STATE OF MINNESOTA
IN COURT OF APPEALS
A09-485

State of Minnesota,
Respondent,

vs.

Carl Joseph Matusovic,
Appellant.

Filed February 16, 2010
Reversed and remanded
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-08-25935

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

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

SCHELLHAS, Judge

Following his conviction of second-degree criminal sexual conduct, appellant argues that the district court abused its discretion by admitting *Spreigl* evidence and by

denying his motion for a mistrial. Appellant also asserts pro se arguments. We reverse and remand for a new trial.

FACTS

Appellant Carl Joseph Matusovic was charged with second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2002), based on allegations that he had sexual contact with B.J., the minor cousin of his live-in girlfriend, T.Y, in the fall of 2003.

At trial, B.J. testified that she often went to the home of appellant and T.Y. to visit with their infant daughter. During such a visit in the fall of 2003, when B.J. was 10 years old, T.Y. left to pick up a relative at the airport and, while she was gone, appellant lay down on the couch next to B.J., touched her chest under her shirt, kissed her, and made her touch his penis over his underwear. Appellant later gave B.J. money, told her not to tell anyone about the incident, and offered her more money if she would have another sexual encounter with him. B.J. refused to engage in another sexual encounter but did not tell anyone about the incident. In 2007, an individual contacted B.J. on the social-networking website, MySpace, claiming to be her "secret admirer." When the individual later identified himself as appellant, B.J. told him never to contact her again and to leave her alone. In the spring of 2008, B.J. reported appellant's fall 2003 sexual contact to her mother.

Over appellant's objection, the district court permitted the state to offer *Spreigl* evidence regarding two incidents that resulted in convictions. The first *Spreigl* incident involved appellant's 1994 conviction of third-degree criminal sexual conduct that arose

out of his sexual relationship with a 14-year-old girl when he was 27 years old. The second *Spreigl* incident involved appellant's 2001 conviction of possession of child pornography, based on pornographic materials that were discovered on appellant's computer hard drive and on nearby floppy disks, which police seized in 2000, while executing a search warrant at appellant's home in connection with a different offense.

The jury found appellant guilty of second-degree criminal sexual conduct, and the district court sentenced him to 240 months' imprisonment. This appeal follows.

D E C I S I O N

Appellant challenges his conviction on the grounds that the district court (1) improperly admitted the *Spreigl* evidence and (2) abused its discretion by denying his mistrial motion. In a pro se brief, appellant raises several additional claims. Because we reverse based on the improper admission of *Spreigl* evidence, we do not address appellant's other arguments.

Evidence of past crimes or bad acts, 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. Fardan*, 773 N.W.2d 303, 315 (Minn. 2009); *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). "Our general exclusionary rule is grounded in the defendant's constitutional right to a fair trial." *Fardan*, 773 N.W.2d at 315 (quoting *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006)) (quotation marks omitted). "The overarching concern behind excluding such evidence is that it might be used for an improper purpose, such as suggesting that the

defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts." *Id.* (quotations omitted).

But *Spreigl* evidence "may be admitted for limited, specific purposes." *Id.* "Those purposes include 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)). *Spreigl* evidence also may 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).

The district court must consider five steps in the process of determining whether to admit *Spreigl* evidence: (1) the state must give notice of its intent to offer the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential for prejudice to the defendant. *Ness*, 707 N.W.2d at 685-86. If the admission of evidence of other crimes or misconduct is a close call, it should be excluded. *Fardan*, 773 N.W.2d at 316; *Spreigl*, 272 Minn. at 495, 139 N.W.2d at 172 ("Where it is not clear to the court whether or not the evidence is admissible as an exception to the general exclusionary rule, the accused is to be given the benefit of the doubt, and the evidence rejected.").

We review the district court's decision to admit *Spreigl* evidence for an abuse of discretion. *Fardan*, 773 N.W.2d at 315. "We will not reverse the district court's allowance of such evidence unless it has been shown that the court clearly abused its

discretion." *State v. Smith*, 749 N.W.2d 88, 93 (Minn. App. 2008) (citing *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996)). "A defendant who claims the trial court erred in admitting evidence bears the burden of showing the error and any resulting prejudice." *Ness*, 707 N.W.2d at 685.

