STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2359, A07-2360

State of Minnesota,
Respondent,

vs.

Paul Frederick Lehr,
Appellant.

Filed January 20, 2009
Affirmed
Shumaker, Judge

Clay County District Court
File No. K6-06-891

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

Brian J. Melton, Clay County Attorney, Pamela L. Harris, Assistant County Attorney, 807 North 11th Street, P.O. Box 280, Moorhead, MN 56560 (for respondent)

Robert A. Lengeling, Beito & Lengeling, P.A., 2915 Wayzata Blvd., Minneapolis, MN 55405 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

SHUMAKER, Judge

In these consolidated appeals, appellant contends that the district court erred in admitting *Spreigl* evidence and that the evidence was insufficient to support convictions of certain counts of criminal sexual conduct. We affirm.

FACTS

These consolidated appeals arise from two separate jury trials. In each case, appellant Paul Frederick Lehr was found guilty of various counts of criminal sexual conduct against minor females. He raises on appeal questions of the admissibility of *Spreigl* evidence and the sufficiency of the evidence to support a conviction of second-degree criminal sexual conduct and of counts of first-degree criminal sexual conduct involving sexual penetration.

The state charged Lehr in 2006 with incidents involving A.R. in 1997, when she was 8 years old, and S.J. in 2002 and 2003, when she was 11 years old. A.R. first disclosed the molestations through a school evaluation form. There followed an investigation by the Moorhead police, and several other females whom Lehr allegedly had molested were discovered. S.J. was one of them.

All incidents occurred in Lehr's home while A.R. and S.J. were visiting Lehr's daughter.

The case involving A.R. was the first to be called for trial. Lehr was charged with counts of sexual penetration and sexual contact. The court ruled that certain *Spreigl* evidence would be allowed. That *Spreigl* evidence consisted of evidence of other

molestations of young females and was admitted to show a common scheme or plan and to refute allegations of fabrication. S.J. was a *Spreigl* witness in the first trial.

In defense counsel's opening statement in the first trial, he indicated that Lehr had admitted to one incident of sexual contact with A.R., but denied sexual penetration and an alleged second incident of sexual contact.

A.R. testified that when she was eight years old she visited Lehr's daughter in her home. When A.R. arrived, Lehr told his daughter to go clean the basement, and he took A.R. to his bedroom. There, he removed her "skort" and underwear. When she said she wanted to leave, he assured her it was "okay," and he rubbed lotion on her legs, touching near her vagina. He then inserted his fingers in her vagina and moved them around. When he was finished, Lehr took his own clothes off and sat on the bed. He had A.R. rub lotion on his penis and when she balked he assured her it was "okay." Lehr then placed A.R.'s hand on his penis and moved it up and down. When the lotion dried, he again put his fingers in her vagina. Lehr left the room and A.R. got dressed and went to find Lehr's daughter. A.R. did not tell anyone of the incident because she was scared and because Lehr had said it was okay.

A few months later, according to A.R.'s testimony, she came again to Lehr's home to play with his daughter. This time Lehr told his daughter to clean her room, he took A.R. to his bedroom where, despite her protests, he took off her "bottoms" and assured her that it was "okay." Lehr put his fingers in her vagina and would not stop when she asked him to. Lehr again removed his clothes and made A.R. rub his penis.

The court allowed the state to call S.J. as a *Spreigl* witness during its case-in-chief. The court gave a limiting instruction before she testified. S.J. stated that she was good friends with Lehr's daughter and would often sleep overnight at Lehr's home. She described an occasion when she was sleeping on the floor of her friend's bedroom. Lehr came into the room and asked if anyone had to go to the bathroom. S.J. said "no," and Lehr left. But he came back about a half hour later and asked her again if she needed to go to the bathroom. When she did not reply, he knelt on the floor next to her, rolled her onto her back, pulled the blanket down to her knees, put his hand under her shirt, and began to feel her breast. He then removed her shorts and underwear, and inserted his fingers into her vagina and moved them around for about 30 seconds. S.J. testified that she next felt something "hairy" down by her vagina, which she thought was probably his moustache. Then Lehr left. S.J. indicated that she told Lehr's daughter what had happened but did not tell her own mother because she was ashamed.

Lehr testified in his own defense. He admitted that one time in 1997 he brought A.R. into his bedroom and had her rub lotion on his back, legs, and erect penis. He denied putting his fingers in A.R.'s vagina and denied that he ever had her touch his penis except on this occasion. He also denied that he ever molested S.J. and explained that, because she had an "accident" at his home previously, he wanted to see if she had to go to the bathroom. He touched her blanket and, believing she had wet herself, he removed her underwear and rinsed them. He also used a "warm wash cloth and just briefly wiped her." He denied touching S.J. in a sexual manner.

When the case involving S.J. was called for trial, Lehr took the same position regarding the *Spreigl* evidence as he did in the first case, namely, "any *Spreigl* involving acts of only second degree criminal sexual conduct should not be admissible." The court ruled that A.R. and another alleged victim, A.P., would be permitted to testify as *Spreigl* witnesses.

