STATE OF MINNESOTA
IN COURT OF APPEALS
A09-158

State of Minnesota,
Respondent,

vs.

Shawn Timothy Cassidy,
Appellant.

Filed April 27, 2010
Affirmed
Kalitowski, Judge
Concurring in part, dissenting in part, Minge, Judge

Hennepin County District Court
File No. 27-CR-08-6355

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Michael K. Walz, Assistant County Attorneys, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Minge, Judge; and Bjorkman, Judge.

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

KALITOWSKI, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant Shawn Timothy Cassidy argues that the district court erred in admitting a video depicting

child pornography that the police found on appellant's computer because (1) the search warrant the police relied on to seize the computer was not supported by probable cause; and (2) the video was improper unfairly prejudicial *Spreigl* evidence. Appellant also contends the district court committed reversible error when it reviewed, in camera, nonpublic documents that appellant sought to discover involving the victim, and determined that there was not good cause to disclose the records to the defense. Finally, in his pro se brief, appellant contends he is entitled to a new trial because of discovery violations by the state. We affirm.

D E C I S I O N

I.

Appellant was convicted of first-degree criminal sexual conduct for sexually abusing I.K., the seven-year-old daughter of appellant's live-in girlfriend. During trial, the district court determined that a video depicting child pornography, discovered on appellant's home computer, could be admitted into evidence by the state.

Appellant argues that the district court improperly admitted the child-pornography evidence because the search warrant on which the police relied to seize appellant's computer was not supported by probable cause. Search warrants may be issued only for probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10; Minn. Stat. § 626.08 (2008). If a warrant is not supported by probable cause, then evidence obtained in the search is inadmissible. *U.S. v. Bach*, 400 F.3d 622, 627 (8th Cir. 2005) (citing *Mapp v. Ohio*, 367 U.S. 643, 655-57, 81 S. Ct. 1684 (1961)); *see also State v. Zanter*, 535 N.W.2d 624, 632-34 (Minn. 1995).

We review a determination of probable cause to issue a search warrant to ensure that there was a substantial basis to conclude that probable cause existed. *State v. Harris*, 589 N.W.2d 782, 787-88 (Minn. 1999). A substantial basis means a "fair probability," given the totality of the circumstances, "that contraband or evidence of a crime will be found in a particular place." *Zanter*, 535 N.W.2d at 633. In determining whether probable cause exists, we review the information in the affidavit, rather than the information actually possessed by the police. *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998); *State v. Secord*, 614 N.W.2d 227, 229 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). We may not undermine the issuing judge's finding of probable cause by engaging in a hypertechnical examination of the affidavit supporting the warrant application. *State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998); *State v. Kahn*, 555 N.W.2d 15, 18 (Minn. App. 1996). There must be "a direct connection, or nexus, between the alleged crime and the particular place to be searched." *Souto*, 578 N.W.2d at 747. "Police officers may rely on training and experience to draw inferences in affidavits, but mere suspicion does not equal probable cause." *Kahn*, 555 N.W.2d at 18. Close cases should be "largely determined by the preference to be accorded warrants." *Secord*, 614 N.W.2d at 229.

Here, the affidavit's descriptions of both the victim's statements and the officer's experience support the issuing judge's finding of probable cause. Because the affidavit recounted the victim's assertion that the abuse occurred many times throughout the home, it provided a link between the crime and the home to be searched. And significantly, the affidavit described the victim's statement that an incident of abuse occurred in the

basement in front of appellant's computer. The affidavit further noted that the victim's mother confirmed that appellant's computer was in the basement. Finally, the affidavit included the affiant-officer's statements that based on his experience, some computers can take photos or videos and that he was aware of cases where suspects took pictures or videos of victims using a computer. Viewing these facts in their totality, we conclude that the affidavit presented to the issuing judge established probable cause to seize appellant's computer.

II.

Appellant argues that even if the computer was properly seized, the district court abused its discretion in admitting into evidence a short video clip involving child pornography that was found on the computer. "We review a district court's evidentiary rulings for abuse of discretion." *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009). To overturn a conviction based on admission of evidence, a defendant must show that the admission was erroneous and unfairly prejudicial. *Id*.

Evidence of a defendant's past crimes or bad acts may not be admitted to prove the defendant's character for committing crimes. *Id.*; Minn. R. Evid. 404(b). "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." *State v. Fardan*, 773 N.W.2d 303, 315 (Minn. 2009) (quotation omitted). But this evidence, known as *Spreigl* evidence, may be admitted to show motive, intent, absence of

mistake, identity, or a common scheme or plan. Minn. R. Evid. 404(b); *Burrell*, 772 N.W.2d at 465; *see State v. Spreigl*, 272 Minn. 488, 491, 139 N.W.2d 167, 169 (1965).

For *Spreigl* evidence to be admissible, five conditions must be met: (1) the state must give notice of its intent to use 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 the 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 the potential for unfair prejudice to the defendant. *Burrell*, 772 N.W.2d at 465. If it is a close call whether the *Spreigl* evidence should be admitted, then it should be excluded. *Id*.

The Minnesota Supreme Court has provided the following guidance to district courts in determining whether evidence of other bad acts is admissible:

> The district court should not simply take the prosecution's stated purposes for the admission of other-acts evidence at face value. Instead, the court should . . . look to the real purpose for which the evidence is offered and ensure that the purpose is one of the permitted exceptions to the rule's general exclusion of other-acts evidence. Only *after* such an examination is completed should the court balance the probative value of the evidence against its potential to be unfairly prejudicial.

