STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2144

State of Minnesota,
Respondent,

vs.

David R. Carlson,
Appellant.

Filed February 10, 2009
Affirmed
Halbrooks, Judge

St. Louis County District Court
File No. CR-05-2261

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

Melanie Ford, St. Louis County Attorney, St. Louis County Courthouse, 100 North Fifth Avenue West, Duluth, MN 55802 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that (1) the evidence was insufficient to prove all the elements of the crime, (2) the district court committed reversible error by admitting *Spreigl* evidence, and (3) the district court violated appellant's constitutional right of confrontation when it limited his cross-examination of the victim. In a pro se supplemental brief, appellant makes additional assignments of error. We affirm.

FACTS

On October 12, 2004, Officer Jason McClure, a liaison officer to the Duluth West schools, interviewed 14-year-old S.M.C.[1] The interview was conducted at the behest of a school administrator, who was concerned that S.M.C. might be a possible victim of criminal sexual conduct. Officer McClure told S.M.C. she was not under arrest and not in any trouble. He said that he wanted to talk to her about appellant David Richard Carlson.

S.M.C. became visibly upset and told Officer McClure that in August 2004, she was waiting near the Fourth Street Market in Duluth for a ride from her sister when appellant approached her in his van. S.M.C., who was then 13 years old, accepted a ride from appellant and sat in the passenger seat. Instead of driving S.M.C. home as she requested, appellant drove the van to a place in the city where houses were being torn

[1] The facts of this case are more fully set forth in *State v. Carlson*, No. A06-961, 2007 WL 1053411, at *1–*2 (Minn. App. Apr. 10, 2007), *review denied* (Minn. June 27, 2007).

down. Appellant asked S.M.C. to show him her breasts and perform fellatio on him, and she refused. Appellant threatened to kill S.M.C. unless she complied. She refused. Appellant offered S.M.C. money and cigarettes if she would comply; she again refused. Appellant then grabbed the back of S.M.C.'s head and forced her to perform fellatio on him. Appellant ejaculated into a shirt. Appellant later drove S.M.C. to a gas station, where he bought her cigarettes and a soda. Appellant gave S.M.C. $45 in cash and dropped her off at the Little Store on 19th Avenue West. S.M.C. went to her own house and spoke to her younger sister, N.R.C., about the incident.

Officer McClure terminated the interview when S.M.C. became very upset. He then interviewed N.R.C., who attended the same middle school as S.M.C.

Appellant was charged with five counts: (1) first-degree criminal sexual conduct; (2) third-degree criminal sexual conduct (age difference); (3) third-degree criminal sexual conduct (force or coercion); (4) solicitation of a child to engage in sexual conduct; and (5) terroristic threats.

Appellant's jury trial commenced on March 28, 2006. S.M.C.'s testimony was consistent with what she had told Officer McClure, but some of the details were new. For example, S.M.C. testified that she saw a weapon in the van, later clarifying that she was referring to a screwdriver. Officer McClure later testified that he had never asked S.M.C. about weapons in the van and that there were additional questions he would have liked to have asked her had she not been so upset.

N.R.C. testified that when S.M.C. arrived home on the evening in question, she came into N.R.C.'s room in tears.[2] S.M.C. told N.R.C. that appellant had asked S.M.C. to show him her breasts and to perform fellatio on him. S.M.C. told N.R.C. that appellant would not let her out of the van unless she complied. S.M.C. also told her sister that appellant had threatened her, although she did not specify what the threat was. S.M.C. showed N.R.C. $40 that she said appellant had given her. N.R.C. acknowledged that she had not told the police that S.M.C. had said that she was threatened or afraid. Officer McClure later testified that he never asked N.R.C. if her sister had reported that appellant threatened to kill her.

Officer McClure testified as described, concluding the state's case-in-chief.

After the completion of the state's case-in-chief, the district court held a hearing to address the admissibility of *Spreigl* evidence. The state sought to admit *Spreigl* evidence of several incidents involving appellant's interactions with juveniles. The prosecutor stated that the *Spreigl* evidence was "being offered to . . . show common scheme or plan and also the intent or motive of [appellant]." The prosecutor argued that each of the incidents was sufficiently related to the charged offense to show a common scheme or plan, specifically, appellant's "opportunistic acts where he attempts to lure juveniles into his vehicle and attempts to offer them money in an attempt to then perform sexual acts or favors for him."

