STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1059

State of Minnesota,
Respondent,

vs.

Ronald Belter,
Appellant.

Filed September 16, 2008
Affirmed
Klaphake, Judge

Hennepin County District Court
File No. 06050750

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

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Lawrence Hammerling, Chief Appellate Public Defender, Melissa V. Sheridan, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104; and

Charles F. Clippert, Special Assistant State Public Defender, 525 Lumber Exchange Building, 10 S. Fifth Street, Minneapolis, MN 55402 (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Worke, Judge.

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

KLAPHAKE, Judge

Appellant Ronald Belter was convicted of two counts of second-degree criminal sexual conduct and one count of second-degree assault. The district court sentenced appellant to life imprisonment on one count of second-degree criminal sexual conduct, based on the jury's finding that the victim was particularly vulnerable due to her age. Appellant challenges both his conviction and his sentence, arguing that (1) he was denied his right to a speedy trial; (2) the district court erred in admitting *Spreigl* evidence; (3) the prosecutor committed misconduct entitling him to a new trial; and (4) the district court failed to provide sufficient guidance to the jury on the aggravated sentencing issue.

Because most of the trial delay was caused by appellant and the district court did not abuse its discretion by admitting the *Spreigl* evidence, by ruling that the prosecutor did not commit misconduct, or by instructing the jury, we affirm.

D E C I S I O N

Speedy Trial

Both the United States and Minnesota Constitutions guarantee a defendant the right to a speedy trial. U.S. Const., amend. VI; Minn. Const., art. I, § 6. Minn. R. Crim. P. 11.10 requires that trial commence within 60 days of a demand for a speedy trial, unless the state, defense counsel, or the court show good cause why trial cannot begin within that period of time. The district court's speedy trial determination, as a constitutional question, is reviewed de novo. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

To determine whether a defendant's right to a speedy trial has been violated, courts employ a balancing test and consider four factors: "(1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay." *Id.*; *see Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972). If the delay is largely the result of defendant's actions, there is no speedy trial violation. *State v. DeRosier*, 695 N.W.2d 97, 109 (Minn. 2005).

Although the delay here was significant, with trial occurring almost nine months after appellant's first speedy trial demand, six of the continuances were requested by the defense and some of the delay was attributable to appellant's competency determination and the grand jury's indictment, which led to dismissal of the original complaint and reissuance of the charges. On this record, we see no prejudice to appellant, who was incarcerated while awaiting trial, but was also being held for probation revocation. We conclude that there was good cause for the delay and that appellant's right to a speedy trial was not violated.

Spreigl Evidence

Evidence of another crime or wrongful act, so-called *Spreigl* evidence, is not admissible to prove a defendant's character, but it may be admitted as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). This court reviews the district court's ruling on admissibility of *Spreigl* evidence for an abuse of discretion. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

Before *Spreigl* evidence can be admitted, the district court must consider whether (1) the state gave notice of its intent to use such evidence; (2) the state clearly explained the purpose for which the evidence is offered; (3) the evidence is clear and convincing; (4) the evidence is material and relevant to the state's case; and (5) the probative value of the evidence is outweighed by its prejudicial effect. *Id.* Appellant asserts that the *Spreigl* evidence was not relevant or material to the state's case and that its prejudicial effect outweighed its probative value, because the incidents were too dissimilar and too far apart in time to be relevant.

The state offered the *Spreigl* evidence to show a common plan or scheme. Such evidence can either be used to bolster identification testimony or to refute charges of fabrication or mistake. *See id.* at 391; *State v. Wermerskirchen*, 497 N.W.2d 235, 241-42 (Minn. 1993). In recent years, the supreme court has sought to narrow the use of *Spreigl* evidence, because of its potential for prejudice, by requiring the state to precisely identify the disputed fact to which the evidence would be relevant. *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006). But *Ness* cites, with apparent approval, the use of *Spreigl* evidence to rebut fabrication if there is a "marked similarity in modus operandi to the charged offense." *Id.* at 688 (quotation omitted); *see also State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007).

The *Spreigl* incident involved 15-year old N.M., who ran away from home in 1995. She was abandoned by friends at a McDonald's, had no money, and was frightened. Appellant approached her and offered to take her to his home. N.M. stayed at appellant's apartment for two months, during which time they had a sexual

relationship, which she described as partially consensual and partially non-consensual. N.M. became pregnant by appellant and has a child.

This incident is similar to the matter before us: both involve young girls, 13-15 years old; in both cases, appellant approached the girls when they were in a vulnerable state and offered to help them; both times appellant offered to take the girls to his apartment; appellant sought to have sex with the girls, successfully in the *Spreigl* incident. Although the prior incident occurred ten years before the current offense, appellant had been incarcerated for part of that time. *See Clark*, 738 N.W.2d at 346 (noting that time span is less significant when defendant was incarcerated for a period of time); *Ness*, 707 N.W.2d at 689. The incidents are similar enough in modus operandi so that the *Spreigl* evidence is relevant and material to the state's case.