The charges against Lehr in the second case were one count of first-degree criminal sexual conduct, alleging the penetration about which S.J. testified in the trial involving A.R., and one count of second-degree criminal sexual conduct, alleging a later incident of sexual contact with S.J.

As to the second incident, S.J. testified that she again was at Lehr's home and that she and his daughter were going to go to the swimming pool. She was wearing a two-piece bathing suit, and Lehr rubbed sunscreen on her back and front. While doing so, he reached his hands underneath her swimsuit in the front, touching the top half of each of her "boobs," and then put his hands underneath the waist of her bikini bottoms and touched the top parts of her vagina and buttocks.

A.R. testified as a *Spreigl* witness in the second trial, describing the molestations she had described in the first trial.

A.P., another *Spreigl* witness, testified that, when she was 13 years old, she attended a sleepover hosted by Lehr's daughter and was sleeping on the couch. She woke up to find Lehr sitting by her feet with her legs across his lap. He was rubbing her legs and her buttocks. She pretended to be asleep and moved her legs off his lap, but he put them back and then put the television remote control under her shorts and continued to

rub her buttocks over and underneath her shorts and underwear. When A.P. opened her eyes and looked at him, Lehr left.

As in the first trial, Lehr testified that he "let" A.R. touch his penis but he denied penetrating her vagina with his fingers. He also denied sexually penetrating S.J. or touching her with sexual intent. He maintained that he had no sexual intent when he applied sunscreen to her. Regarding A.P., he said he got up in the middle of the night and noticed that the television was on. He had to "dig" into the folds of the blanket covering A.P. to locate the remote and he "probably" brushed up against her back and buttocks while doing so.

D E C I S I O N

In each of Lehr's trials, the district court allowed "other acts" evidence under Minn. R. Evid. 404(b), also known as *Spreigl* evidence. On appeal, Lehr challenges the admissibility of that evidence.

Evidence that the accused has engaged in other acts is not admissible to show that the accused had a propensity to commit the crime charged, for that would be impermissible character evidence. Minn. R. Evid. 404(b); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). But other acts may be shown for relevant, nonpropensity purposes. Minn. R. Evid. 404(b). Among the proper purposes listed in the illustrative catalog of rule 404(b) is the showing of a "plan" or "absence of mistake or accident." *Id.* Caselaw adds to the list the purpose of addressing the issue of "a fabrication or a mistake in perception by the victim." *State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993).

The admission of *Spreigl* evidence rests within the district court's discretion and we will not reverse the court's decision absent a showing of a clear abuse of that discretion. *State v. Blom*, 682 N.W.2d 578, 611 (Minn. 2004). That showing must be made by the party alleging error. *Kennedy*, 585 N.W.2d at 389. Even if *Spreigl* evidence was admitted erroneously, we will not reverse unless there is a reasonable likelihood that the erroneously admitted evidence affected the verdict. *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995).

When exercising its discretion under rule 404(b), the court must consider five requirements: (1) the proponent must give notice of the intent to offer "other acts" evidence; (2) the notice must disclose the nonpropensity purpose for which the evidence will be offered; (3) the defendant's involvement in the other act must be shown by clear and convincing evidence; (4) the evidence must be relevant to the proponent's case; and (5) the probative value of the evidence must not be outweighed by its potential for unfair prejudice to the defendant. Minn. R. Evid. 404(b).

Lehr's first challenge in both cases is as to the *Spreigl* notices. He does not claim that there was a lack of notice, or a lack of specificity, or that the notices were untimely. Rather, he contends that the purposes listed in the notices— "common plan or scheme and/or to refute allegations of fabrication"—were not the purposes the state emphasized during final argument. Instead of the disclosed purposes, Lehr indicates that the state argued that S.J.'s testimony in the first case corroborated A.R. and that, in the second case, the state used A.P.'s testimony to improperly bolster that case. He further argues that even the stated purposes were not satisfied because there was no adequate showing

of a common scheme or plan and that he never contended in the first trial that A.R. fabricated her testimony.

The content of the notice required by rule 404(b), the so-called *Spreigl* notice, must accomplish two important goals. It must be specific enough to inform the opponent of precisely why the "other acts" evidence will be offered. Secondly, the disclosed purpose must legitimately fit both the nonpropensity intent of the rule and the facts of the case. *See State v. Smith*, 749 N.W.2d 88, 94 (Minn. App. 2008) (requiring the trial court to ascertain the purpose for which the evidence is offered and not rely simply on the "talismanic invocation of an item from the rule 404(b) list").

Lehr concedes the specificity of the notices but challenges the fit of the averred purposes to the cases. One of the purposes was to show a common scheme or plan. To fit this purpose, the "other acts" evidence "must have a marked similarity in modus operandi to the charged offense." *State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006). The "other act" need not be a "signature" crime. *Blom*, 682 N.W.2d at 612. On the other hand, "[i]f the prior crime is simply of the same generic type as the charged offense, it ordinarily should be excluded." *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007) (quotation omitted).