The state sought to admit evidence of six *Spreigl* incidents. The district court ruled that it would admit evidence of three of the incidents, stating:

[2] N.R.C. was 14 years old at the time of appellant's trial.

> The Court is going to find that—based on the evidence submitted so far, . . . the State's case is not the strongest case in the world and that there are parts of it that are rather weak.
>
> The Court is going to find regarding the following incidents that they will be allowed in: That—regarding May 29, 1998, . . . [t]hat incident has been shown by clear and convincing evidence. It is relevant regarding the scheme or plan or modus operandi and that it's more probative than prejudicial, that it should be allowed in—or testimony regarding it will be allowed.
>
> Next, the Court is going to allow in evidence regarding the August 28, 2004 incident. Again, I am going to find that that has been shown by clear and convincing evidence to have occurred. It is relevant regarding the scheme or plan and that it is more probative than prejudicial. . . .
>
> Finally, I am going to allow in evidence regarding the October 10, 2004 incident. I am going to find that that was shown by clear and convincing evidence. It is relevant regarding the scheme or plan and that it is more probative than prejudicial.

All of the *Spreigl* incidents took place in Duluth. On May 29, 1998, appellant approached a group of juveniles and offered them money to get into his van and perform a "strip show." Appellant was not charged for the 1998 incident. On August 28, 2004, appellant offered money to a group of young girls if they would get into his vehicle. Appellant was charged with disorderly conduct for this incident. On October 10, 2004, two girls got into appellant's car. Both girls were 14 at the time of appellant's trial, and one of the girls had also been involved in the August 2004 incident. In exchange for money, one girl showed appellant her breasts, and the other girl gave appellant a "hand job." Appellant ejaculated into a shirt that he had with him in the front seat. He later

purchased fast food and cigarettes for the two girls. No charges arose from the October 2004 incident.

Appellant was found guilty of the criminal-sexual-conduct and solicitation charges and acquitted of the terroristic-threats count. Appellant moved for judgment of acquittal and a new trial on the first-degree criminal-sexual-conduct charge, based on insufficient evidence. The district court granted appellant's motion for judgment of acquittal on the first-degree criminal-sexual-conduct charge and denied appellant's other requests. The state appealed, and we reversed the district court's order. *Carlson*, 2007 WL 1053411, at *1. Appellant was sentenced to 144 months. Appellant now appeals his conviction of first-degree criminal sexual conduct.

D E C I S I O N

I.

We first address appellant's argument that the evidence was insufficient to prove that he caused S.M.C. to have an imminent fear of great bodily harm and that this fear allowed him to accomplish the act of sexual penetration. As appellant acknowledges, we have already ruled on the merits of this issue. After the jury verdict, appellant moved the district court for judgment of acquittal on the first count, arguing that there was insufficient evidence of S.M.C.'s reasonable fear of imminent great bodily harm to sustain a conviction of first-degree criminal sexual conduct. The district court granted appellant's motion for judgment of acquittal, concluding that "there was insufficient evidence to support the jury's verdict regarding the third element of Criminal Sexual Conduct in the First Degree." The state appealed, and we concluded that the evidence

was "sufficient to support the jury's determination that S.M.C. had a reasonable fear of imminent great bodily harm during the incident." *Carlson*, 2007 WL 1053411, at *4. We also concluded that appellant accomplished the act because S.M.C. had a fear of imminent great bodily harm. *Id.* at *6.

It is "a well-established rule that issues considered and adjudicated on a first appeal become the law of the case and will not be reexamined or readjudicated on a second appeal of the same case." *Lange v. Nelson-Ryan Flight Serv., Inc.*, 263 Minn. 152, 155, 116 N.W.2d 266, 269 (1962). We therefore conclude that the doctrine of the law of the case precludes our review of this issue.

II.

