**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-0921**

State of Minnesota,
Respondent,

vs.

Bobby Lockett,
Appellant.

**Filed April 21, 2009**
**Reversed and remanded**
**Schellhas, Judge**

Ramsey County District Court
File No. 62-K1-07-002914

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

Susan Gaertner, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (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 Schellhas, Presiding Judge; Lansing, Judge; and Crippen, 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

**SCHELLHAS**, Judge

Appellant challenges his conviction of second-degree criminal sexual conduct and prison sentence, arguing that (1) *Spreigl* evidence was improperly admitted, (2) the prosecutor committed misconduct in his closing argument, and (3) his sentence was incorrectly calculated. We reverse and remand for a new trial.

## FACTS

Respondent State of Minnesota charged appellant Bobby Lockett with (1) criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(a) (2006), which defines second-degree criminal sexual conduct as sexual contact with a complainant under 13 years of age where the actor is more than 36 months older than the complainant, and (2) kidnapping in violation of Minn. Stat. § 609.25, subd. 1(a) (2006), which prohibits confining or removing from one place to another a person under the age of 16 without the consent of the person's parent and with the purpose of facilitating the commission of a felony. The charges were based on allegations that on August 11, 2007, Lockett touched the vaginal area of A.B., a ten-year-old girl, on the outside of her clothing. Lockett was tried before a jury.

Before trial began, the state moved to admit *Spreigl* evidence of two prior acts of Lockett: a 1993 incident in which Lockett allegedly touched the vaginal area of a ten-year-old girl outside her clothing, resulting in a 1995 conviction of criminal sexual abuse in Illinois; and a 2006 incident in which Lockett allegedly attempted to sexually touch

C.H., who was a witness in this case. The prosecution offered the *Spreigl* evidence to prove common scheme or plan.

The only evidence offered of the facts underlying the 1993 incident was a copy of the Illinois complaint, which stated that Lockett had fondled the vaginal area of a ten-year-old girl on the outside of her clothing. The complaint contained no further detail. The district court deferred ruling on the *Spreigl* evidence until after it heard the state's evidence.

A.B. testified that on August 11, she and her younger sister, T.D., were with a friend, C.H., at an apartment building where C.H. lived. The children, all girls, were playing in front of the building. Lockett worked as a caretaker at the building and was at the building that day. According to A.B., Lockett greeted the girls and asked A.B. if she wanted to help him with "the trash and stuff" and told A.B. that he would pay her $20. A.B. brought trash to a garbage can in the back of the building while C.H. and T.D. remained in front. C.H. and T.D. then went to the back of the building and Lockett, who had also gone to the back of the building, told them to return to the front. A.B. then tried to go to the front of the house and Lockett grabbed her over her mouth, pulled her into the backyard, and pushed her into a small room at the back of the building. A.B. said that the room was at the end of a hallway and that the room had red curtains. A building resident later testified that Lockett had a key to a vacant unit in the building that had red curtains. A.B. testified that in the room Lockett asked to "see where [her] private area is." While he said this, he touched her with his hands, over her clothes, in her "private area." He touched her in this way three times. She testified that her "private area" is

below her waist in the front of her body. While he was touching her, she cried and said no and then ran out the door. A.B. found C.H. and T.D. and told them that she wanted to go home. On the way home, A.B. told C.H. that Lockett had tried to rape her; at home, she told the same thing to her mother and grandmother. A.B. also told a police officer and a woman at a hospital what Lockett had done.

A.B.'s trial testimony was not entirely consistent with her pretrial reports. A.B.'s mother testified at trial that A.B. reported that the incident happened in a hallway or door in the back of the building, that Lockett had asked to touch her chest, and that Lockett had touched both her chest and vaginal area. Police Officer Stephen Bobrowski testified that A.B. told him that Lockett touched her "all over," including her chest and vaginal area. On cross-examination, A.B. denied telling the police that Lockett touched her on her chest. Alice Swenson, a pediatrician with the Midwest Children's Resource Center (MCRC), testified that A.B. identified the genital area as "private" and told her that she was touched on her "private." The jury was shown a video of A.B.'s interview at MCRC and was provided a transcript of the interview. During the interview, A.B. said that Lockett put his hand over her mouth several times and that Lockett did not touch any part of her body other than her private area.

