STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2090

State of Minnesota,
Respondent,

vs.

Michael Nicholas Kocur,
Appellant.

Filed December 22, 2009
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-08-17632

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

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

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Huspeni, 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

HALBROOKS, Judge

Appellant challenges his conviction of attempted third-degree criminal sexual conduct on the grounds that the district court abused its discretion by admitting *Spreigl* evidence and that the evidence was insufficient to sustain his conviction. We affirm.

FACTS

On April 8, 2008, appellant Michael Nicholas Kocur, then 40 years old, left his home with the stated intention of looking for a prostitute to have sex. Kocur saw R.D., a 14-year-old girl, walking on Lyndale Avenue in Minneapolis. Kocur drove by R.D. several times in his car, waited while she went into a convenience store, and eventually pulled over, rolled down his window, and asked her if she wanted a ride. R.D. declined. Kocur offered again, and when R.D. declined again, Kocur drove off. R.D. then called her mother on her cell phone, who advised her to call 911, which R.D. did. While she was on the phone with the dispatcher, she saw Kocur drive by one more time. After talking with police, R.D. went to school.

The police apprehended Kocur shortly thereafter based on the description R.D. had provided. An officer brought R.D. to where Kocur was being held, and R.D. identified him as the person who had offered her a ride. Kocur was arrested and gave a statement to police. In his statement, Kocur admitted that he was looking for a prostitute before work, that he thought R.D. was 18 or 19 years old and a prostitute, and that he asked her if she wanted a ride and a date. Kocur was charged with attempted third-degree criminal sexual conduct (age difference) in violation of Minn. Stat. § 609.344,

subd. 1(b) (Supp. 2007), and stalking/harassment in violation of Minn. Stat. § 609.749, subds. 2(a)(2), 3(a)(5), 3(b) (2006).[1]

The state notified Kocur that it intended at trial to introduce *Spreigl* evidence of two past convictions—one for attempted third-degree criminal sexual conduct involving a 15-year-old girl and one for solicitation of prostitution involving a 13-year-old girl. Both past convictions were from 1998. In his guilty plea involving the 15-year-old, Kocur admitted to picking the victim up in his car in Brooklyn Park and taking her to his house. At his house he then "attempted to engage in criminal sexual penetration with the use of some type of force or coercion." Specifically, he "attempt[ed] to have a juvenile female perform oral sex" on him, and he would not let her leave his house when she wanted to leave. There was no evidence that Kocur knew this victim. Kocur pleaded guilty to attempted third-degree criminal sexual conduct in connection with this incident.

In his guilty plea involving the 13-year-old, Kocur admitted to picking up the victim in his car somewhere near her school in Columbia Heights. He drove around with the victim for ten to fifteen minutes talking with her about pornography and sex and trying to get the victim to work as a prostitute for him. He also asked her to pull up her sweater and expose her breasts. This victim was a stranger to Kocur. As a result of this incident, Kocur pleaded guilty to solicitation of prostitution.

[1] The original complaint also charged him with attempted false imprisonment, but that charge was later dropped.

The district court allowed the evidence of these prior convictions to be admitted, and Kocur was found guilty by a jury on both charges. He now appeals his conviction of attempted third-degree criminal sexual conduct.

D E C I S I O N

I.

Kocur argues that the district court abused its discretion by admitting evidence of his two prior convictions. Evidence of past crimes, 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. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). But *Spreigl* evidence may be admissible to prove other factors, including motive, intent, identity, or a common scheme or plan. *Id.* In deciding whether to admit such evidence, a district court examines whether (1) the state has given notice of its intent to admit the evidence, (2) the state has clearly indicated what the evidence will be offered to prove, (3) there is "clear and convincing evidence that the defendant participated in the prior act," (4) the evidence is "relevant and material to the state's case," and (5) the probative value of the evidence is "outweighed by its potential prejudice to the defendant." *State v. Ness*, 707 N.W.2d 676, 685–86 (Minn. 2006).

The state offered the *Spreigl* evidence for two purposes—to prove Kocur's intent and to prove that he had a common scheme or plan. Kocur challenges the admission of his past convictions under the fourth and fifth steps in the district court's analysis—whether the past convictions are relevant to the state's case and whether the probative value of the evidence is outweighed by prejudice. We review the admission of *Spreigl*

evidence for an abuse of discretion. *Id.* at 685. The district court stated when admitting the evidence that "[s]ince the State's case is circumstantial and involves an attempt, all of the characteristics of the other two offenses . . . are relevant and would have probative value."

