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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1235**

State of Minnesota,
Respondent,

vs.

Kevin M. Krueger,
Appellant.

**Filed June 9, 2009
Reversed and remanded
Collins, Judge***

Ramsey County District Court
File No. K0-06-1002

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Considered and decided by Shumaker, Presiding Judge; Bjorkman, Judge; and
Collins, Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Appellant seeks reversal of his conviction of third-degree criminal sexual conduct, challenging the sufficiency of the evidence and arguing that the district court abused its discretion by admitting evidence of a prior conviction without analyzing the factors set forth in *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). Because the district court erroneously admitted evidence of appellant's prior conviction and there is a reasonable possibility that the verdict was thereby significantly affected, we reverse and remand.

FACTS

In late December 2005, after being grounded for breaking curfew, N.Y. and two of her foster sisters ran away from their foster home. The girls remained on the run for approximately one week. When they returned to the foster home, police investigators questioned them about what transpired while they were away. N.Y., who was 15, revealed that she and appellant Kevin Krueger had engaged in a sexual relationship. Krueger, who was 24 and denied any sexual involvement with N.Y., was charged with one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b) (2004). A jury found Krueger guilty as charged, and he was sentenced to 36 months' imprisonment. This appeal followed.

DECISION

I.

Krueger first contends that his conviction is not supported by sufficient evidence, arguing that N.Y.'s testimony was "confused and incoherent" and "inherently unbelievable"; that the testimony of other witnesses failed to corroborate N.Y.'s testimony and at times contradicted it; and that some of the state's witnesses had a motivation to lie and "punish" Krueger.

Our review of a claim of insufficient evidence is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach a guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). On review, we assume that the jury believed the state's witnesses and rejected any contrary evidence. *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007). Here, we must determine whether the evidence in the record could reasonably permit the jury to find Krueger guilty of third-degree criminal sexual conduct.

A defendant is guilty of third-degree criminal sexual conduct if he "engages in sexual penetration with another person if . . . the complainant is at least 13 but less than 16 years of age and the [defendant] is more than 24 months older than the complainant." Minn. Stat. § 609.344, subd. 1(b). Here, the jury heard N.Y. testify about the three sexual

encounters she had with Krueger. Although N.Y.'s timeline was inconsistent and confused, N.Y. always asserted that she and Krueger engaged in sexual activity on three separate occasions. N.Y.'s testimony was corroborated at least in part by a witness who testified that N.Y. told her about the first time she had sexual intercourse with Krueger and that she witnessed N.Y. perform oral sex on Krueger. And although the details of the sexual encounters differ slightly when told by another witness, that witness also testified that he was aware that Krueger and N.Y. had had sexual intercourse at Krueger's home on at least one occasion. The state's witnesses were young, inexperienced, and likely scared teenagers testifying about events that spanned the course of a week and that occurred ten months earlier. It is not to be expected that their testimony be mirror images of each other.

Krueger also contends that "[a]ll three of the state's principal witnesses had strong motivations to lie." But Krueger had ample opportunity to uncover any bias, malice, or ulterior motivation on the part of the witnesses during trial. Krueger aggressively exploited the weaknesses and inconsistencies of the state's witnesses and challenged their credibility.

Finally, Krueger points out that two witnesses admitted to others that they lied to police investigators about Krueger's relationship with N.Y. Although the jury heard evidence that both witnesses had made statements about Krueger's innocence, it also heard lengthy testimony about Krueger's conduct and relationship with N.Y., and the witnesses' "explanations" of why they made the statements they made.

Addressing each of Krueger's arguments, it is not our role to reweigh the facts presented at trial, and it is solely the province of the jury to weigh the credibility of the witnesses. Following our careful review of the record, we conclude that the evidence could reasonably permit the jury to find Krueger guilty of third-degree criminal sexual conduct as charged.

II.