C.H. testified that she lives in the apartment building where Lockett touched A.B., that on the day in question A.B. and T.D. were playing at the building, and that Lockett was at the building that day. According to C.H., the three girls started out in the front of the building and A.B. and Lockett then went to the backyard to throw things away. C.H. testified that A.B. helped Lockett because she wanted money. On cross-examination,

C.H. testified that Lockett had not asked for her help and that A.B. just started helping him and told him that she wanted to get paid to help. C.H. testified that, at some point, she and T.D. were in the backyard, Lockett asked if they were going to go to the front yard, and C.H. and T.D. returned to the front yard while A.B. stayed in the backyard with Lockett. C.H. testified that A.B. returned to the front yard once to ask if C.H. and T.D. were okay and then returned to the backyard. Then A.B. came again to the front yard "shivering and crying and saying she wanted to go home." C.H. testified that on the way home, A.B. told her that Lockett had "tried to touch her in inappropriate spots." On cross-examination, C.H. said that on the way home, A.B. said that Lockett had tried to rape her.

C.H.'s trial testimony was not entirely consistent with her pretrial reports. Police Officer Leonard Manning, who spoke with C.H. on August 11, testified that C.H. told him that Lockett asked A.B. if she wanted to make money before A.B. started to help him. C.H. also told Officer Manning that A.B. returned to the front of the building only once, when she wanted to go home. C.H. said that A.B. reported that Lockett tried to rape her. Police Sergeant Thomas Radke testified that C.H. said that Lockett had offered A.B. money to help him and that, on the way home, A.B. reported that Lockett had touched her, not that he tried to rape her.

After the state's witnesses testified, the district court determined that there was a marked similarity in modus operandi between the 1993 *Spreigl* incident and the charged offense, that the probative value of the *Spreigl* evidence outweighed its prejudicial effect, and ruled that the state could introduce the 1993 *Spreigl* incident.

The only evidence offered by the state about the facts underlying the 1993 incident was the complaint accompanied by a certified statement of the clerk of court in Cook County, Illinois. Lockett objected to the admission of the complaint, arguing that it was inadmissible hearsay and that it provided insufficient evidence of the underlying facts of the *Spreigl* incident. The only evidence of the 1995 conviction arising out of the 1993 incident was a sentencing-commitment order with the sentence and a reference to a probation violation redacted. The redaction was for the purpose of submitting the order to the jury.[1] At the close of the state's case, the prosecutor introduced the *Spreigl* evidence of the 1993 incident by reading to the jury a portion of the complaint:

> The Circuit Court of Cook County, and it states that Bobby Lockett has on or about the 26th of July, 1993, at 7553 South Essex in Cook County, Illinois, committed the offense of aggravated criminal sexual abuse in that he, a person 17 years of age or over, to wit: Approximately 35 years of age, committed an act of sexual conduct, to wit: Fondled the vaginal area over the clothing of said victim with [M.B.], a person under 13 years of age, to wit: Ten years of age.

During his testimony, Lockett provided his explanation about the *Spreigl* evidence, denying any wrongful conduct but admitting that he pleaded guilty. He testified that he had gotten into trouble "one time." On cross-examination, the district court allowed the prosecutor to ask questions eliciting from Lockett that he had violated parole and had been convicted of failure to register as a sex offender.

[1] The *Spreigl* evidence consisting of C.H.'s allegation that Lockett attempted to touch her a year earlier was not admitted. Apparently, the state did not seek to admit that evidence at the close of its case in chief.

In closing, the prosecutor told the jury that if it believed A.B., "this case is over with. The defendant is guilty[,]" and asked the jury if it believed that A.B. was making it up and whether she was fooling everyone, and told the jury that it was its job to determine if it was the truth. The prosecutor stated, "For you to decide that this didn't happen, you have to determine that [A.B.] is lying, that [A.B.] is lying to you," and repeated this argument several times, also arguing that the jury would have to conclude similarly that C.H. was lying.

The jury found Lockett guilty of second-degree criminal sexual conduct and not guilty of kidnapping. The district court sentenced Lockett to 60 months' imprisonment, which was presented to the court as the presumptive guidelines sentence. This appeal follows.

## D E C I S I O N

Lockett challenges his conviction and sentence on the grounds that (1) the *Spreigl* evidence was improperly admitted, (2) the prosecutor committed misconduct in his closing argument, and (3) his sentence was incorrectly calculated. We reverse and remand based on error in admitting the *Spreigl* evidence, conclude that we do not need to reach the prosecutorial misconduct argument because we reverse on other grounds, and reverse and remand appellant's sentence for correction.

