STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1031

State of Minnesota,
Respondent,

vs.

Patrick Phillip Luna,
Appellant.

Filed October 20, 2009
Affirmed
Lansing, Judge

Goodhue County District Court
File No. 25-CR-07-2335

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

Stephen Betcher, Goodhue County Attorney, Goodhue County Justice Center, 454 West Sixth Street, Red Wing, MN 55066 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Lansing, Presiding Judge; Shumaker, Judge; and Harten, 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

LANSING, Judge

On appeal from his conviction of three counts of criminal sexual conduct, Patrick Luna challenges the district court's rulings on *Spreigl* evidence, contests the sufficiency of position-of-authority evidence necessary to prove two of the counts, and raises additional trial issues in a supplemental, pro se brief. We conclude that the *Spreigl* evidence was properly admitted, that the evidence on the position-of-authority element was neither factually nor legally deficient, and that the remaining pro se arguments do not provide grounds for reversal. We therefore affirm.

F A C T S

The three convictions at issue in this appeal are based on Patrick Luna's interaction with DB between June 2003 and November 2005. During that time Luna was employed by the city of Kenyon and also owned a business where DB occasionally worked. DB lived in Kenyon with his mother and his age ranged from thirteen to sixteen between June 2003 and November 2005.

DB provided direct testimony on the events underlying the convictions. He said that Luna occasionally paid him to arrange stock in the freezer at Luna's store and that Luna frequently gave him a ride to or from the store. While DB was working at the store, Luna would talk to him about sex and make statements about how "it is okay to be gay, and stuff like that." Luna's first sexual contact with DB occurred in a back room at the store, after closing. Luna rubbed DB's penis over his pants, took it out, and stimulated it orally and manually. At Luna's request, DB masturbated Luna and inserted a broom

handle into Luna's anus. Luna drove DB home and gave him ten dollars. After that, Luna frequently repeated the acts of sexual contact. DB testified that Luna drove him to remote locations around Kenyon "a lot" where they would perform oral sex on each other in Luna's vehicle. The sexual contact also occurred when Luna took DB to Luna's house, to the break room of the snowplow garage, and to an upstairs room at the fire department. DB said that he engaged in sex acts with Luna because DB "grew up poor" and Luna gave him cash, a TV, and a stereo.

In addition to DB's direct testimony, the state played two videotaped interviews in which DB disclosed the abuse to police and two recorded phone conversations between DB and Luna that police arranged with DB. In the recorded conversations Luna did not acknowledge the sexual contact but repeatedly apologized to DB for "whatever I did, whatever you think I did to you."

The district court also permitted *Spreigl* testimony from three other young men. Luna did not contest the admissibility of *Spreigl* evidence provided by AB, who was the first of the *Spreigl* witnesses. AB, who was a friend of DB's, testified that Luna had engaged in similar sexual conduct with him. He also testified that, at times, sexual contact occurred while both he and DB were with Luna. Thus, AB's testimony corroborated DB's testimony on specific instances of conduct and also provided *Spreigl* evidence on Luna's conduct with AB.

Luna disputed the admissibility of other *Spreigl* evidence and the district court held a hearing outside the jury's presence before allowing some, but not all, of the proposed evidence. The district court allowed the testimony of CL and DM.

CL described sex acts with Luna that took place in a city vehicle while CL was working under Luna's supervision to fulfill court-ordered community service. DM, who was another employee at Luna's store, described physical contact and suggestive comments by Luna. Other witnesses testified about the places that DB and the three young men described and also testified to physical evidence related to the testimony. Luna testified in his own defense and presented supporting testimony through employees at his business, a parent of two employees, and his wife.

The jury found Luna guilty on all three counts. He appeals his conviction, challenging the admissibility of CL's and DM's *Spreigl* evidence and the sufficiency of the evidence on two of the convictions that include a position-of-authority element. In a pro se supplemental brief he also raises evidentiary and fair-trial issues.

D E C I S I O N

I

Evidence of other crimes or acts, known in Minnesota as *Spreigl* evidence, is inadmissible as proof of a person's character or to show that the person acted in conformity with that character. Minn. R. Evid. 404(b); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). This evidence of other acts may, however, be admissible as proof of motive, intent, knowledge, common scheme or plan, or absence of mistake or accident. *Kennedy*, 585 N.W.2d at 389.

Five requirements must be met to allow the admission of *Spreigl* evidence: (1) the state must provide notice, (2) the state must clearly indicate what the evidence will be offered to prove, (3) the state must provide clear and convincing proof that the defendant

participated in the prior act, (4) the offered evidence must be relevant and material to the state's case, and (5) the probative value of the evidence must outweigh any potential for unfair prejudice. Minn. R. Evid. 404(b); *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). We review the admission of *Spreigl* evidence for abuse of discretion. *Ness*, 707 N.W.2d at 685. If abuse of discretion is shown, the defendant must also show prejudice. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Luna concedes that CL's and DM's testimony satisfies the first three factors for admission of the evidence but challenges the last two: the relevance of the admitted testimony and its probative value as weighed against its prejudice. We, therefore, address those elements as they apply, first, to CL's testimony and then to DM's testimony.