When weighing the probative value of the evidence against its prejudicial effect, the *Ness* court instructs the district court to "address the need for *Spreigl* evidence in the context of balancing the probative value of the evidence against its potential for unfair prejudice." *Id.* at 690. Here, the defense concentrated on attacking the credibility of the two child witnesses by emphasizing that they were in trouble for surreptitiously leaving home and by suggesting that their testimony was fabricated. There was no corroborating physical evidence, and the two children were the only eyewitnesses of the sexual behavior. In that context, the state needed the *Spreigl* testimony to bolster the credibility of its witnesses and to rebut the charge of fabrication; appellant's approach to the girls is strikingly similar to his approach to N.M.

As to prejudice, the court instructed the jury about the limited purpose for the *Spreigl* evidence prior to N.M.'s testimony, which covers only six pages in more than 300 pages of testimony. N.M. testified only about how appellant approached her and that they had a partially consensual sexual relationship that resulted in a child; the more lurid facts of that relationship were not disclosed to the jury.

We conclude that the district court did not abuse its discretion by admitting the *Spreigl* testimony, but we caution the district court again to sparingly admit such testimony because of its "great potential for misuse." Minn. R. Evid. 404(b) advisory comm. cmt.

Prosecutorial Misconduct

The district court has discretion to determine whether a prosecutor engaged in misconduct; the reviewing court will reverse "only where the misconduct, viewed in light of the entire record, is of such serious and prejudicial nature that appellant's constitutional right to a fair trial was impaired." *State v. Robinson*, 604 N.W.2d 355, 361 (Minn. 2000).

Appellant sets forth three instances of prosecutorial misconduct. First, the last sentence of the prosecutor's opening statement was: "It's about the police officers who investigated the crime and about this defendant, who was caught, again." Appellant suggests that this improperly invited the jury to speculate on whether appellant had a criminal record. Second, the prosecutor elicited a statement from the investigating officer that pornographic magazines found in appellant's apartment contained photographs of "very young girls"; the court had ruled that the magazine contents could not be submitted

into evidence. The court sustained appellant's objection to this question, but stated that he did so because the prosecutor used the phrase "very young girls," rather than limiting it to "young girls."

Third, during N.M.'s testimony, the prosecutor asked N.M. if she had nonconsensual sex; the court had limited the *Spreigl* testimony to the circumstances of their meeting, her age, and the fact they had a sexual relationship and N.M. had his child. The prosecutor informed the court that she intended to ask if some of the sexual relationship was nonconsensual; the court did not specifically rule on that issue, but barred evidence of pornography, weapons, drug use, and physical abuse. The court overruled appellant's objection to this testimony.

Viewing the record in its entirety, as we must, the prosecutor's use of the word "again" in her opening statement does not rise to the level of misconduct, particularly because the trial testimony included the *Spreigl* evidence.

Deliberately ignoring or failing to obey a limiting court order is prosecutorial misconduct. *State v. Haynes*, 725 N.W.2d 524, 529 (Minn. 2007); *State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994). Based on this record, the prosecutor did not deliberately disobey the court's limiting order and properly discussed with the court the evidence she intended to present about N.M. The court's determination that these three incidents were not deliberate prosecutorial misconduct was not an abuse of discretion. *See Robinson*, 604 N.W.2d at 361.

Jury Instruction

The district court is given considerable latitude in its instructions to the jury and will not be reversed absent an abuse of discretion. *State v. Oates*, 611 N.W.2d 580, 584 (Minn. App. 2000), *review denied* (Minn. Aug. 22, 2000). The district court also has discretion to give additional instructions in response to a jury's question. *State v. Laine*, 715 N.W.2d 425, 434 (Minn. 2006). The court may clarify or reread previous instructions or decline to answer. *Id.*

The state asked that appellant be sentenced under Minn. Stat. § 609.3455, subd. 4(a)(2)(i) (Supp. 2005), which provides that a defendant with one prior sex offense conviction can be sentenced to life imprisonment if the present offense includes an aggravating factor that would permit an upward durational departure under the sentencing guidelines. The court instructed the jury to consider whether the victim was particularly vulnerable based on her age, an aggravating factor under Minn. Sent. Guidelines II.D.2.b.(1). During deliberations, the jury requested clarification in a note to the court, asking, "We would like more clarification for the question, 'Has the State proved beyond a reasonable doubt that [J.G.] was particularly vulnerable due to her age?'" After discussion with counsel, the court instructed the jury as follows: "All I will tell you is that the instructions that you have been given are complete in and of themselves and you may rely on the common understanding of the meaning of those words."

Appellant argues that the term "particular vulnerability" fails to provide sufficient guidance to the jury, relying on *State v. Weaver*, 733 N.W.2d 793 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). In *Weaver*, this court took issue with the phrase

"particular cruelty," because it failed to give the jury guidelines for applying the term. *Id.* at 802. The *Weaver* court noted that a sentencing court could apply the term, because of its familiarity with other cases of a similar nature that could provide a context for the decision, something a sentencing jury lacks. *Id.*

But there is a difference between "particular cruelty" and "particular vulnerability" due to a victim's age. To meaningfully apply the term "particular cruelty," the sentencing jury needs a body of knowledge it lacks: familiarity with multiple cases of a similar nature in which the criminal conduct is physically or psychologically cruel beyond that ordinarily observed in such a case. But every juror has experience with the processes for aging and maturing, and the relative vulnerability of a person due to these processes. The court's instruction to the jury to use its understanding of the common meaning of the phrase was not an abuse of discretion.

Affirmed.