Appellant does not dispute that the state satisfied the first and third steps of the *Spreigl* analysis—it gave proper notice of its intent to offer the *Spreigl* evidence and it met its burden of proving the prior conduct by clear and convincing evidence. Accordingly, we address the second, fourth and fifth steps in the *Spreigl* analysis.

Clear Indication by State of Purposes for which Spreigl Evidence was Offered

Appellant argues that the state identified only one purpose for offering the *Spreigl* evidence—to prove identity, which was not in dispute. We agree that identity was not disputed in this case and that the *Spreigl* evidence was not admissible for the purpose of proving identity. Appellant and B.J. were acquainted prior to the alleged incident, and appellant did not claim that B.J. mistook him for someone else. Moreover, B.J. specifically testified that appellant touched her, kissed her, and had her touch him. Appellant's sole defense was that B.J. was fabricating the fall 2003 incident; therefore, if there was an incident of sexual misconduct against B.J., appellant was the perpetrator.

But we disagree with appellant that the state only pointed to proof of identity as a purpose for offering the *Spreigl* evidence. The state also identified the purpose of showing a common scheme or plan by appellant. The state concluded its argument for admission of the *Spreigl* evidence by saying, "So, Your Honor, it's identity *and it's common scheme and plan*." (Emphasis added.)

"The district court should not simply take the prosecution's stated purposes for the admission of other-acts evidence at face value." *Ness*, 707 N.W.2d at 686. Instead, the district court must "conduct a thoroughgoing examination of the purposes for which *Spreigl* evidence is offered, and to weigh the probative value of the evidence on disputed issues in the case against its potential for unfair prejudice." *Id*. at 690. Here, when ruling on the admissibility of the *Spreigl* incidents, the district court said:

> They are *relevant to the issue of identity* because they show [appellant]'s, not only interest, but sexual interest in young pre-teen girls and the fact that he seeks relationships with them for that purpose.
>
> I might add that they have special significance in the context of this case. This would relate to the need issue and I guess the prejudice issue, that there has been a delay in reporting. And under these circumstances, the victim is vulnerable to an attack about her honesty in making these reports. So for that reason, I also find that the probative value outweighs any prejudice.
>
> Further, they have relevance because the [child-pornography conviction] relates to the use of a computer, which is also how contact was made with the victim, although a different website I'm sure. The use of the computer is involved in the defendant's sexual conduct. Taking everything into account, I find that the probative value of this evidence outweighs the admitted prejudicial effect.

(Emphasis added.)

Although the district court's comments are consistent with the state's argument that it intended to use the *Spreigl* evidence for the purposes of identity *and common scheme or plan*, when the court gave the jury cautionary instructions about the *Spreigl* evidence, both before the evidence was introduced and in its final charge to the jury, the

court stated that the evidence was being offered for the limited purpose of identifying appellant as the person who sexually assaulted B.J. in the fall of 2003. Thus, although the state identified the purpose of showing a common scheme or plan by appellant, the purpose for which the district court allowed admission of the *Spreigl* evidence is unclear.

Even though proof of identity was the only express purpose for which the district court allowed admission of the *Spreigl* evidence, and we have concluded such a purpose was improper in this case, we will analyze the relevance and materiality of the *Spreigl* evidence as though the court admitted it for the purpose of showing a common scheme or plan, which was a proper purpose. *See Ness*, 707 N.W.2d at 688 (stating that *Spreigl* evidence is admissible under the common-scheme-or-plan exception "to refute the defendant's contention that the victim's testimony was a fabrication").

Relevance and Materiality of Spreigl Evidence to State's Case

Appellant argues that his "prior misconduct bears no significant similarity to the current charge" and that it was therefore irrelevant. "To properly assess the relevancy and probative value of the evidence, the district court must first identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *Fardan*, 773 N.W.2d at 317 (quoting *Ness*, 707 N.W.2d at 686) (quotation marks omitted).