Spreigl evidence may be offered to prove intent, "but the admission of such evidence under this exception requires an analysis of the kind of intent required and the extent to which it is a disputed issue in the case." *Id.* at 687. Kocur's intent is an element of the charged offense, because Kocur was charged with attempted third-degree criminal sexual conduct. The Minnesota Supreme Court has interpreted the intent required to convict someone of an attempted crime as requiring "a specific intent to commit that particular offense." *State v. Welch*, 675 N.W.2d 615, 619 (Minn. 2004) (quotation omitted). Kocur argues that his taped statement, wherein he admits to looking for a prostitute, was sufficient to prove his intent. But Kocur only admited to intending to have sex with a prostitute, not with R.D., and he argued to the jury that he abandoned his attempt when he realized that R.D. was not a prostitute. Kocur therefore essentially denied that he had the specific intent to have sex with R.D. *Spreigl* evidence may be relevant to refute a defendant's denial of requisite intent. *See State v. Fardan*, 773 N.W.2d 303, 317-18 (Minn. 2009) (concluding that evidence of a bad act involving the same gun was relevant to refute defendant's claim that the gun accidently fired, proving that defendant intended to fire his gun). We conclude that the *Spreigl* evidence in this case was relevant to show that Kocur's true intent was to have sex with R.D., even after realizing that she was not a prostitute.

Similarly, the *Spreigl* evidence was relevant to show that Kocur utilized his common scheme or plan when he asked R.D. if she wanted a ride and that getting her into his car was a step in his plan. We recognize that the common-scheme-or-plan exception is most frequently used in cases when identity or fabrication is an issue. Identity is not an issue here. If a crime was committed, it was committed by Kocur. But "the use of common scheme or plan evidence is not limited to instances when identity is at issue." *Kennedy*, 585 N.W.2d at 391. Similarly, because the facts are not disputed here, there is no need for common-scheme-or-plan evidence to refute a fabrication. We nevertheless conclude that the state properly offered the evidence under this exception. The exception was originally used "for those offenses which could be described as preplanned steps in a larger scheme of which the charged offense was another step." *Ness*, 707 N.W.2d at 687 (quotation omitted). Here, there was direct evidence of only the first step in Kocur's plan—attempting to get a girl into his car. Evidence of his past convictions was necessary to demonstrate Kocur's entire plan to the jury. *Spreigl* evidence "can be used to show a link between the bad act and the charged offense in order to establish a modus operandi." *Kennedy*, 585 N.W.2d at 391.

For *Spreigl* evidence to be "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. "*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[.]" *Kennedy*, 585 N.W.2d at 391. The district court did not specifically comment on the similarity in modus operandi of the past convictions to the current offense. Kocur

argues that his prior convictions are "not markedly similar to the charged offense and, therefore, not relevant and material as common scheme or plan evidence." Kocur attempts to distinguish the third-degree criminal-sexual-conduct conviction on the basis that the prior conviction "involved the use of force and coercion to attempt sexual penetration" whereas this charge did not involve force. Kocur attempts to distinguish the solicitation-of-prostitution conviction claiming that "the only similarity was the age of the complainant." Kocur claims that "[o]ther than the young age of the complainants, the two incidents do not have a distinctive similar character that unites them with the charged offense."

Although the proper course is not to admit *Spreigl* evidence when admissibility is very close, *Ness*, 707 N.W.2d at 685, in this case, the similarity of the modus operandi is sufficient. Kocur's characterization of the prior convictions as dissimilar other than the ages of the victims is inaccurate. Both prior incidents involved Kocur (1) picking up girls in his car (2) between the ages of 13 and 15 (3) who were strangers to him and (4) attempting sex crimes. The past convictions are sufficiently similar to be relevant to establish Kocur's common scheme or plan. As in *State v. Wermerskirchen*, where *Spreigl* evidence was admitted under the common-scheme-or-plan exception, "the evidence served to complete the picture of [Kocur], to put his current conduct in its proper and relevant context, not to paint another picture or lead the jury to convict on the basis of an irrelevancy." 497 N.W.2d 235, 242–43 (Minn. 1993).

"Our review for abuse of discretion reflects the fact that the district court is best positioned to weigh" the relevance of the evidence. *State v. Washington*, 693 N.W.2d

195, 201 (Minn. 2005). We decline to substitute our judgment for that of the district court and conclude that the district court did not abuse its discretion by determining the evidence of Kocur's past convictions was relevant to prove Kocur's intent and a common scheme or plan.