Prior to trial, the state notified Krueger of its intent to offer his prior conviction of third-degree criminal sexual conduct¹ as substantive evidence, arguing that it was admissible because (1) the prior crime showed that “there is a motive, there is a plan, [and] there is a common scheme”; (2) it was “relevant to [Krueger]’s state of mind”; and (3) the complaining witness was “thoroughly confused by the sequence of events” and the prior crime evidence “would go to credibility and go to show that this, in fact, happened.” Over a defense objection and without conducting a thorough analysis under Minn. R. Evid. 404(b), the district court admitted the prior conviction because it showed a common scheme—“having sex with underage females.” On appeal, Krueger asserts that the district court erred by admitting the evidence, arguing that the court’s failure to apply the rule 404(b) analysis constituted an abuse of discretion and that had the district court engaged in the proper analysis, it would have determined that the evidence of Krueger’s prior offense was not admissible. The state concedes that the evidence was erroneously admitted but contends that Krueger was not prejudiced by the admission.

¹ Because Krueger’s out-of-state conviction is substantively equivalent to Minnesota’s third-degree criminal sexual conduct, we will refer to Krueger’s prior offense as such for simplicity.

Evidence of past crimes or bad acts, also 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). However, such evidence may be admissible to prove factors such as motive, intent, identity, knowledge, and common scheme or plan. Minn. R. Evid. 404(b). *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).

Essential to the admission of *Spreigl* evidence, (1) the prosecutor must give notice of its intent to admit the evidence consistent with the rules of criminal procedure; (2) the prosecutor must clearly indicate what the evidence will be offered to prove; (3) the defendant’s involvement in the act must be proved 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 applying this test, the district court should first determine the precise purpose for which the evidence is offered and its relevance to that purpose. *Id.* Only after it determines that the evidence is relevant for an allowable purpose should a court apply the fifth prong’s balancing test. *Id.*

We review a district court’s decision to admit *Spreigl* evidence for an abuse of discretion. *State v. Blom*, 682 N.W.2d 578, 611 (Minn. 2004). But the defendant bears the burden of establishing the error and any prejudice resulting from it. *Kennedy*, 585

N.W.2d at 389. When a district court errs by admitting such evidence, we will not reverse unless there is a reasonable possibility that the evidence significantly affected the verdict. *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995).

Although the state concedes that the district court abused its discretion by admitting evidence of Krueger's prior conviction, because we review the decisions of the district court, not the contentions of the parties, we will address each element in the rule 404 analysis.

Notice

On June 6, 2006, the state duly noticed its intent to offer the evidence.

Clear indication of purpose

The state asserted that the evidence was relevant to Krueger's state of mind, arguing that it would show motive and a common scheme or plan.

Proved by clear and convincing evidence

It was undisputed that in 2005 Krueger was convicted upon his plea of guilty of the South Dakota equivalent of the crime of third-degree criminal sexual conduct, satisfying the requirement of proof of the prior act by clear and convincing evidence.

Relevant and material

In admitting the prior-crime evidence, the district court stated that the evidence was relevant to the common plan or scheme of engaging in sexual activity with underage females. Krueger contends that the other-acts evidence is not relevant to the issues in this case "except for the improper purpose of showing that because appellant had sex

with a teenager once, he had the propensity to do so again. And that purpose is explicitly excluded by Rule 404(b).”

When determining whether past misconduct is admissible under the common-scheme-or-plan exception, the misconduct “must have a *marked similarity* in modus operandi to the charged offense.” *Ness*, 707 N.W.2d at 688 (emphasis added). “[I]f the prior crime is simply of the same generic type as the charged offense, it ordinarily should be excluded.” *State v. Wright*, 719 N.W.2d 910, 917-18 (Minn. 2006) (quotation omitted).

Here, the only material similarities between Krueger’s prior crime and the current charge are that both acts involved vaginal penetration of a minor. In other cases affirming the admission of *Spreigl* evidence, the jury was presented with more factual similarities establishing a modus operandi. *See, e.g., id.* at 918 (past misconduct and charged offense (1) “involved intrusions into homes of vulnerable victims whom the [defendant] had known for some time”; (2) took place “in the early morning hours”; (3) “were preceded by extensive drug use”; (4) were committed with similar weapons; and (5) involved “markedly similar” injuries); *Blom*, 682 N.W.2d at 612 (“[b]oth incidents involved the kidnapping of young, petite women to remote, wooded areas” and “also involved subduing the women by applying force at their neck and throat areas”); *Kennedy*, 585 N.W.2d at 391 (past misconduct and charged offense involved same victim, occurred in same bedroom, and involved “nearly identical” advances).