Appellant's second argument is that the district court improperly admitted irrelevant and unduly prejudicial *Spreigl* evidence. We review the decision to admit *Spreigl* evidence for an abuse of discretion. *State v. Blom*, 682 N.W.2d 578, 611 (Minn. 2004). Appellant must show that the court erred and that the error was prejudicial. *See State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

Before a district court can admit *Spreigl* evidence: (1) the prosecutor must give notice of his intent to admit the evidence; (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 and material to the prosecutor's case; and (5) the probative value of the evidence must not be outweighed by its potential for unfair prejudice to the defendant. *State v. Ness*, 707 N.W.2d 676, 685–86 (Minn. 2006). In his brief, appellant assigns error only to the fourth

and fifth steps of the district court's *Spreigl* analysis, waiving appellate review of the first three steps. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

A. Relevance

> In determining the relevance and materiality 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. 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 and citations omitted). This test is applied in a flexible manner on appeal; admission is upheld "notwithstanding a lack of closeness in time or place if the relevance of the evidence was otherwise clear." *State v. Lynch*, 590 N.W.2d 75, 80–81 (Minn. 1999) (quotation omitted). *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 or modus operandi." *Id.* at 81; *see also Blom*, 682 N.W.2d at 612 ("The past crime does not have to be a signature crime, as long as the crime is sufficiently similar to the incident at issue before the jury." (quotation omitted)). The district court is in the best position to weigh these factors. *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005). We address appellant's arguments as to the relevance of each of the *Spreigl* incidents in turn.

1. May 29, 1998 incident

Appellant argues that the 1998 incident, which occurred six years before the charged offense, is stale. The supreme court has declined "to adopt a bright-line rule for determining when a prior bad act has become too remote to be relevant." *Washington*, 693 N.W.2d at 201. Instead, "when confronted with an arguably stale *Spreigl* incident, [the district court] should employ a balancing process as to time, place, and modus operandi." *Id.* at 202; *see also Blom*, 682 N.W.2d at 612 (stating that "a close temporal relationship is not required, but is simply a factor in determining relevancy"). Minnesota appellate courts have affirmed the admission of *Spreigl* evidence stemming from misconduct occurring as long as 19 years before the charged crime. *See Washington*, 693 N.W.2d at 201–02 (citing *State v. Rainer*, 411 N.W.2d 490, 493 (Minn. 1997)). The 1998 incident is therefore not inadmissible solely due to its age; it must be evaluated in light of the other relevancy factors.

Although appellant makes no argument regarding the "place" factor in determining relevancy, we note that the *Spreigl* incidents and the charged offense here all occurred in Duluth. *See State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007) (rejecting argument that offenses were not close in place when both occurred in same metropolitan area).

"[I]n determining whether a bad act is 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. Appellant argues that the 1998 incident did not involve force, coercion, or threats and is therefore not markedly similar to the charged

offense involving S.M.C. We conclude that appellant's argument regarding lack of force is without merit because appellant was also charged with crimes not requiring the use of force. The district court acknowledged as much, stating that each of the *Spreigl* incidents was relevant "to the solicitation issue as opposed to any alleged force or coercion." In addition, a charged offense may be more severe than the *Spreigl* occurrences. *See State v. Boehl*, 697 N.W.2d 215, 220 (Minn. App. 2005) (affirming admission of *Spreigl* evidence to show "a pattern of opportunistic fondling of young girls . . . after establishing a relationship of trust with their mothers" even though charged offense was "more severe" than the *Spreigl* occurrences), *review denied* (Minn. Aug. 16, 2005).

Like the offense of which appellant was convicted, the 1998 *Spreigl* incident involved appellant, a vehicle, juveniles, and the offer or exchange of money for sexual favors. The *Spreigl* offense occurred in the same metropolitan area as the charged offense, and its admission is not precluded by the passage of time. We therefore conclude that the district court did not abuse its discretion by determining that the 1998 incident was relevant.

2. August 28, 2004 incident

Appellant argues that the August 2004 *Spreigl* incident did not involve force, coercion, or threats and is therefore not markedly similar to the charged offense involving S.M.C. *See Ness*, 707 N.W.2d at 688. As we concluded with the 1998 incident, appellant's argument regarding lack of force is without merit.