Kocur also argues that the district court abused its discretion by determining that the probative value of the *Spreigl* evidence outweighed the risk of unfair prejudice. Kocur argues that the *Spreigl* evidence is "precisely the type of inflammatory prejudicial evidence that a jury may use to conclude that [he] committed the charged offense because he had been convicted of criminal sexual conduct in the past." *Spreigl* evidence is not admissible unless the probative value of the evidence outweighs its potential for unfair prejudice. *Kennedy*, 585 N.W.2d at 391. 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." *State v. Bolte*, 530 N.W.2d 191, 197 n.3 (Minn. 1995) (quotation omitted). *Spreigl* evidence, by its nature, is prejudicial, but the balancing analysis focuses on whether it is unfairly prejudicial, meaning that it "persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

The district court found that the evidence was "prejudicial in a case like this, but . . . the probative value outweigh[ed] the potential prejudice to [Kocur], given the nature of the charges involved." Kocur's argument that the probative value of the *Spreigl* evidence was outweighed by the risk of unfair prejudice relies in part on his assertion that

the prior convictions were irrelevant to the charged offense, and therefore there was no probative value to weigh against the inherent prejudice. But, as discussed above, the past convictions were relevant to show Kocur's intent and to prove a common scheme or plan, and therefore this argument has no merit.

The necessity of the *Spreigl* evidence is an important factor in weighing the probative value against the prejudicial effect. *Ness*, 707 N.W.2d at 690. When identity is not an issue, the district court should look at the state's case as a whole in determining the need for the evidence, not the weakness of a particular issue. *Id.* The prior convictions were necessary to bolster the state's case because, in charging an attempted crime, the state needed to show that Kocur intended to have sex with R.D. (not just a prostitute). The state also needed to show that asking R.D. if she would get in his car was, in fact, a substantial step toward the crime of third-degree criminal sexual conduct. The state was unable to make this connection without the *Spreigl* evidence. The district court noted the circumstantial nature of the state's case when determining that the *Spreigl* evidence was probative.

The difficulty in this case is that the precise reason the evidence was probative also presents the greatest risk for unfair prejudice. The potential for unfair prejudice was that the jury would convict appellant based on his plan, not on his actions. An attempted crime requires the actor to take a "substantial step" toward completing the crime. Minn. Stat. § 609.17, subd, 1 (2006). Evidence of Kocur's plan may have obscured the question of whether Kocur's actions constituted a substantial step. But the district court twice issued cautionary instructions to the jury. Cautionary instructions help to avoid unfair

prejudice. *Kennedy*, 585 N.W.2d at 392. The court also issued an adequate instruction of what constituted a substantial step. And this court presumes that jurors follow the district court's instructions. *State v. Courtney*, 696 N.W.2d 73, 84 (Minn. 2005). Although this is a close case, and another district court may have decided, within its discretion, to exclude the evidence, we conclude that the district court did not abuse its discretion by determining that the probative value of the *Spreigl* evidence outweighed the risk for unfair prejudice and by admitting the evidence of Kocur's prior convictions.

II.

Kocur also claims the evidence was insufficient to support the jury's verdict. He makes two sufficiency arguments. First, he alleges that the evidence is insufficient to support a conviction of attempted third-degree criminal sexual conduct because his act of offering R.D. a ride was not a substantial step toward completion of the crime. Second, in his pro se supplemental brief, Kocur contends that the state did not provide sufficient evidence that he did not voluntarily and in good faith abandon his attempt.

In considering a claim of insufficient evidence, this court conducts a "painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court 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 the

defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

The jury found Kocur guilty of attempted third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b). Under this section, it is a crime for any person to "engage[] in sexual penetration with another person . . . if . . . the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant." *Id.* If there is more than a ten-year age difference, as here, mistake of age is not a defense. *Id.* Consent is never a defense. *Id.* The statute criminalizing attempts provides, "[w]hoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime." Minn. Stat. § 609.17, subd. 1.

In general, in cases convicting a defendant of attempted criminal sexual conduct, the facts involve a more overtly sexual act than asking a girl if she wants a ride. *See, e.g.*, *Dale v. State*, 535 N.W.2d 619, 623–24 (Minn. 1995) (affirming conviction for attempted first-degree criminal sexual conduct where the defendant placed the victim in a headlock, threatened to kill her, forcibly restrained her, and ripped off her clothes); *State v. Peterson*, 262 N.W.2d 706, 707 (Minn. 1978) (finding that the act of chasing, grabbing, and threatening victims if they did not have sexual intercourse with the defendant was a substantial step toward committing third-degree criminal sexual conduct); *State v. Meemken*, 597 N.W.2d 582, 586 (Minn. App. 1999) (concluding that touching a girl's thigh in conjunction with multiple statements of intention to commit a sexual act was a substantial step toward committing second-degree criminal sexual conduct), *review*

denied (Minn. Sept. 28, 1999). But our supreme court has noted that "[a]cts 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) (citations omitted).

