STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2390

State of Minnesota,
Respondent,

vs.

Nathaniel Black,
Appellant.

Filed October 21, 2008
Reversed and remanded
Schellhas, Judge

Hennepin County District Court
File No. 05070255

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

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

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Schellhas, Judge; and Crippen, Judge.*

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* 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

SCHELLHAS, Judge

Appellant challenges his convictions of first-degree criminal sexual conduct and sentence, arguing that the district court erred by (1) admitting *Spreigl* evidence, (2) not instructing the jury as to the purpose of the *Spreigl* evidence, (3) admitting expert testimony, and (4) admitting evidence of appellant's prior convictions of sexual misconduct for impeachment purposes. Appellant also argues that his enhanced sentence was based on judicial fact-finding in violation of *Blakely v. Washington*. We affirmed appellant's convictions but, because of a *Blakely* violation, reversed appellant's sentence and remanded for resentencing. *State v. Black*, No. A06-2390, 2008 WL 1867965 (Minn. App. Apr. 29, 2008), *vacated* (July 15, 2008). The supreme court vacated our decision and remanded the matter to us "for reconsideration in light of the standard for admission of *Spreigl* evidence to show a common scheme or plan in *State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006), which requires a 'marked similarity in modus operandi' between the charged offense and *Spreigl* evidence." The supreme court "expressed no opinion regarding the proper result of application of that standard to the facts of this case." On remand, we reverse appellant's convictions and remand to the district court for a new trial.

FACTS

On October 30, 2005, appellant Nathaniel Black sexually assaulted a woman, S.D., whom he had known for 18 months and had resided with since January 2005. On November 1, 2005, S.D. called 911 from a gas-station pay phone and told the dispatcher

that she was trying to get her children out of the house because appellant had engaged in nonconsensual anal sex with her and she felt threatened by him. When the police arrived, S.D. told them that appellant had anally raped her, and they arrested him and transported him to the police station. S.D. followed the police in her own car. At the police station, S.D. again told police that appellant had anally raped her and that she was injured. S.D. was transported to a medical center where she was examined by a nurse practitioner, Jean Peters, a certified sexual-assault nurse examiner for adolescents and adults. Appellant was charged with two counts of first-degree criminal sexual conduct, pursuant to Minn. Stat. § 609.342, subds. 1(c) (victim had reasonable fear of imminent great bodily harm (Count 1)), 1(e)(i) (2004) (personal injury to victim (Count 2)). The jury convicted appellant on both counts.

At trial, Peters testified that during her examination of S.D., she observed recent bruises on the tops of S.D.'s thighs and fissures or lacerations in the anal area. Based on her eight years of experience as a sexual-assault nurse examiner and nurse practitioner, Peters testified that she had never seen these kinds of injuries to the rectal area after consensual anal sex. Over appellant's objection, the prosecutor asked Peters: "Given what [S.D.] told you happened to her, is it your opinion that this was consensual or nonconsensual penetration?" Peters answered that in her opinion, the anal sex was nonconsensual.

Also at trial, over appellant's objection, the district court allowed the prosecution to introduce evidence of two *Spreigl* incidents to refute appellant's claims that S.D.'s testimony was a "fabrication or mistake in perception." The first was a March 25, 1994

incident in which appellant, then age 29, engaged in criminal sexual conduct with a 15-year-old female acquaintance, A.C. A.C. was riding in the passenger seat of appellant's car, when appellant stopped and tried to kiss her. When A.C. refused and asked appellant to take her home, appellant reclined A.C.'s seat and pulled down her pants. When she resisted, appellant held A.C.'s hands over her head, and forcibly penetrated her. Appellant then drove A.C. to her home. A.C. told her mother what happened; her mother had already called the police because A.C. had not come home yet. Appellant was arrested and charged with first- and third-degree criminal sexual conduct, but was convicted only of fourth-degree criminal sexual conduct pursuant to a plea agreement.