### *Spreigl Evidence*

*Spreigl* evidence refers to evidence of other crimes, wrongs, or acts. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). *Spreigl* evidence is governed by Minn. R. Evid. 404(b). *State v. Smith*, 749 N.W.2d 88, 92 (Minn. App. 2008). "[Rule 404(b)] precludes

evidence of another act extrinsic to the case if the purpose is to show a person's character and then to invite the inference that the person's conduct conformed to that character. Stated another way, the rule bars propensity evidence." *Id.* Though *Spreigl* evidence may not be used as character or propensity evidence, it may be admissible for "limited" and "specific" purposes, including showing motive, intent, knowledge, identity, absence of mistake or accident, or a common scheme or plan. *Ness*, 707 N.W.2d at 685 (citing Minn. R. Evid. 404(b)). For *Spreigl* evidence to be admitted: (1) the state must give notice of intent to admit the evidence; (2) the state must indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material; and (5) the probative value of the evidence must not be outweighed by its potential for prejudice. *Id.* at 686.

Admission of *Spreigl* evidence is reviewed for an abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996). A defendant claiming error must demonstrate both error in admission of the evidence and that the error was prejudicial. *State v. Grayson*, 546 N.W.2d 731, 736 (Minn. 1996). Lockett argues that the *Spreigl* evidence was erroneously admitted because (1) it was not relevant, (2) it was unfairly prejudicial, and (3) it was not presented in a proper form.

In *Ness*, the supreme court ruled that two incidents of past sexual conduct were not admissible as *Spreigl* evidence in a criminal sexual conduct trial. *Ness*, 707 N.W.2d at 691. In making its ruling, the *Ness* court discussed whether the evidence was clear and convincing, had a proper purpose, was relevant, particularly in light of its remoteness in

time, and whether the probative value outweighed the potential for unfair prejudice. *Id.* at 686-91. The *Ness* court addressed the "common scheme or plan" purpose for admission of *Spreigl* evidence, noting that "the closer the relationship between the other acts and the charged offense, in terms of time, place, or modus operandi, the greater the relevance and probative value of the other-acts evidence and the lesser the likelihood that the evidence will be used for an improper purpose." *Id.* at 688.

The *Ness* decision makes clear that a marked similarity in modus operandi between a *Spreigl* incident and the charged offense is required for the *Spreigl* incident to be relevant to show "common scheme or plan." *Id.* Here, the district court concluded that a marked similarity in modus operandi was shown. The record, however, does not provide an evidentiary basis to support the comparison. The *Spreigl* evidence of the 1993 incident does not provide sufficient details necessary for the district court to determine whether the *Spreigl* incident and charged offense have a marked similarity in modus operandi. *See State v. Bartylla*, 755 N.W.2d 8, 21 (Minn. 2008) (concluding that *Spreigl* incident and charged offense showed marked similarity in modus operandi when defendant committed attacks late at night against female victims by nonconsensual entry through unlocked doors followed by violent attacks focusing on the head and face, even though only one incident involved a death); *State v. Clark*, 738 N.W.2d 316, 346-47 (Minn. 2007) (concluding that marked similarity was not present and noting that other cases affirming the admission of *Spreigl* evidence had "details tending to establish a more distinctive modus operandi"); *State v. Gomez*, 721 N.W.2d 871, 878 (Minn. 2006) (concluding *Spreigl* incidents and charged offense reflected marked similarity in modus

operandi where similarities were "striking" because in each "the victims were elderly, the victims were physically assaulted in their homes, and the victims' wallets or purses were taken or money was demanded").

Lockett also argues that a portion of the Illinois complaint should not have been admitted as evidence of the *Spreigl* incident because the factual statements are inadmissible hearsay and the state incorrectly relied on two cases as support for the admissibility of a portion of the complaint as *Spreigl* evidence, *State v. Crocker*, 409 N.W.2d 840 (Minn. 1987), and *State v. Alt*, 529 N.W.2d 727 (Minn. App. 1995), *review denied* (Minn. July 20, 1995). We agree.