Although Lehr's conduct toward A.R., S.J., and A.P. was not identical, it had sufficiently marked similarities to permit the district court to conclude that Lehr employed the same basic modus operandi with each victim. He took advantage of opportunities when his daughter's friends came to his home to visit or to sleep over. Two of the friends were young females, of ages that would likely incline them to comply with

the wishes of an adult authority figure. The one older female was accosted while she apparently slept and thus would not have a chance to protest. All touching was of the intimate areas, although some involved penetration. Lehr's conduct was not merely of a generic type for it was markedly similar in location, victim selection, circumstance of opportunity, and nature of conduct. We conclude that the state identified a specific and proper rule 404(b) purpose for the "other acts" evidence, and satisfied the notice requirement of the rule. We also note that the other disclosed purpose of refuting fabrication was proper as well.

Although Lehr contended that he never claimed the witnesses were fabricating their testimony, the evidence shows only two possibilities: Either they were making their stories up or they were mistaken in their perceptions of Lehr's conduct. The *Spreigl* evidence addressed both possibilities.

The fact that in its final argument the state might not have addressed the purposes noted in the *Spreigl* notices has no bearing on admissibility if the evidence otherwise showed that such disclosed purposes were legitimate and fit the case. What a lawyer chooses to argue in closing argument would not alter or negate admissibility that otherwise was established.

Lehr further contends that the "other acts" were not shown by clear and convincing evidence, that they were irrelevant, and that the potential for prejudice outweighed their probative value.

If Lehr engaged in a common scheme, which the evidence shows he did, then individual acts that made up that scheme are necessarily relevant to show the overall

conduct. *See Wermerskirchen*, 497 N.W.2d at 242-43 (indicating that past incidents of child sexual abuse are relevant to show that a contested incident actually occurred.).

Evidence is clear and convincing when it is highly probable that it is true. *Kennedy*, 585 N.W.2d at 389. With respect to A.R.'s testimony, that standard was met and exceeded because the jury believed her evidence beyond a reasonable doubt. And the testimony of S.J. and A.P., attesting as it did to Lehr's modus operandi respecting all acts and lacking any likely motive to fabricate or distort, surely satisfied the standard of clear and convincing evidence. Despite the fact that several years had elapsed between the crimes and the trials, there remained a remarkable, unrehearsed consistency among the witnesses so that it was highly likely that their testimony was true. Remoteness in time is a factor to consider in assessing the relevancy of evidence, its probative value, and its weight. *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005). But the court does not consider that factor in isolation from place and modus operandi. *Id.* In the context of those additional factors, the remoteness of time was not an overriding concern.

Lehr urges that the probative value of the "other acts" evidence was outweighed by their potential for unfair prejudice. We have discussed the probative value of the evidence. That value was heightened by the fact that the jury had to decide each case by resolving the contradictory testimony of an adult versus the testimony of children without the aid of any other witness or any physical evidence to corroborate any of the improper conduct. "Unfair prejudice" refers to "the capacity of the evidence to persuade by illegitimate means." *State v. Cermak*, 365 N.W.2d 243, 247 n.2 (Minn. 1985) (quotation omitted). As we have noted, the *Spreigl* evidence admitted here was illegitimate and was

clearly admissible, within the court's discretion, under rule 404(b). Furthermore, the court limited the number of *Spreigl* incidents the jury was permitted to learn about and gave the proper limiting instructions both at the time the evidence was offered and in its final charge. Doing so, the court properly and judiciously exercised its discretion. *See State v. Slowinski*, 450 N.W.2d 107, 114-15 (Minn. 1990) (concluding that the trial court lessened danger of unfair prejudice by giving cautionary instructions to the jury).

Finally, we reject Lehr's contentions that there was no need for the *Spreigl* evidence and that the evidence was sufficient to support convictions of first-degree criminal sexual conduct. The *Spreigl* evidence was necessary to support the legitimate purpose of showing a common scheme or plan and to help the jury resolve stark contradictions in the evidence.

Despite Lehr's claim that the cases were based entirely on circumstantial evidence and both were filled with inconsistencies, a careful review of the record in each trial supports the verdicts. There was direct evidence in each case, namely, the testimony of each crime victim. And the inconsistencies in the testimony were not substantial.

Our review of the sufficiency of the evidence requires that we ascertain whether, under the facts in the record and the reasonable inferences to be drawn from them, a jury could reasonably find the defendant guilty. *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003). If the jury believed only A.R. in the case involving her and only S.J. in the case involving her, there would be sufficient evidence to support each verdict. "The assumption that the jury believed the state's witnesses is particularly appropriate when resolution of the case depends on conflicting testimony . . . ." *State v. Pippitt*, 645

N.W.2d 87, 92 (Minn. 2002). In all, "[a] defendant bears a heavy burden to overturn a jury verdict." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001). Lehr did not meet that burden.

Affirmed.