CL testified that he met Luna when CL was ordered to do community service for the city of Kenyon; that Luna drove CL to and from worksites, which entailed taking him to remote locations outside Kenyon; that Luna talked to him about sex, particularly male homosexual contact; that Luna masturbated suggestively in CL's presence and said it "was all for [CL]"; and that Luna asked to touch CL's penis and offered him large amounts of cash or help with his criminal legal problems. CL said he let Luna touch him because of the offers, because he had no other way to complete his service hours, and because reporting Luna would be fruitless because Luna was "a really well represented person in the community."

The district court concluded the testimony was relevant to show a common scheme. To show a common scheme, evidence must be markedly similar to the charged conduct. *Ness*, 707 N.W.2d at 688. Luna's interaction with CL has significant similarity

to the charged conduct with DB. Luna was often alone with each of them in a supervisory capacity. Luna talked about homosexual contact to both of them, and followed up later with explicit requests. He promised both of them rewards directed at particular needs or vulnerabilities. And the contact with CL occurred after Luna drove him to remote areas out of town, which is similar to the contact Luna had with DB. The time, place, and modus operandi is markedly similar.

In balancing the probative and prejudicial effects, the district court cited the similarity of the conduct with CL. The district court also stated that the evidence was somewhat necessary to the state's case. *See Ness*, 707 N.W.2d at 690 (stating that need for evidence is also considered in weighing prejudice against probative value). The record supports this conclusion. Luna's defense theory was that DB and AB were collaborating to fabricate the abuse. CL's testimony countered this with evidence of similar conduct, inflicted on someone not associated with DB. Luna's conduct with CL was markedly similar to the charged conduct and more probative than prejudicial. Allowing CL's testimony was not abuse of discretion.

DM's testimony is a closer question. DM testified that, while working for Luna, Luna made two comments that DM took as jokes insinuating oral or anal sex. He also said that Luna "would say that I was gay . . . [and that] I knew I was gay." And he said that once or twice Luna "grabbed [DM's] butt" at the store, and that DM punched Luna in the shoulder and told him not to do that.

Luna's interactions with DM were similar to the conduct in the early stages of his conduct with DB. The district court characterized the acts as initial steps in Luna's

modus operandi, and concluded that they were similar enough in these early stages to be relevant in establishing a common scheme. DM's testimony lacks other similarities. DM did not testify that Luna ever attempted to get him alone in the store, his truck, or other remote settings. Luna never asked to or tried to touch DM's penis. Luna did not offer DM any rewards or exploit his needs. Because the conduct with DM is less similar, it weighs less favorably for admissibility in weighing the probative value against the prejudicial effect.

Nonetheless, DM's testimony indicates that the initial steps were abandoned because DM was firm in his rejection. Consequently, the evidence has probative value that countered the testimony of defense witnesses that they did not see improper behavior at Luna's store. We recognize that when *Spreigl* admissibility is very close, the proper course is not to admit it. *See State v. Clark*, 738 N.W.2d 316, 347 (Minn. 2007) (finding abuse of discretion in close case). But we conclude that in these circumstances, the similarity of the common scheme is sufficient. Even if it were not, its admission was harmless because there is no reasonable possibility that DM's testimony significantly affected the verdict. *See id*. (stating that erroneous *Spreigl* admission does not require reversal unless defendant shows prejudice). Compared to the testimony of DB, AB, and CL, the conduct described by DM is significantly less aggravated. The case turned entirely on crediting the evidence presented by DB, AB, and CL, and the jury believed them.

II

Two of Luna's convictions—the first- and second-degree charges—include as an element that the defendant was in a "position of authority" over the victims. Second-degree criminal sexual conduct occurs when a person (1) has any sexual contact with another who is between thirteen and sixteen years of age, (2) is at least forty-eight months older than the victim, and (3) is "in a position of authority over" the victim. Minn. Stat. § 609.343, subd. 1(b) (2002). And, if these circumstances exist and the sexual contact constitutes "penetration," the person commits first-degree criminal sexual conduct. Minn. Stat. § 609.342, subd. 1(b) (2002). Any person "acting in the place of a parent . . . [or] charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief," is in a position of authority. Minn. Stat. § 609.341, subd. 10 (2002). An employer is in a position of authority. *See State v. Hanson*, 514 N.W.2d 600, 602-03 (Minn. App. 1994) (referring to employer's position of authority over complainant employee); *State v. Hall*, 406 N.W.2d 503, 503-04, 505-06 (Minn. 1987) (affirming defendant's position of authority over fourteen-year-old he hired as babysitter).

We review the record in a light favorable to the jury's verdict to determine if any evidence reasonably supports it. *State v. Fort*, 768 N.W.2d 335, 343 (Minn. 2009); *see State v. Spence*, 768 N.W.2d 104, 110 (Minn. 2009) (determining if record was "sufficient to permit the jurors to reach [their] verdict"). Questions of statutory interpretation are reviewed de novo. *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002).