The second *Spreigl* incident occurred in 1996, when appellant assaulted and had sexual intercourse with a 15-year-old female victim, B.U., on several occasions. At the time, B.U. resided with appellant and his friend for approximately two months while working as a prostitute. B.U. testified that she usually gave all of her prostitution earnings to appellant, that appellant warned her not to come home unless she had money, and that appellant got angry and beat her if she did not give him the money. B.U. also testified that appellant knew she was age 15, when he had sexual intercourse with her. As a result of appellant's conduct, he was charged with first- and third-degree criminal sexual conduct and receiving profit derived from prostitution and was convicted of all three offenses. Appellant testified at trial that as a result of these convictions, he was incarcerated from February 1996 to September 1996, November 1996 to April 2002, and February 2005 to April 2005.

The district court determined that the evidence of appellant's past sexual misconduct was clear and convincing and that the evidence was important to the state's case. The district court concluded that "[t]he probative value of the *Spreigl* incidents in this case outweighs its potential for unfair prejudice," and stated that:

> The Court finds sufficient and substantial similarities exist between Defendant's prior crimes and the current charged offense. Defendant has a pattern of sexually abusing women with whom he is acquainted. In the March 25, 1994 incident, Defendant forcibly penetrated A.C. and later claimed that any sexual activity he engaged in with A.C. was consensual. In the February 20, 1996 incident, Defendant engaged in sexual intercourse with B.U. and claimed that the intercourse was consensual. In the current case, Defendant admits having anal intercourse with S.D., but again claims the act was consensual. Given these similarities, the Court finds sufficient similarities between the charged offense and the *Spreigl* incidents.

The *Spreigl* evidence was introduced through the live testimony of both victims. The district court also allowed the state to use these convictions to impeach appellant.

Appellant requested that the jury be instructed about the specific purpose for which the evidence of the 1994 and 1996 *Spreigl* incidents was admitted. During one conference with the district court, appellant's counsel said, "I think . . . you should say that it's offered to show common scheme or plan," but his request was rejected. At a later conference, appellant's attorney said

> *State v. Ness* says that the state has to have a very specific reason and not just a vague reason why the *Spreigl's* admissible. So I think what goes along with that, is you have to tell the jury that it's being offered for a specific reason . . . . So I think . . . a very specific exception should be told to the jury.

The district court denied the request. Ultimately, without giving the particular instruction requested by appellant, the district court instructed the jury, per 10 *Minnesota Practice* CRIMJIG 2.01 (2004), that the *Spreigl* evidence could not be used to prove appellant's character and that the evidence was offered for the limited purpose of assisting the jury in determining whether appellant committed the charged crime. Appellant's counsel argued in closing that the evidence could not be used to prove appellant's character, as did the prosecutor, but neither stated the specific purpose for which it could be used.

After the jury returned its guilty verdicts on both counts of first-degree criminal sexual conduct, the district court granted the state's request to seek an upward departure from appellant's presumptive sentence under the Minnesota Sentencing Guidelines over appellant's objection. Pursuant to *Blakely v. Washington*, the same jury was reconvened as a sentencing jury and was charged with determining whether sufficient aggravating factors existed to justify an upward durational departure in appellant's sentence. One of the aggravating factors the jury was asked to determine was whether children were present in the home. S.D. testified that she knew her four children, ranging in age from 13 to six years old, were in the house on the night appellant assaulted her. The prosecutor argued to the jury that "the question is very specific, were children present in the house, not did the children hear, not did the children see, not were they in the same room as the rape." Based in part on the jury's finding that there were children in the house at the time of the offense, the district court sentenced appellant to a mandatory 30-year prison sentence under Minn. Stat. § 609.109, subd. 4(a) (Supp. 2005).

D E C I S I O N

Evidence of past crimes or 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). But *Spreigl* evidence may be admissible to prove factors such as motive, intent, identity, knowledge, and common scheme or plan. *Kennedy*, 585 N.W.2d at 389. *Spreigl* evidence may also be admitted to show whether the conduct on which the charge was based actually occurred or was "a fabrication or a mistake in perception by the victim." *State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993). In deciding whether to admit such evidence, we examine (1) whether the state has given notice of its intent to admit the evidence, (2) whether the state has clearly indicated what the evidence will be offered to prove, (3) whether there is "clear and convincing evidence that the defendant participated in the prior act," (4) whether the evidence is "relevant and material to the state's case," and (5) whether the probative value of the evidence is "outweighed by its potential prejudice to the defendant." *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). The admission of *Spreigl* evidence is reviewed under an abuse-of-discretion standard. *Id.* at 685. In determining the relevance of *Spreigl* evidence to the charged crime, a court must consider its proximity to the charged crime in time, place, or modus operandi. *Kennedy*, 585 N.W.2d at 391. In this case, the district court found that both the 1994 and 1996 incidents were sufficiently proximate to the charged offense in all three respects.