In *Crocker*, the supreme court concluded that proving a conviction with a certified copy of the conviction and a set of papers that included the complaint was not improper, particularly where no objection was made to the use of the records to prove the prior conviction. 409 N.W.2d at 843-44. This court relied on *Crocker*, when it ruled in *Alt* that a *Spreigl* offense was properly admitted via the probable cause portion of the complaint along with the victim's statement to the police. 529 N.W.2d at 730. Lockett argues that *Alt* was wrongly decided and that a complaint may now be inadmissible in light of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). In *Crawford*, the Supreme Court concluded that the right of the accused to confront witnesses attaches to all testimonial statements by witnesses against the accused. *State v. Bobadilla*, 709 N.W.2d 243, 249 (Minn. 2006) (applying *Crawford*). Under *Crawford*, all testimonial out-of-court statements are barred from use at trial when the accused was not given a prior opportunity to cross-examine the declarant. *Id.* And, more recently, the supreme

court has stated that "evidence of arrests or charges should not itself be admitted to prove the underlying acts" under Federal Rule of Evidence 404(b), noting that "[s]tatements in a complaint are hearsay, implicating confrontation concerns." *State v. Wright*, 719 N.W.2d 910, 917 n.1 (Minn. 2006) (quotation omitted) (citing 8 Henry W. McCarr & Jack S. Nordby, Minnesota Practice-Criminal Law and Procedure § 32.22, at 468 (3d ed. 2001)).

We conclude that *Crocker* and *Alt* are distinguishable from this case and that the portion of the complaint offered as *Spreigl* evidence is inadmissible hearsay. In both *Crocker* and *Alt*, the complaint was only a part of the *Spreigl* evidence admitted. Here, the portion of the complaint that was admitted was the only source of the facts underlying the 1995 conviction, i.e., the only *Spreigl* evidence offered by the state. And, we note that *Crocker* and *Alt* were decided before *Crawford* and that the supreme court's footnote in *Wright* indicates that the *Crawford* analysis may be applicable to hearsay admitted to prove a *Spreigl* incident. Because we conclude the portion of the complaint, as the only evidence of the facts underlying the *Spreigl* incident, constituted inadmissible hearsay, we do not need to reach the *Crawford* issue.

When a district court errs in admitting *Spreigl* evidence, "if there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted, then the error in admitting the evidence was prejudicial error." *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995) (quotation omitted). Given the highly prejudicial nature of evidence of past sexual misconduct involving a child and the weaknesses in the state's case, there is a "reasonable possibility" that the verdict "might

have been more favorable" if the *Spreigl* incident had not been admitted. We therefore conclude that the error was prejudicial, and we reverse and remand for a new trial.

***Sentence***

Appellant's criminal history score as calculated before sentencing was 2. With a criminal history score of 2, appellant's presumptive guidelines sentence was a 60-month executed sentence. Appellant's criminal history score was calculated by assigning 1.5 felony points for his Illinois sexual assault conviction and .5 felony points for his Illinois conviction for failure to register as a sex offender. Appellant argues that he should not have received .5 felony points for the failure-to-register conviction, and that without the .5 points, his presumptive sentence was a 48-month stayed sentence. The state concedes this point, and we agree with appellant.

Criminal history points are calculated according to the offense-level that corresponds to the sentence imposed for a conviction as determined under Minnesota law. *See* Minn. Sent. Guidelines II.B.1.e. (stating that when a prior felony conviction resulted in a misdemeanor or gross misdemeanor sentence the conviction is counted as a misdemeanor or gross misdemeanor for purposes of the criminal history score), II.B.5. (stating that out-of-state convictions will be designated as felonies, gross misdemeanors, or misdemeanors based on "the offense definitions and sentence provided in Minnesota law"); *see also State v. Vann*, 372 N.W.2d 750, 752 (Minn. App. 1985) ("Case law interpretation has recognized that if the actual foreign sentence received is not a felony sentence by Minnesota definition, then no felony criminal history point is generated."), *review denied* (Minn. Sept. 26, 1985). In Minnesota, a felony sentence is at least one

year and one day of imprisonment. Minn. Stat. § 609.02, subd. 2 (2008). Appellant's sentence on the failure to register conviction was one year. The sentence was therefore not a felony sentence in Minnesota and no felony points should have been assigned for the conviction. Without the .5 felony points, appellant's criminal history score was 1.5. Because half-points are rounded down, Minn. Sent. Guidelines cmt II.B.101, appellant's sentence should have been calculated with 1 felony point. With 1 felony point, appellant's presumptive sentence was a 48-month stayed sentence. We therefore agree with appellant that his presumptive sentence was calculated incorrectly.

**Reversed and remanded.**