To be relevant and material to the state's case, "*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 and modus operandi." *Ness*, 707 N.W.2d at 688. To be admissible under the common-scheme-or-plan exception, the *Spreigl* incident must "have a marked similarity in modus operandi to

the charged offense." *Id.* at 688 (emphasis omitted). *Spreigl* evidence "ordinarily should be excluded" if it is "simply of the same generic type as the charged offense." *State v. Wright*, 719 N.W.2d 910, 917-18 (Minn. 2006). We therefore must determine whether either of the admitted *Spreigl* incidents has a marked similarity to the charged offense determined by time, place and modus operandi.

1994 Incident and Conviction of Third-Degree Criminal Sexual Conduct

Appellant's prior criminal sexual conduct occurred in 1994, nine years before the conduct underlying the offense charged in this case. The Minnesota Supreme Court has not adopted a bright-line rule for determining when a prior bad act has lost its relevance on the basis of remoteness in time. *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005). In *Ness*, the supreme court noted that

> relevancy concerns about bad acts that are remote in time are lessened if (1) the defendant spent a significant part of that time incarcerated and was thus incapacitated from committing crimes; (2) there are intervening acts that show a repeating or ongoing pattern of very similar conduct; or (3) the defendant was actually convicted of a crime based on the prior bad act, thus reducing the prejudice of having to defend against claims of acts that occurred years before.

707 N.W.2d at 689. As a result of his conduct in 1994, appellant received a sentence in 1995 of 57 months, *State v. Matusovic*, No. C2-02-879, 2002 WL 31892795, at *1 (Minn. App. Dec. 31, 2002), which incapacitated him from committing crimes for a significant period of time. This circumstance lessens our relevancy concerns, and we conclude that the 1994 *Spreigl* incident was not too remote in time to retain relevance and probative value. And, as to the place, the *Spreigl* incident was relatively close to the place of

appellant's conduct underlying the charged offense because both occurred in the Twin Cities metropolitan area. *See State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007).

But we agree with appellant that his 1994 criminal sexual conduct lacks a marked similarity in modus operandi to the charged offense. Both appellant's 1994 criminal sexual conduct and the conduct underlying the charged offense involved sexual contact with a minor female, both occurred inside homes, and after both incidents, when appellant's involvement was discovered, appellant threatened suicide. We conclude that these similarities do not constitute marked similarities in modus operandi.

The type, duration, and context of the *Spreigl* incident are markedly different from the charged offense. The *Spreigl* incident involved numerous acts of sexual intercourse with a 14-year-old female victim over a period of approximately six months. During this time period, appellant resided in the victim's home, sharing the victim's bedroom with the knowledge of her father. In contrast, appellant's alleged conduct underlying the charged offense involved one instance of sexual contact with B.J., age 10. We conclude that the district court abused its discretion in admitting this *Spreigl* evidence.

2000 Incident Resulting in 2001 Conviction of Possession of Child Pornography

Appellant does not dispute that the *Spreigl* incident involving his possession of child pornography is relatively close in time and place to the charged offense, but he argues that the incident is irrelevant because it is insufficiently similar to the charged offense. We agree.

Possession of child pornography is wholly distinct from second-degree criminal sexual conduct. The state contends that the child-pornography conviction was similar to

the charged offense because it "matched" appellant's use of the computer to contact B.J. on MySpace. But appellant's Internet contact with B.J. occurred in 2007 and was not the basis for the charged offense of second-degree criminal sexual conduct. The conduct underlying appellant's conviction of possession of child pornography is not markedly similar to the charged offense in modus operandi or any other way. We therefore conclude that the district court abused its discretion in admitting evidence of this *Spreigl* incident.

Whether Probative Value of Spreigl Evidence Outweighed Potential for Unfair Prejudice

If we had concluded that the *Spreigl* evidence was relevant, we would also be required to examine whether its probative value, i.e., its necessity to bolster B.J.'s credibility, outweighed its potential for unfair prejudice. *See Fardan*, 773 N.W.2d at 319. For that determination, we would "balance the relevance of the other offenses, the risk of the evidence being used as propensity evidence, and the State's need to strengthen weak or inadequate proof in the case." *Id.* We note that *Spreigl* evidence, by its nature, is prejudicial, but the balancing analysis for unfair prejudice focuses on whether the evidence "persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). We are persuaded that the potential for unfair prejudice to appellant outweighed the probative value of the evidence. Admission of the *Spreigl* evidence presented a substantial risk that the jury would view appellant as having a propensity to sexually pursue minor girls and to commit crimes involving sexual misconduct. And, although the district court reasonably found that B.J.'s delay in