Luna concedes that the evidence satisfies the age elements and the penetration element of count 1. *See* Minn. Stat. § 609.341, subd. 12(1) (2002) (defining "sexual penetration" to include fellatio). The only issue is whether Luna was in a position of authority over DB. He argues that Luna and DB's relationship did not sufficiently show an employment relationship.

Luna points to DB's testimony that he did not consider Luna his boss. Although this statement might weigh against the evidence that DB performed tasks at the store under Luna's direction, our review is limited to determining whether evidence in the record could support the jury's determination that Luna was in a position of authority. *Spence*, 768 N.W.2d at 110. The record amply shows that Luna paid DB for work that DB performed at the store, which is sufficient to show employment. The fact that DB's employment was sporadic, without a specific expectation or established agreement, does not, as a matter of law, require reversal. The statutory definition encompasses supervisory responsibility assumed by the defendant, "no matter how brief." Minn. Stat. § 609.341, subd. 10. The record shows that Luna employed DB for brief periods at the store, over a period of several years. *See Hall*, 406 N.W.2d at 504, 506 (stating that defendant had hired complainant as babysitter almost daily for prior month).

The evidence before the jury was sufficient to satisfy the statutory definition of "position of authority," as an element of counts 1 and 2.

III

In his pro se supplemental brief, Luna raises additional evidentiary and fair-trial issues. We conclude that none of these issues provides a basis for reversal, and we address eight of them specifically.

We reject Luna's contention that the district court abused its discretion by not allowing him full access to DB's school and juvenile court records. The district court conducted an in camera review of these records and determined that they were neither relevant to Luna's defense nor admissible for impeachment. District courts have broad discretion when balancing a witness's right to privacy against the defendant's right to present his defense. *State v. Bakken*, 604 N.W.2d 106, 110 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). On appeal we have independently reviewed the confidential records and determined that the district court did not abuse its discretion when it ruled that the records did not contain evidence relevant to Luna's defense or material that would have provided a basis for impeachment.

Second, the district court did not abuse its discretion by declining Luna's motion for change of venue. *See State v. Moore*, 481 N.W.2d 355, 363 (Minn. 1992) (stating standard for review of venue determinations). Luna contends, generally, that the jury pool was tainted by pretrial publicity. A defendant seeking a change of venue based on pretrial publicity who has had a chance to voir dire the jury must show that the publicity has affected the minds of specific jurors. *See* Minn. R. Crim. P. 25.02 (stating dissemination of prejudicial material must create reasonable likelihood of unfair trial); *Moore*, 481 N.W.2d at 364 (requiring showing of prejudice). The district court

conducted a thorough voir dire on this issue to determine whether any potential juror had been affected by pretrial publicity. Luna concedes that even the jurors who "acknowledged reading about the case . . . might not have remembered what [the article] said." The record provides no basis to indicate that any specific juror was affected by pretrial publicity.

Third, Luna asserts that various aspects of the state's proof were weak or contradicted by his defense. DB's testimony, together with that of the other witnesses, was more than sufficient to support the jury's verdict on each of the three convictions. On appeal, we do not retry facts, but instead defer to the jury's conclusions. *Fort*, 768 N.W.2d at 343. The weight and credibility of that testimony is "exclusively the province of the jury." *Francis v. State*, 729 N.W.2d 584, 589 (Minn. 2007).

Luna's fourth and fifth arguments assert racial prejudice and juror misconduct. Neither of these assertions was raised in the district court and Luna provided no factual basis on which to base or review these challenges. *See Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717 (1986) (stating that claim of racial bias in jury requires showing of purposeful discrimination by state); *see also State v. Durfee*, 322 N.W.2d 778, 786 (Minn. 1982) (stating that "party who learns of a misconduct of a juror during trial may not keep silent and then attempt to take advantage of it in the event of an adverse verdict").

Sixth, Luna argues that his counsel was ineffective. Our review of the record discloses no deficiency in representation, and Luna has not pointed to any facts in the record to support his general allegation. *See Strickland v. Washington*, 466 U.S. 668,

687, 104 S. Ct. 2052, 2064 (1984) (establishing standard for ineffective assistance of counsel claim); *cf. Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004) (stating that ineffective-counsel claim is not waived and may be brought in postconviction petition when it cannot be decided on district court record).

Luna's seventh and eighth arguments are allegations that the judge and prosecutor committed misconduct. The allegation of judicial misconduct is directed at the district court's refusal to allow Luna an unrestricted release pending trial. The district court did not abuse its discretion by limiting Luna's contact with minors while on release because the rules of criminal procedure provide for consideration of public-safety concerns when determining pretrial conditions. Minn. R. Crim. P. 6.02, subd. 2; *State v. Martin*, 743 N.W.2d 261, 266 (2008). In light of the charges pending against Luna, the district court did not abuse its discretion by imposing conditions. And finally, we are unable to find any comments in the prosecutor's closing argument analyzing the evidence and arguing witness credibility that represent plain error. *See State v. Wright*, 719 N.W.2d 910, 918-19 (Minn. 2006) (stating that prosecutor is free to analyze evidence and argue witness credibility).

Affirmed.