Appellant also argues that the August 2004 *Spreigl* incident did not involve a request of sexual favors from the girls and is therefore not relevant. We disagree. Taking

into account the other *Spreigl* incidents and the charged offense, the August 2004 *Spreigl* incident is relevant as an example of attempted sexual misconduct. As the supreme court has explained: "Acts that appear to be innocent may lose their innocent nature when repeated. . . . [E]ven one previous act or attempt of sexual misconduct can, when common features exist between the acts, be highly indicative of a design to commit sexual misconduct." *State v. McLeod*, 705 N.W.2d 776, 785–86 (Minn. 2005). "In other words, a series of acts inform the factfinder of the actor's intent in ways that a single act cannot." *Id.* at 786.

Both the charged offense and the August 2004 *Spreigl* incident involved appellant, a vehicle, young girls, and the offer or exchange of money. And although appellant makes no arguments as to the factors of time or place regarding this incident, we note that it occurred in the same month and the same metropolitan area as the charged offense. We therefore conclude that the district court did not abuse its discretion by determining that the August 2004 *Spreigl* incident was relevant.

3. October 10, 2004 incident

Appellant argues that the October 2004 incident did not involve force, coercion, or threats and is therefore not markedly similar to the charged offense against S.M.C. *See Ness*, 707 N.W.2d at 688. As we concluded with the other two *Spreigl* incidents, appellant's argument regarding lack of force is without merit.

Appellant also argues that the October 2004 incident involved girls "actively seeking out appellant's company and willingly engaging in sexual favors in exchange for money," as opposed to appellant approaching the girls. But both the charged offense and

the October 2004 incident involved appellant, a vehicle, young girls, and the offer or exchange of money for sexual favors. And although appellant makes no argument as to the factors of time or place regarding this incident, we note that it occurred in the same metropolitan area, one month after the charged offense. We therefore conclude that the district court did not abuse its discretion by determining that the October 2004 incident was relevant.

B. Balancing

Appellant argues that the district court abused its discretion by determining that the probative value of the *Spreigl* evidence was not outweighed by its potential for unfair prejudice to the defendant. *See Ness*, 707 N.W.2d at 685–86.

Appellant's first contention regarding the final *Spreigl* factor is that the district court abused its discretion by conducting an independent-necessity test, which the supreme court abandoned in *Ness*. But *Ness* does not prohibit a district court from considering the strength or weakness of the state's case, provided that this consideration takes place during the final step of the *Spreigl* analysis:

> The prosecution's need for other-acts evidence should be addressed in balancing probative value against potential prejudice, not as an independent necessity requirement, which has become a shibboleth. Henceforth, courts should address the need for *Spreigl* evidence in the context of balancing the probative value of the evidence against its potential for unfair prejudice.

707 N.W.2d at 690. The supreme court later clarified that the *Ness* decision was an attempt

> to move away from the undue emphasis we had previously placed on the strength or weakness of the state's case. In doing so, we clarified that the strength or weakness of the state's case would no longer be considered an independent requirement for admission of 404(b) evidence and that the state's need for the evidence should be considered when the trial court balanced the probative value of the evidence against its potential for unfair prejudice.

State v. Bell, 719 N.W.2d 635, 639 (Minn. 2006) (citation omitted); *see also State v. Smith*, 749 N.W.2d 88, 93 (Minn. App. 2008) ("Under *Ness*, the state's need for 404(b) evidence is a factor in the overall balancing process the district court must undertake in deciding admissibility."). We therefore conclude that the district court did not abuse its discretion by considering the state's need for the *Spreigl* evidence.

Appellant also contends that the district court abused its discretion by determining that the state's case was weak. Specifically, appellant argues that the district court did not "specifically identify the disputed issue in the case, nor did it weigh the probative value of the evidence on the disputed issue against the potential for unfair prejudice." But *Ness* does not preclude a district court's consideration of the state's case as a whole; rather, the supreme court held that the probative value of the evidence in *Ness* was outweighed by its potential for unfair prejudice because it was not relevant and because it "was not needed to strengthen otherwise weak or inadequate proof of an element of the charged offense *or the state's case as a whole*." *Ness*, 707 N.W.2d at 689 (emphasis added).

