STATE OF MINNESOTA
IN COURT OF APPEALS
A09-40

State of Minnesota,
Respondent,

vs.

Rodney Russell Trudeau,
Appellant.

Filed March 23, 2010
Affirmed in part, reversed in part, and remanded
Schellhas, Judge

Clay County District Court
File No. 14-CR-08-263

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction and sentence, arguing that *Spreigl* evidence was improperly admitted and that his criminal-history score was calculated incorrectly. We affirm the conviction but reverse and remand for resentencing.

FACTS

In January 2008, respondent State of Minnesota charged appellant Rodney Russell Trudeau with two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a), alleging that, from the summer of 1983 through the spring of 1986, appellant engaged in sexual penetration with twin sisters, S.T. and T.B., who were under 13 years of age when appellant was more than 36 months older. At the time of their sexual abuse, S.T. and T.B. were in the second, third, and fourth grades. When the state charged appellant, S.T. and T.B. were 31 years old.

Prior to trial, the state sought permission to offer *Spreigl* evidence that appellant sexually abused two girls when they were seven and eight years old, which resulted in his conviction of gross sexual imposition in North Dakota in 1982. Defense counsel conceded "time, place and M.O." of the *Spreigl* incidents but argued that the prejudicial value of the evidence outweighed its probative value. The district court ruled that the *Spreigl* evidence was admissible, concluding that it was supported by clear and convincing evidence and its probative value was not outweighed by the danger of unfair prejudice to appellant.

Both S.T. and T.B. testified at trial. S.T. testified that the sexual abuse began in 1983, when she was seven years old and in second grade, and continued into 1985, when she was in fourth grade. In that period, S.T. lived with her mother, B.S., her mother's fiancé, R.S., her twin sister, T.B., and a younger brother. For six months, the family resided in an apartment located on 19th Street in Moorhead, across from Romkey Park. S.T., T.B., and their younger brother played in the park "[a]ll the time," and met appellant there. The children knew appellant as "Dusty," and he eventually became their babysitter without pay. The family was very poor and appellant bought the children things, such as an Atari, and took pictures of them for B.S., who did not own a camera. Appellant "frequently" bought the children candy, took them to parks, and took them to do things in the community. At that time, appellant also began sexually abusing S.T. in the apartment, including touching her vagina and penetrating it.

After the family moved to a duplex on 18 1/2 Street in Moorhead, S.T. saw appellant "at least weekly," and the sexual abuse continued, including penile penetration of S.T.'s vagina. S.T. felt that the abuse was her fault because it felt good, and appellant said that because it felt good and S.T. and T.B. never said no, they "would be in trouble just as much as he would." Appellant told S.T. and T.B. that "if we told anybody, he would get in trouble and . . . we would no longer be able to be friends." S.T. and T.B. "took [appellant] as being a babysitter but also a friend, because he took us places, bought us things, he did everything that our parents couldn't." S.T. testified that, "fairly early on," she and T.B. "agreed to never tell anybody. Ever."

S.T. also testified that appellant sexually abused her outside of her home. Appellant took S.T. and T.B. to Dairy Queen and then to a movie theater, where the girls would touch appellant's penis with their hands or put their heads down like they were sleeping and perform oral sex. Appellant used a jacket to cover the activity. Appellant sexually abused the girls at his mother's house in Jamestown, North Dakota, including touching and penetration. Appellant took the girls to a secluded area between Dilworth and Glyndon, where he laid out a blanket and the girls touched his penis with their hands and he penetrated their vaginas with his penis. S.T. remembered watching intercourse between appellant and T.B. and watching T.B. touch appellant's penis until he ejaculated.