Because the evidence of Kocur's past offenses was properly admitted, it was appropriate for the jury to use this evidence to determine Kocur's specific intent when he asked R.D. if she wanted a ride. *See Welch*, 675 N.W.2d at 618, 620 (using *Spreigl* evidence to prove defendant intended to commit third-degree criminal sexual conduct when he knocked the victim to the ground); *Ture v. State*, 353 N.W.2d 518, 524 (Minn. 1984) (using *Spreigl* evidence to prove defendant intended to rape his victim when he tried to force her into his car). We must assume that the jury rejected Kocur's version of events, in which he claimed that he mistook R.D. for a prostitute and instead believed the testimony at trial that indicated that there was nothing about R.D.'s appearance that would have led a reasonable person to believe that she was a prostitute. The testimony indicated R.D. was wearing a high school sweatshirt and walking in a neighborhood not frequented by prostitutes. There is no evidence indicating that Kocur could have believed that R.D. was in need of a ride, and yet Kocur waited while she went into a convenience store. The jury reasonably concluded, based in part on the *Spreigl* evidence, that Kocur had a plan in mind when he left his house and that he intended to pick up a young girl and commit third-degree criminal sexual conduct.

The question remains whether Kocur's actions on the particular day in question were sufficient to constitute a substantial step toward committing the crime. Kocur argues that his act of asking R.D. if she wanted a ride was not a "substantial step" toward actually having sex with R.D. The jury was adequately instructed on the definition of a substantial step:

> An act is a "substantial step" toward the commission of the crime if it clearly shows an intent to commit Criminal Sexual Conduct in the Third Degree and it directly tends to accomplish that crime. The act itself, however, need not be criminal in nature.
>
> Stated differently, in order to find [Kocur] guilty of attempted Criminal Sexual Conduct in the Third Degree, the State must prove beyond a reasonable doubt that the mental process of [Kocur] passed from the stage of just thinking about the crime of Criminal Sexual Conduct in the Third Degree to actually intending to commit that crime *and* that the physical process of the defendant passed from the stage of mere preparation to some firm, clear, and undeniable action to accomplish that intent. Mere preparation, which may consist of planning the offense or of obtaining or arranging the means for its commission, is not sufficient to constitute an attempt.

The evidence showed that Kocur went as far as selecting a target, following her for several blocks, waiting for her to come out of a convenience store, pulling over, rolling down his window, and repeatedly asking her if she would like a ride. Based on this evidence, the jury reasonably concluded that Kocur went beyond mere preparation and took a substantial step toward completing his plan. Viewing the jury verdict in light of all possible inferences supporting the verdict, we conclude that there is sufficient evidence to support the jury's determination that Kocur intended to commit third-degree criminal sexual conduct and took a substantial step toward committing the crime.

In his pro se supplemental brief, Kocur also argues that there is insufficient evidence to support a jury finding that he was not entitled to the affirmative defense of abandonment. "It is a defense to a charge of attempt that the crime was not committed because the accused desisted voluntarily and in good faith and abandoned the intention to commit the crime." Minn. Stat. § 609.17, subd. 3 (2006). An attempt is not voluntarily abandoned if the defendant refrains from completing the act because of intervening events. *State v. Cox*, 278 N.W.2d 62, 66 (Minn. 1979).

Kocur claims that he immediately left when R.D. refused a ride because he realized that he had made a mistake in thinking that she was a prostitute and because he did not want to scare her. Assuming, as we must, that the jury believed R.D.'s description of the encounter at trial, it was R.D.'s repeated refusal that stopped Kocur from completing the crime and not a voluntary and good-faith abandonment by Kocur upon realizing his mistake. R.D.'s testimony at trial was that Kocur tried to persuade R.D. to get into the car even after she initially refused. The jury was instructed on the defense of abandonment and chose to believe that any abandonment was not voluntary or in good faith, but rather was caused by an intervening event—R.D.'s refusal to consent. Therefore, there was sufficient evidence to support the jury's verdict that Kocur did not voluntarily and in good faith abandon his attempt.

Affirmed.