Appellant argues that the 1994 incident was so remote in time as to be irrelevant and impossible to defend against. Minnesota courts have not firmly established how old an act must be before it is inadmissibly remote, and *Spreigl* evidence as old as nineteen years has been held admissible. *State v. Washington*, 693 N.W.2d 195, 201-02 (Minn. 2005). Bad acts that are remote in time may still be relevant if: (1) the defendant was incarcerated, and thus unable to commit any other crimes, for a significant portion of that time; (2) intervening acts show a repeating or ongoing pattern of very similar conduct; or (3) the defendant was convicted of a crime based on that act, thus reducing the prejudice of having to defend against claims of that act later in time. *Ness*, 707 N.W.2d at 689. As to incarceration, a court may, for the purposes of its analysis, subtract the length of incarceration from the time that has passed since the charged offense. *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007). Between 1994 and 2005, the time of the charged offense, appellant was incarcerated for approximately six years, which the district court considered in finding that the 1994 incident was not "fatally remote in time." Given appellant's intervening six-year period of incarceration, we conclude that the district court did not abuse its discretion in finding that the 1994 incident was not too remote in time to be admissible.

In our decision, vacated by the supreme court, we affirmed the district court's admission of *Spreigl* evidence at trial on the basis that it was "sufficiently related to the charged offenses in time, place, or modus operandi." *State v. Black*, No. A06-2390, 2008 WL 1867965, at *4 (Minn. App. Apr. 29, 2008) (quotation omitted), *vacated* (July 15, 2008). For *Spreigl* evidence to be "admissible under the common scheme or plan

exception, it must have a *marked similarity* in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688 (emphasis added). If the admissibility of *Spreigl* evidence presents a close call, it should not be admitted. *Id*. at 685. In this case, the district court found that evidence of both the 1994 and 1996 incidents was admissible for the purpose of showing a common plan or scheme because there were "sufficient and substantial similarities" between the prior crimes and the charged offenses. But in making this finding, the district court applied a pre-*Ness* standard under which *Spreigl* evidence need only be sufficiently or substantially similar in modus operandi to the charged offenses to be admissible. *See Kennedy*, 585 N.W.2d at 391 ("*Spreigl* evidence need not be identical in every way to the charged crime, but must instead be sufficiently or substantially similar to the charged offense—determined by time, place and modus operandi"). Following *Ness*, *Spreigl* evidence must have "a marked similarity in modus operandi to the charged offense" in order to be admissible. *Ness*, 707 N.W.2d at 688 (quoting the *Kennedy* rule, and clarifying that *Spreigl* evidence "must have a marked similarity in modus operandi to the charged offense."). Therefore, we must determine whether the *Spreigl* incidents in this case are markedly similar in modus operandi to the charged offenses.

Appellant argues that the 1996 incident was not markedly similar in modus operandi to the charged offenses because it did not involve forced sex. He argues that both the 1996 and 1994 incidents are not markedly similar in modus operandi to the charged offenses because they involved a minor instead of an adult. Appellant cites *Clark*, 738 N.W.2d at 345-47, in which evidence pertaining to a prior rape was found not

to be markedly similar in modus operandi to a charge of rape committed during a robbery. The *Clark* court observed that the only similarities between the incidents as presented to the jury were that the defendant used a gun to threaten his victims, both acts occurred in the victims' bedrooms, and both acts involved vaginal penetration or attempted vaginal penetration. *Id.* at 346. The *Clark* court noted that the differences between the charged offense and the prior incident were that in the prior incident, the offense "did not involve a robbery," the defendant and "two others broke into the victim's home," and the offense "involved oral as well as vaginal penetration." *Id.* at 346 n.15. Additionally, the court noted that the defendant "apparently told the victim of his past misconduct that she owed him money, and he disabled two telephones before leaving her home." *Id.* at 347 n.15. The *Clark* court concluded that the two incidents did "not arguably share a 'marked similarity'" in modus operandi as required by *Ness*. *Id*. at 347.