reporting the incident made her vulnerable to attacks about her honesty, the state's need to counter that vulnerability was not sufficient to overcome the risk of unfair prejudice to appellant. B.J. was 15 years old at the time of trial, and she testified about why she waited so long to report the incident with appellant. Although there were some minor inconsistencies in B.J.'s testimony, her testimony about appellant's conduct toward her was consistent with her pretrial statements and remained consistent throughout her direct- and cross-examination. We conclude that any probative value of the *Spreigl* evidence did not outweigh the potential for unfair prejudice.

Effect on Verdict

Having concluded that the district court abused its discretion by admitting the *Spreigl* evidence, we must determine whether that error warrants reversal. *Fardan*, 773 N.W.2d at 320. Appellant "bears the burden of demonstrating that he was prejudiced by the admission of the evidence." *Id.*

"To warrant a new trial, the erroneous admission of *Spreigl* evidence must create a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id*. "If such a possibility exists, the error in admitting the evidence was prejudicial error, warranting a new trial." *Id.*

In determining whether appellant has met his burden, we are guided by *Fardan*. In *Fardan,* the supreme court concluded that the district court abused its discretion by admitting evidence of prior criminal sexual conduct at a trial on murder and aggravated-robbery charges because the evidence had little bearing on the defendant's state of mind at the time of the charged incident and the prejudicial impact of the prior conduct

outweighed any limited probative value. *Id.* at 319-20. But the supreme court concluded that there was not a reasonable possibility that the erroneously admitted evidence significantly affected the verdict. *Id.* at 320-21. In reaching that conclusion, the supreme court particularly noted the presence of other evidence on the issue for which the *Spreigl* evidence was offered, the district court's limiting instruction to the jury, the limited manner in which the evidence was presented, and the fact that the state did not explicitly mention the evidence in closing argument. *Id.*

We consider these factors in evaluating whether the district court's improper admission of *Spreigl* evidence significantly affected the verdict in this case. The non-*Spreigl* evidence, as a whole, was fairly strong, and the state was able to offer some testimony to counter appellant's claim that B.J. fabricated the incident. However, all of the other factors weigh in favor of reversing.

The jury heard about appellant's prior *Spreigl* incidents from the beginning to the end of the trial. The state mentioned the incidents in its opening statement and cross-examined appellant about the incidents, his sexual interest in young girls, and additional contact he had with young girls via the Internet. And the state referred to both incidents and appellant's "sexual interest in girls" multiple times during its closing argument.

The state also presented compelling live testimony regarding each of the *Spreigl* incidents, not just excerpts from the hearings at which appellant pleaded guilty or stipulated evidence as in *Fardan*. *Cf. Clark*, 738 N.W.2d at 347 (noting that improperly admitted *Spreigl* evidence did not warrant a new trial, in part because the evidence was not presented "through compelling live testimony from past victims"). The complainant

in appellant's third-degree criminal-sexual-conduct case testified that appellant knew she was in middle school but misrepresented his age to her throughout their six-month sexual relationship. The police officer who discovered the child pornography in appellant's home testified that he was executing a search warrant pertaining to another offense when he discovered pornographic materials involving pre-pubescent girls on appellant's computer and on nearby floppy disks. And he described the nature of the materials he discovered on the computer and recited the descriptions written on the floppy disks.

Finally, the district court's cautionary instructions were confusing and likely ineffective. Although the court properly advised the jury that the *Spreigl* evidence served only a limited purpose and that it was not to be used to infer guilt or propensity, the court erred in instructing the jury that it could consider the evidence for the purpose of determining identity, which was not at issue. And that was the only purpose for which the jury was advised that it could consider the evidence. Thus, while the jury generally is presumed to heed cautionary instructions, *Clark*, 755 N.W.2d at 261, the district court's misdirection may have undermined the effectiveness of the instruction in this case.

On this record, we conclude that there is a substantial possibility that the *Spreigl* evidence significantly affected the verdict. Accordingly, we reverse appellant's conviction and remand for a new trial.

Reversed and remanded.