In this case, the two incidents at issue do not share marked similarities and thus cannot be reasonably said to reflect a common scheme or plan.

Probative value versus potential for unfair prejudice

The balancing test for admissibility of prejudicial *Spreigl* evidence differs from the test for admissibility of prejudicial evidence in general under Minn. R. Evid. 403. This element of the *Spreigl* test requires only that the probative value of the prior-crime evidence is not outweighed by the potential for unfair prejudice, whereas the rule 403 test asks whether the potential for unfair prejudice *substantially* outweighs the probative value. *See Ness*, 707 N.W.2d at 685-86 (noting that *Spreigl* evidence should be excluded if balancing test is close); *compare* Minn. R. Evid. 404(b) *with* Minn. R. Evid. 403. Unfair prejudice “does not mean the damage to the opponent’s case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means.” *Bolte*, 530 N.W.2d at 197 n.3.

The state first argues that Krueger suffered no prejudice because the evidence was overwhelmingly favorable to him. This argument rings hollow. Although the evidence regarding the prior crime established that Krueger cooperated with police, took responsibility for his actions, and is a loving and devoted father, it more pointedly revealed that Krueger had previously engaged in an illegal sexual relationship with a minor. Given that the prior conviction is for the same crime as the one charged, it strains credulity to believe that the evidence was nonetheless favorable because the jury was able to see that Krueger had some positive attributes.

The state also contends that the admission of Krueger’s prior conviction was not prejudicial because the district court had also ruled it to be independently admissible as

impeachment evidence under Minn. R. Evid. 609.² This argument is likewise flawed. First, absent admission of the evidence under rule 404, admission under rule 609 could have occurred only if Krueger testified in his own defense and therefore could be impeached. Krueger's decision to testify came after the district court had already admitted evidence of the prior crime as substantive evidence in the state's case-in-chief. Had the district court ruled otherwise, there is no assurance that Krueger would have elected to testify in his own defense. Moreover, when evidence is admitted solely under rule 609, the prosecutor may not elicit evidence concerning the facts underlying the prior conviction, *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006), and Krueger would have been entitled to an instruction limiting jurors' consideration of the prior conviction only to assess Krueger's credibility as a witness—not as substantive evidence of guilt, Minn. R. Evid. 609(a) & 1989 comm. cmt.

Because the prior-crime evidence was not relevant and material and the probative value does not outweigh the potential for unfair prejudice, the admission of the *Spreigl* evidence was erroneous. Generally, the error is harmless unless a defendant can establish “that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *Bolte*, 530 N.W.2d at 198 (quotation omitted). In making this determination, we need not decide whether a jury would have convicted the defendant without the error, but rather whether the error reasonably could have affected the jury's decision. *State v. Shannon*, 583 N.W.2d 579, 586 (Minn. 1998).

² We neither express nor intend to imply an opinion as to the admissibility of Krueger's prior conviction for impeachment purposes under rule 609. The issue is not raised in this appeal and we decline to address it.

Here, the state's case was admittedly weak. In fact, when arguing for the admission of the prior-crime evidence, the prosecutor stated that the complaining witness was "thoroughly confused by the sequence of events" and that the prior-crime evidence "would go to credibility and go to show that this, in fact, happened." The factual details provided by N.Y. regarding the sexual conduct were inconsistent and vague. The only other evidence supporting the state's case was the testimony of witnesses with limited firsthand knowledge of N.Y. and Krueger's relationship, and whose credibility was tainted by inconsistent out-of-court statements and friendship with N.Y. Moreover, the testimony of N.Y. and the other witnesses was internally inconsistent. Recognizing the vulnerability of the state's case, we reverse Krueger's conviction because we cannot conclude that the guilty verdict "was surely unattributable" to the erroneous admission of the prior-crime evidence and remand for a new trial.

Krueger also contends that he received ineffective assistance of counsel, and argues that the district court abused its discretion in making a procedural ruling at trial. Because we reverse Krueger's conviction on other grounds, it is not necessary to address these additional issues, and we decline to do so.

Reversed and remanded.