In *State v. Smith*, where the defendant was charged with a firearms offense, this court recently determined that the defendant's 2001 conviction of the same offense was inadmissible as *Spreigl* evidence because of differences between the two offenses. 749 N.W.2d 88, 95 (Minn. App. 2008). For example, the two incidents involved different types of handguns, and the handguns were kept at different locations. *Id.* In the 2001 incident, the defendant admitted that he and others owned the handgun and that he was in charge of keeping the handgun; in the charged offense, while the handgun at issue was accessible to several people, "[n]o actual possession was shown as to anyone" and "[n]o ownership of the gun was ever established." *Id.* We observed that similarity between the

2001 incident and the charged offense "[began] and end[ed] with the name of the crime and the possession of a handgun." *Id.*

In this case, the district court found "sufficient and substantial similarities" between the *Spreigl* incidents and the charged offenses, but under *Ness*, only *Spreigl* incidents that are *markedly similar* in modus operandi to the charged offenses are admissible. And, as in *Clark*, differences in modus operandi exist between the two *Spreigl* incidents and the charged offenses. In the 1994 incident, although appellant was acquainted with the victim, he was not residing with her as he was with S.D. In both *Spreigl* incidents, the victims were minors, unlike S.D. In the 1996 incident, although the victim testified that appellant had sexual intercourse with her, she did not testify that he forced sexual penetration of any kind on her as alleged by S.D. The differences in modus operandi between the *Spreigl* incidents and the charged offenses in this case do not support a finding that there is a "marked similarity" in modus operandi as required by *Ness*. Therefore, we conclude that the district court erred in admitting the *Spreigl* evidence.

When *Spreigl* evidence is erroneously admitted by the district court, a reviewing court "must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Ness*, 707 N.W.2d at 691; *see also Smith*, 749 N.W.2d at 95 (concluding that the district court abused its discretion in admitting *Spreigl* evidence because "the danger that the jury would, and likely did, use the [*Spreigl* evidence] improperly for character purposes was substantial and that danger outweighed the probative value of the evidence"). A reviewing court makes this

determination by examining the entire trial record. *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995). The strength of the case against a defendant weighs in favor of a determination that erroneously admitted evidence was harmless. *See State v. Bailey*, 732 N.W.2d 612, 623-24 (Minn. 2007) (concluding that if *Spreigl* evidence was erroneously admitted, it "could not reasonably have affected the jury's verdict" due to the strength of DNA evidence against the defendant); *State v. Courtney*, 696 N.W.2d 73, 84 (Minn. 2005) (determining that erroneously admitted *Spreigl* evidence was harmless in part because the "state's witnesses testified in detail" as to the fact at issue).

In this case, although the prosecution's case against appellant was strong in light of the testimony and photographic evidence admitted at trial, we must also consider the nature of the *Spreigl* evidence in assessing its harm to appellant. *See Clark*, 738 N.W.2d at 347. In *Clark*, the supreme court ruled that the defendant was not prejudiced by the erroneous admission of *Spreigl* evidence because the evidence was introduced by a reading of a plea-hearing transcript, and "not through compelling live testimony from past victims," and because "the state did not refer to the *Spreigl* evidence in its closing argument." *Id.* at 347-48. Similarly, in *Courtney*, the prosecutor merely read into the record a portion of the complaint from the *Spreigl* incident. 696 N.W.2d at 83. Here, unlike *Clark* and *Courtney*, both victims of the *Spreigl* incidents provided compelling live testimony at appellant's trial, and both parties referred to the *Spreigl* incidents in closing arguments, the state briefly during rebuttal. Considering the nature of the *Spreigl* evidence, we cannot conclude that there is no reasonable possibility that the admission of *Spreigl* evidence significantly affected the jury's verdict. We therefore remand to the

district court for a new trial. Because we are remanding for a new trial, we do not reach the remaining issues.

Reversed and remanded.