Furthermore, Minnesota caselaw demonstrates that *Spreigl* evidence is often extremely important in sexual-conduct cases involving child victims. *See McLeod*, 705

N.W.2d at 786 (stating that *Spreigl* evidence showing a pattern of conduct "is particularly important in child sexual abuse cases where there will be problems of secrecy, victim vulnerability, the absence of physical proof of the crime, the unwillingness of some victims to testify, and a general lack of confidence in the ability of the jury to assess the credibility of child witnesses"); *see also Boehl*, 697 N.W.2d at 219 ("In criminal sexual conduct cases, particularly in child sex abuse prosecutions, prior acts of sexual conduct are often relevant where the defendant disputes that the sexual conduct occurred or where the defendant asserts the victim is fabricating the allegations."). Here, there were no witnesses to the offense other than appellant and S.M.C., no physical evidence due to the delay in reporting, and the credibility of S.M.C. was central to the case. We therefore conclude that the district court did not abuse its discretion by determining that the state's case was weak.

Appellant's final contention regarding the fifth *Spreigl* step is that the evidence was unfairly prejudicial to him because it attacked his character by "portray[ing] [him] as a pedophile who preyed on young girls" and allowed the state to conduct a "trial within a trial" because more witnesses testified during the *Spreigl* part of trial than during the case-in-chief. Appellant cites to *Ness* and *Ture v. State*, 681 N.W.2d 9, 16 (Minn. 2004), in support of his arguments. But these cases are distinguishable.

Ness involved a *Spreigl* incident that was so stale (occurring 35 years before the charged offense) that it was found to be irrelevant. 707 N.W.2d at 689. Additionally, *Ness* was an unusual case because there was an adult eyewitness to the sexual conduct, making the state's case particularly strong. *Id.* at 680, 690.

Ture involved the presentation of *Spreigl* evidence in the form of 24 witnesses testifying to the details of a prior murder for nearly three of the 12 days of trial testimony. 681 N.W.2d at 16. The supreme court determined that this presentation of evidence was "practically a retrial" of the prior murder case, noting that "[m]uch of the witnesses' testimony was redundant." *Id.* We conclude that the *Spreigl* evidence here is not "unduly cumulative" like the evidence in *Ture*. *Id.* As evidence of the three *Spreigl* incidents, nine witnesses testified. The state's case took two days to present, with *Spreigl* evidence presented on one of those days. It appears that the presentation of the *Spreigl* evidence was done efficiently, and appellant does not argue that the evidence was unduly cumulative.

The district court followed the five-step admission procedure and did not perform the balancing step until the state had presented its case-in-chief. *See Blom*, 682 N.W.2d at 611 ("The district court should lower the risk of prejudice by withholding its decision on admitting the evidence until the state has presented all of its other evidence . . . ."). The district court also limited the number of *Spreigl* incidents. *See Washington*, 693 N.W.2d at 203 ("By limiting the number of *Spreigl* incidents, the court properly guarded against admitting evidence that was unnecessary to the prosecution, that risked fixating the jury on prior incidents, and that might have treaded on the sometimes blurry line between proving modus operandi and impugning a defendant's character.") Furthermore, the district court instructed the jury as to the proper use of the *Spreigl* evidence prior to the testimony regarding each incident and again before closing arguments. *See Lynch*, 590 N.W.2d at 81 (stating that cautionary instructions to the jury when *Spreigl* evidence

was received and again at end of trial "assured that the jury did not give improper weight to the evidence"). Because of the district court's adherence to proper *Spreigl* procedure, its limitation of the number of *Spreigl* incidents, and the weakness of the state's case, we conclude that the district court did not abuse its discretion when it performed the fifth step of the *Spreigl* analysis.[3]

III.

We next address appellant's argument that the district court violated his constitutional right of confrontation when it prohibited him from cross-examining S.M.C. about a prior accusation of sexual assault that she had made against another man. The other man was acquitted in 2002.

