time on appeal that Minn. R. Evid. 404(b) is unconstitutional. But because this issue was not raised below, it would be imprudent to address it for the first time on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts generally will not decide issues that were not presented to the district court); *see also State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980) ("The law is clear in Minnesota that the constitutionality of a statute cannot be challenged for the first time on appeal.").

Affirmed.