When S.T. was in fourth grade, the family moved to a house in Dilworth, and appellant subsequently moved into an apartment in the basement of the house, which occupied the entire basement. In that house, appellant continued to sexually abuse the girls, including the girls touching appellant's penis and appellant penetrating the girls' vaginas with his fingers and penis. S.T. watched appellant penetrate T.B.'s vagina with his fingers, and S.T. testified that the girls were together for "[a] lot of stuff that happened in the basement." Near 1986, while S.T. was still in fourth grade, appellant stopped sexually abusing her when he moved out of the basement apartment. Although B.S. and R.S. "frequently" asked S.T. and T.B. whether appellant was sexually abusing them, the girls always said, "no, we can't believe you would think that, you know, we would tell you if something happened." When appellant moved out, B.S. and R.S. asked the girls whether appellant had sexually abused them, but they said no, because appellant had told them that they would get into as much trouble as appellant. The girls did not

disclose their abuse as they got older because they were afraid of how the information would be handled and "knew the damage was done by then."

T.B.'s testimony was consistent with the testimony of her twin sister, S.T. T.B. remembered appellant buying the children things, including an Atari, a jacket, and candy "[a]ll the time." She remembered that appellant took the children to places to which their mother "would have never been able to take us," and testified, "that's how he befriended us." T.B. did not remember abuse at the apartments on 19th and 18 1/2 Streets, but testified that her lack of memory "doesn't mean that it didn't happen." She explained: "I tend to block a lot of the details out." T.B. thought she remembered more from Dilworth because "that was towards the end of it where it was happening more often." In Dilworth, appellant penetrated T.B.'s vagina with his fingers and penis. Appellant's penile penetration did not occur "every time" and was "not deep penetration," but it "was definitely inside [her] vagina." Appellant told T.B. that "if it feels good, . . . you don't need to tell your parents because that means it's okay, because it feels okay." T.B. remembered one occasion in particular when S.T. was present and she saw appellant touch and put his finger in S.T.'s vagina. T.B. also remembered abuse at a park, at appellant's mother's house in Jamestown, and at a movie theater. T.B. and S.T. never spoke about the abuse "at length," but they made a pact never to tell their mother or stepfather. T.B. said that she knew "the guilt that [her] mom would have," and she and S.T. were afraid that their stepfather would "kill him." T.B. remembered her parents asking "a few times" if she had been sexually abused, including shortly after appellant

moved out. T.B. told her parents no. She also remembered her mother asking when the girls were teenagers and she testified, "I still would never have told her."

B.S. and R.S. also testified. They never saw appellant abuse S.T. or T.B. and did not know about the abuse, but both B.S. and R.S. were wary. R.S. watched appellant closely but did not see him do anything. B.S. and R.S. kicked appellant out of the basement apartment in Dillworth, after someone told R.S. that appellant "had been in prison for molesting a couple of girls."

The state called J.L. as its first *Spreigl* witness. Before J.L. testified, the district court gave the jury a cautionary instruction. J.L. testified that, as a child, when she lived in low-income housing in Jamestown, her mother dated appellant for two to three years. When J.L. met appellant, she was ending first grade or beginning second grade and was seven or eight years old. Appellant purchased for J.L. and her sister many things and took them places, such as a fair. As J.L. put it, the things purchased "[e]ventually [came] with a price," when appellant started sexually abusing J.L., including penetration of her vagina with his fingers. The abuse "got worse as time went by" and "happened more and more often." Eventually, J.L.'s family moved away from the low-income housing and into a duplex, and appellant moved in with the family. J.L.'s mother worked nights and appellant watched the children at night. He did almost all of the cooking and cleaning around the house, which made J.L.'s mother "really really happy." Appellant made elaborate dinners and "use[d] those later on as you owe me, you know, I did this for you, I did that for you, you owe me."

J.L. testified that at that house, the sexual abuse "got really, really bad" and "happened almost daily." Appellant did not purchase as many gifts, but he paid many of the bills so the family could "live in a nicer house like that." "[A] giant open field" was located across the gravel road from the house, where appellant often took the children to fly kites or walk. On one occasion, appellant touched J.L. behind a hay bale. Other incidents of sexual abuse also occurred outside the house, including on a boat, on a nature trail behind a park, and off of an exercise path. J.L. did not remember ever touching appellant's penis. When asked whether appellant's penis touched her vagina, J.L. said "[i]t almost happened one time" but she got really scared, ran away, locked herself in the bathroom, and hid there all night.