The scope of cross-examination is left largely to the district court's discretion and will not be reversed absent a clear abuse of discretion. *State v. Parker*, 585 N.W.2d 398, 406 (Minn. 1998); *see also State v. Lanz-Terry*, 535 N.W.2d 635, 641 (Minn. 1995) (applying an abuse-of-discretion standard in determining whether district court's restriction upon defendant's cross-examination of witness violated the Confrontation Clause). "On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

The district court's discretionary authority to control the scope of cross-examination is limited by the Sixth Amendment. *Lanz-Terry*, 535 N.W.2d at 640. But

[3] Because we conclude that the district court did not abuse its discretion by admitting the *Spreigl* evidence, we do not address whether the evidence significantly affected the verdict.

prior accusations of sexual misconduct are relevant to the victim's credibility only if there has been a determination that the accusations were fabricated. *State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). Before admitting evidence of prior false accusations, the district court "must first make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists." *Id.* The only evidence that appellant offered to prove the falsity of S.M.C.'s past allegation was that the accused was acquitted. We cannot conclude that an acquittal of the accused is sufficient to establish a reasonable probability that an allegation of sexual misconduct was fabricated. We therefore conclude that the district court did not clearly abuse its discretion by refusing to allow appellant to cross-examine S.M.C. about the prior allegation.

IV.

Appellant also argues that the district court violated his constitutional right of confrontation when it refused to allow him to cross-examine S.M.C. about her status as a runaway and a truant. Appellant's theory was that S.M.C. lied to Officer McClure "in an effort to deflect attention away from her own wrongdoing," and that cross-examination on this matter was relevant to establish S.M.C.'s motive to fabricate allegations against appellant.

A criminal defendant establishes a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness. *Lanz-Terry*, 535 N.W.2d at 640. "But not everything tends to show bias, and courts may

exclude evidence that is only marginally useful for this purpose. The evidence must not be so attenuated as to be unconvincing because then the evidence is prejudicial and fails to support the argument of the party invoking the bias impeachment method." *Id.* Furthermore, "[i]n determining whether a restriction of cross-examination violates the defendant's right to confront witnesses, a distinction must be made between general credibility attacks and attacks on a witness's testimony designed to reveal bias." *Id.*

We cannot conclude that the district court abused its broad discretion to control the scope of cross-examination. Whether questioning S.M.C. about runaway or truancy issues would reveal a motive for her to lie or would constitute a general credibility attack upon her is a decision well within the district court's discretion.

But even if we were to conclude that the district court erred, such error would be harmless beyond a reasonable doubt. *See State v. Greer*, 635 N.W.2d 82, 90 (Minn. 2001) ("Erroneous exclusion of defense evidence is subject to harmless error analysis."). To find the error harmless, this court "must be satisfied beyond a reasonable doubt that an average jury (i.e., a reasonable jury) would have reached the same verdict if the evidence had been admitted and the damaging potential of the evidence fully realized." *Id.* (quotation omitted). Appellant claims that S.M.C. lied to Officer McClure because she wanted to deflect attention away from her own wrongdoing. But Officer McClure testified that he informed S.M.C. that she was not in any trouble before he spoke with her. And S.M.C.'s sister, who did not have a chance to consult with S.M.C. before speaking to Officer McClure, confirmed S.M.C.'s story. Therefore, any error in excluding this line of cross-examination was harmless.

V.

Appellant raises several arguments in his pro se supplemental brief. Although none of these issues was raised in appellant's April 11, 2006 motion for judgment of acquittal and a new trial, we address each of these arguments in turn.

A. Ineffective assistance of counsel

Appellant asserts that his trial counsel was ineffective. But appellant makes no claim that his trial counsel made any errors or that her conduct fell below a standard of reasonableness. *See Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (stating that a defendant must affirmatively prove that representation fell below an objective standard of reasonableness and that but for counsel's unprofessional errors, the result of the proceeding would have been different). Instead, appellant argues that the district court's evidentiary rulings severely restricted his trial counsel's ability to mount a defense. Appellant's ineffective-assistance argument is more properly categorized as a confrontation-clause argument, which we have already addressed. We therefore conclude that appellant's ineffective-assistance claim is without merit.

B. Taped interview with Officer Carter

Appellant makes several arguments regarding a taped interview with Officer Carter. On the morning of January 3, 2005, Officer Carter followed appellant by car and initiated a traffic stop after appellant made a turn without signaling. The officer asked appellant if there was a place the two of them could talk. Appellant agreed to meet the officer at a Subway restaurant. At approximately 9:00 a.m., Officer Carter conducted a taped interview with appellant at the restaurant. The supplemental police report indicates

that Officer Carter told appellant that he was free to go and did not have to answer any questions. Appellant agreed to speak with Officer Carter, who asked him about the October 2004 incident and the offense against S.M.C. Appellant denied involvement in any sexual activity with the girls.

1. *Miranda*

Appellant claims that his constitutional rights were violated because he was not advised of his *Miranda* rights when Officer Carter recorded their conversation.[4] Regardless of whether the restaurant interview amounted to custodial interrogation, we conclude that appellant's *Miranda* argument is without merit because the statements made to Officer Carter were never admitted at trial. *See State v. Caldwell*, 639 N.W.2d 64, 67 (Minn. App. 2002) ("Statements made during a custodial interrogation cannot be admitted into evidence unless the suspect is given the *Miranda* warning and intelligently waives the right against self-incrimination."), *review denied* (Minn. Mar. 27, 2002).

2. Sixth Amendment right to counsel

Appellant argues that the interview with Officer Carter violated his Sixth Amendment right to counsel. But the Sixth Amendment right to counsel "attaches as soon as the accused person is subject to adverse judicial proceedings, including arraignments." *Clark*, 738 N.W.2d at 337; *see also* Minn. Const. art. 1, § 6 (guaranteeing a right of legal representation to anyone charged with a crime). Because appellant's Sixth Amendment right had not yet attached when the statements were made to Officer Carter, we conclude that appellant's argument is without merit.

[4] *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

3. Exculpatory evidence

Appellant's final argument regarding the taped interview is that the audio tape of the restaurant interview constituted exculpatory evidence that the prosecution failed to make available to him. Appellant appears to confuse the taped restaurant interview with two other taped conversations mentioned in the record, both of which had been lost or destroyed by the time of trial. The taped interview with Officer Carter does not appear to have been lost or destroyed; both appellant's trial counsel and the prosecutor stated at the pretrial hearing that they had listened to the tape, and appellant's trial counsel stated that she was having it transcribed. We therefore conclude that appellant's claim of prosecutorial misconduct regarding the taped restaurant interview is baseless.[5]

C. Juror misconduct

Appellant mentions that the district court dismissed four jurors after a hearing. This incident apparently arose after the court reporter overheard a juror telling three other jurors that he did not think that he could vote to acquit if appellant did not testify. Appellant claims that the district court should have questioned all of the jurors, not only the juror who was overheard making the statement. This incident is not mentioned in the district court file or transcripts, and appellant does not cite to the record or specify a date when the in-chambers hearing occurred. This court cannot presume error in the absence of an adequate record. *See Custom Farm Servs., Inc. v. Collins*, 306 Minn. 571, 572, 238

[5] In addition, it does not appear that appellant raised a prosecutorial-misconduct objection at trial regarding any of the three tapes. *See State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003) ("If the defendant failed to object to the misconduct at trial, he forfeits the right to have the issue considered on appeal, but if the error is sufficient, this court may review.").

N.W.2d 608, 609 (1976). We therefore do not reach the merits of appellant's claim of juror misconduct.

D. Biased witness

Appellant alleges that a state witness "work[ed] for" his trial counsel, but it is not clear to which witness he is referring. In the absence of adequate briefing, we decline to reach the merits of this issue. *See State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997).

E. Probable cause

In his pro se reply brief, appellant argues for the first time that the district court "abuse[d its] discretion on probable cause" and that his conviction should therefore be reversed. Appellant's argument appears to be that the issue of probable cause was never resolved. In its November 3, 2005 order, the district court explicitly found that probable cause existed for the acts alleged in the complaint. Regardless of the merits of this issue, appellant cannot inject an issue in a reply brief that was not raised or argued in the initial brief. *See McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990).

Affirmed.