While appellant sexually abused J.L., he told her that he was a special friend, that "friends keep secrets among each other," and that "you don't tell other people your secrets, you always keep secrets." Appellant also said, "you wouldn't want to ruin our friendship now, would you?" J.L. had a friend, C.M., at the low-income housing, and appellant once gave them both a big bag of candy and told C.M. "at the same time about, you know, secret friendships and all that and how we were special and that this was a gift and that, um, there would be more gifts like it." Once, at a reservoir, appellant sexually abused both J.L. and C.M. Appellant sat between the girls and put his hands inside their shorts. And, "[a] few times down at the low income housing he would have us in the back room while our parents were out front either drunk or high." Appellant sat on the bed in between the girls with his hands in their pants.

After J.L.'s testimony, the district court gave another cautionary instruction, and C.M. testified. C.M. testified that she grew up in Jamestown and, when she was seven or eight years old and in first or second grade, she lived in an apartment building. Money was "tight"—"Low income, um, food stamps, that kind of thing." When she lived in the apartment, she met appellant, who gave J.L. and her treats and took them places. C.M. remembered going to the Jamestown reservoir and to the park. She also remembered appellant sexually abusing her. Appellant touched her with his hands, either on the outside or inside of her clothes, and touched her vaginal area. C.M. had difficulty remembering and believed that she had "blocked out" things over time, but she remembered that appellant touched her when the two of them were on a paddle boat. Appellant also took his penis out of his shorts, wrapped her hand around it with his own hand, and stroked himself. C.M. saw him ejaculate. C.M. also remembered that appellant touched his penis at a fair, she believed on of one the rides, although she did not remember "a whole lot" about it.

H.L. testified for the defense. In the summer of 1984, H.L. was ten years old, lived on 19th Street in Moorhead, and met appellant when S.T. and T.B. introduced her. H.L.'s "friendship or relationship" with appellant continued to the present day, and appellant knew everyone in her family. From 1984 to 1986, he was like a part of her family; he went on family vacations and was there for holidays. S.T. and T.B. were with them at times as well, and H.L. testified that there was not anything different about the way appellant acted with them than how he acted with her family. H.L. never saw appellant do anything inappropriate with them. Appellant took children in her family to

do things that were "[mostly] things we didn't need to pay for," like swimming in the pool in appellant's complex or going to a park in Glyndon. H.L. did not remember appellant buying candy or taking the children to get ice cream. The children went places with appellant both with and without their parents.

The jury found appellant guilty of both counts. Appellant's presumptive sentence was 95 months' imprisonment on count one and 113 months on count two. Appellant's presumptive sentences were calculated under the 1983 guidelines, based on a total of four criminal-history points, two of which were for two 1991 drug-related felony convictions. The district court sentenced appellant to 101 months on count one and 45 months, consecutively, on count two. The sentences are top-of-the-box sentences on both counts. The court calculated appellant's sentence on count one, based on a criminal-history score of four, and, on count two, based on a criminal-history score of zero. *See* Minn. Sent. Guidelines IV (1983). This appeal follows.

D E C I S I O N

Appellant argues that the *Spreigl* evidence was improperly admitted, and he challenges his sentence on the ground that his criminal-history score was improperly calculated.

Spreigl Evidence

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 ensure that five steps are followed before admitting *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 argues that admission of the *Spreigl* evidence was error because its probative value was outweighed by its prejudicial effect. He argues that the probative value of the evidence was low because the state's evidence was strong and the state therefore did not need the *Spreigl* evidence to prosecute its case. To evaluate probative value and potential for unfair prejudice, "we 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." *Fardan*, 773 N.W.2d at 319.

The district court ruled that the *Spreigl* evidence was admissible for the purpose of showing common scheme or plan. The common-scheme-or-plan purpose allows evidence of other acts which bear a "marked similarity in modus operandi" to the charged offense such that the other acts tend to "corroborate evidence" of the charged offense. *Ness*, 707 N.W.2d at 688 (quotation omitted). Before trial, appellant conceded that the *Spreigl* evidence was sufficiently similar in time, place, and modus operandi, and

appellant does not attempt to withdraw the concession on appeal. Even without appellant's concession, the district court correctly concluded that the evidence was sufficiently similar in time, place, or modus operandi. Because of the marked similarity in modus operandi between the *Spreigl* incidents and the charged offenses, the *Spreigl* incidents had a strong tendency to corroborate the testimony of the victims.

The risk of unfair prejudice is essentially inherent in *Spreigl* evidence offered in sexual-abuse cases, and the supreme court has said that the use of *Spreigl* evidence to show a common scheme or plan poses a "particular risk" for unfair prejudice. *See Ness*, 707 N.W.2d at 687-88. Here, the *Spreigl* evidence was unquestionably damaging to appellant. But unfair prejudice is not established where evidence is simply highly damaging. *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). Evidence is unfairly prejudicial when it "persuades by illegitimate means, giving one party an unfair advantage." *Id.* Here, the jury was given multiple cautionary instructions about the proper use of *Spreigl* evidence, and "[w]e presume that jurors follow a judge's instructions." *State v. Miller*, 573 N.W.2d 661, 675-76 (Minn. 1998). Because of the strong legitimate probative value of the *Spreigl* evidence admitted in this case, its admission was not *unfairly* prejudicial to appellant.

Appellant focuses on whether the state needed the *Spreigl* evidence, relying heavily on *Ness*. But, in *Ness*, the supreme court concluded that the *Spreigl* incident did not have a marked similarity in modus operandi to the charged offense and therefore was not relevant, and the court then concluded that the prejudicial effect of the *Spreigl* evidence outweighed its probative value. *Id.* at 689. Here, because the *Spreigl* incidents

are markedly similar to the charged offenses in modus operandi, they were relevant. In *Ness*, the court concluded that the state's case was not weak on the issue for which the evidence was offered—to show that the defendant touched the victim's intimate parts or to bolster the victim's credibility. *Id.* at 690. But the court stated it was doing away with the former "independent necessity" requirement under which the state was required to show a need for *Spreigl* evidence and that need should be considered in balancing probative value and prejudicial effect. *Id.* at 689.

A weak case is not a requirement for admission of *Spreigl* evidence. *See State v. Bell*, 719 N.W.2d. 635, 639 (Minn. 2006) (stating that the supreme court, in *Ness*, was "attempting to move away from the undue emphasis [it] had previously placed on the strength or weakness of the state's case"). And "need" for these purposes "is not necessarily the absence of sufficient other evidence to convict." *Ness*, 707 N.W.2d at 690. (quotation omitted). Where a case is otherwise sufficient to go a jury, *Spreigl* evidence may still be needed "because, as a practical matter, it is not clear that the jury will believe the state's other evidence bearing on the disputed issue." *Id.* (quotation omitted). Here, because of the time lapse between the abuse and the victims' reports of the abuse, the victims' historical denials to their parents that appellant had abused them, and the testimony of defense witness, H.L., the state's need for the evidence was strong. The victims' credibility was crucial to the state's case, and the *Spreigl* evidence was offered to corroborate the victims' testimony about appellant's abuse and modus operandi. Considering the high probative value of the *Spreigl* evidence, the danger of unfair prejudice, and the state's need for the evidence, we conclude that the district court did not

abuse its discretion in admitting the *Spreigl* evidence. We therefore affirm appellant's conviction.

Sentence

On review of a sentence, this court may vacate or set aside a sentence, direct entry of an appropriate sentence, or order further proceedings. Minn. Stat. § 244.11, subd. 2(b) (2008). Appellant argues that under the 1983 sentencing guidelines, his criminal-history score on count one should not have included his two 1991 felony drug convictions. The state argued to the district court that even though the 1983 guidelines were used to determine the presumptive sentence, the present rules that govern decay of prior offenses should be used to determine appellant's criminal-history score. The district court appears to have adopted the state's reasoning. On appeal, the state argues that the district court's calculation of appellant's criminal-history score on count one was correct under the 1983 guidelines.

Interpretation of the sentencing guidelines is a question of law reviewed de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). But we will not reverse a district court's determination of a defendant's criminal-history score absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Under the 1983 Sentencing Guidelines, an offender is assigned one criminal-history point for "every felony conviction for which a felony sentence was stayed or imposed before the current sentencing," subject to certain conditions. Minn. Sent.

Guidelines II.B.1 (1983). The condition relevant to this case is found in sub-paragraph (e) of section II.B.1, and reads:

> Prior felony sentences will not be used in computing the criminal history score if a period of ten years has elapsed since the date of discharge from or expiration of the sentence to the date of offense of any subsequent misdemeanor, gross misdemeanor or felony, provided that during the period the individual had not received a felony, gross misdemeanor, or misdemeanor sentence, whether stayed or imposed.

Minn. Sent. Guidelines II.B.1.(e).

Appellant argues that sub-paragraph (e) means that if ten sentence- or offense-free years have elapsed since the expiration of appellant's 1991 felony drug sentences, the sentences decayed and should be excluded from his criminal-history score. The state argues that sub-paragraph (e) means that the sentences would decay only if ten sentence-free years have elapsed since the expiration of the 1991 sentences to the date of the offense presently being sentenced. The state reasons that because the present offenses being sentenced were committed before the commencement of the 1991 sentences, the 1991 sentences could not have decayed.

The state's interpretation of sub-paragraph (e) does not comport with the express language of sub-paragraph (e). Sub-paragraph (e) states that a prior felony sentence will not be used to compute the criminal-history score if ten years have elapsed since the expiration of the sentence to the date of offense and "*any subsequent* misdemeanor, gross, misdemeanor or felony." *Id.* (emphasis added). This language does not state or suggest that the present offense being sentenced is the pertinent offense for comparison;

it rather states that ten years must elapse since the expiration of the sentence and *any subsequent* offense.

Appellant's interpretation of sub-paragraph (e) is better supported by the comments to the guidelines and caselaw. The comments to the 1983 guidelines state that "[a] person who was sentenced for three felonies within a five-year period is more culpable than one sentenced for three felonies within a twenty-year period," and that "[t]he Commission decided that after a significant period of offense-free living, the presence of old felony sentences should not be considered in computing criminal history scores." *Id.* These comments reflect a focus on whether there was a period of offense-free living and do not call for comparison of the date of the present offense being sentenced and the date a prior sentence ended. And caselaw reflects concern with an offense-free period. In *State v. Henning*, we addressed decay language identical to that at issue here and rejected an offender's argument that prior sentences had decayed by stating: "Ten offense-free years did not pass." 378 N.W.2d 646, 648 (Minn. App. 1985). We also stated that "the date of a subsequent offense, whether misdemeanor (excluding traffic misdemeanors) or felony, starts a new ten-year period which must be offense-free before a previous conviction will decay." *Id.*

We are persuaded that sub-paragraph (e) provides that prior sentences decay under the 1983 guidelines when followed by ten sentence- or offense-free years. In this case, the record contains no evidence of any misdemeanor, gross misdemeanor, or felony sentence or offense between 1996 and the present charges, which were filed in 2008. We conclude that appellant's 1991 felony sentences decayed under sub-paragraph (e),

because they were followed by ten sentence- and offense-free years. The district court therefore abused its discretion in calculating appellant's criminal-history score on count one by assigning criminal-history points to the 1991 felony drug sentences. We remand for resentencing.

Affirmed in part, reversed in part, and remanded.