State v. Ness, 707 N.W.2d 676, 686 (Minn. 2006) (quotation and citation omitted). In *Ness*, a teacher was charged with second-degree criminal sexual conduct for touching the intimate parts of E.M., an 11-year-old boy, in an art class. *Id.* at 680-83. Ness denied touching E.M.'s intimate parts. The prosecution sought to admit evidence of a prior groping incident in which Ness claimed that he was trying to discipline a student, arguing

that this other-acts evidence was admissible to show motive, intent, and lack of mistake or accident. *Id.* at 686-87. The district court admitted the evidence. *Id.* at 683. But in *Ness*, the supreme court rejected the state's argument that the evidence was admissible to show that Ness's motive for touching E.M. was sexual gratification. *Id.* at 687.

The supreme court stated that "motive concerns external facts that create a desire in someone to do something, whereas intent is a state of mind in which an act is done consciously, with purpose." *Id.* Ness's desire to touch E.M. for sexual gratification was based on internal facts, namely Ness's sex drive and sexual appetites. Thus, the other-acts evidence did not establish motive. As an example of other-acts evidence that established motive, the *Ness* court cited *State v. Ferguson*, 581 N.W.2d 824, 834 (Minn. 1998), a case that allowed *Spreigl* evidence to show that gang affiliation was motive for murder. *Id.* A person's membership in a gang is an external fact, so evidence that shows that a crime was committed at least in part because the perpetrator was a gang member establishes motive.

In addition, the supreme court concluded that the other-acts evidence could not legitimately be admitted to show intent because defendant Ness denied touching E.M.'s intimate parts. *Id.* at 687-88. Specifically, the supreme court reasoned that "the real issue was not Ness's intent, but whether or not Ness touched E.M.'s intimate parts . . . [The] sexual or aggressive intent [required by the charge] can readily be inferred from the contacts themselves[.]" *Id.* The *Ness* court also rejected the lack-of-mistake-or-accident purpose for admission of the evidence for a similar reason: because the real issue was not

whether Ness touched E.M.'s intimate parts accidentally, but whether he touched E.M.'s intimate parts at all. *Id.* at 687.

Here, as in *Ness*, the prosecution argued that the evidence of child pornography was admissible to show motive, intent, and lack of mistake or accident. The state asserts that appellant's possession of pornography shows that his motive for abusing I.K. was a desire for sexual gratification. But as in *Ness*, this asserted "motive" is not actually motive, but intent. Thus, the evidence is not admissible under Minn. R. Evid. 404(b) to show motive. *See id.*

Moreover, appellant, like Ness, denied that the abuse occurred. Thus, following the analysis of *Ness*, the real issue is not whether appellant had a sexual intent in touching I.K. or whether he accidentally abused I.K., but whether he in fact improperly touched I.K. Therefore, we conclude that the evidence is not admissible under rule 404(b) to show intent or lack of mistake.

The record here indicates that the district court did not make the required *Ness* analysis of the state's purported reasons for introducing the *Spreigl* evidence. The only record of the basis for the district court's ruling allowing introduction of the evidence is the court's statement:

> I will allow the State to present evidence that child pornography was found on [appellant's] computer, and my ruling was both under the Spreigel [sic] and the fact that there was particular relevance, given [I.K.'s] statements that at least one of the alleged acts had occurred while she was brought to – and had sat in the chair adjacent to the computer of [appellant].

Based on this statement, the state argues that the district court admitted the evidence both as *Spreigl* evidence and as substantive "context" evidence because it was "probative of appellant's motive, intent and state of mind." But the evidence here is not "linked together in point of time or circumstances," with the charged crime, "so that one cannot be fully shown without proving the other[.]" *See State v. Wofford*, 262 Minn. 112, 118, 114 N.W.2d 267, 271 (1962). There was no evidence that appellant showed I.K. the child pornography on the computer. Nor does the evidence "show a causal relation or connection between the two acts so that they may reasonably be said to be part of one transaction." *See id.* at 118, 114 N.W.2d at 271-72. Thus, the video was not properly admitted as substantive evidence.

Based on the supreme court's holding in *Ness*, we are compelled to conclude that the district court erred by failing to ensure that the state was offering the child-pornography evidence for a legitimate reason. And based on the analysis in *Ness*, the evidence cannot be offered to show motive, intent, or lack of mistake or accident. Therefore, on this record, we conclude that it was an abuse of discretion to admit the *Spreigl* evidence.

Harmless Error

When the district court has erred in admitting *Spreigl* evidence, we must examine the entire trial record to determine whether "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995). Factors to consider in performing this analysis include whether the evidence of appellant's guilt was overwhelming, whether the prosecutor

relied on the erroneous evidence in closing arguments, whether the defense's evidence was weak or of doubtful credibility, and whether the district court gave an appropriate cautionary instruction. *Id.* at 198-99.

Based on our painstaking review of the record, we conclude that the erroneous admission of the *Spreigl* evidence was harmless. Most importantly, the evidence of appellant's guilt was overwhelming. I.K. provided detailed, compelling testimony of numerous incidents of sexual abuse that was consistent with her prior statements recounting the abuse. And although Minn. Stat. § 609.347, subd. 1, provides that I.K.'s testimony does not need to be corroborated, her testimony was corroborated. Significant corroborating evidence can include testimony by others about the emotional state of the victim when the abuse was reported. *State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984). When I.K. recounted the abuse to her mother and others, the record indicates that she became visibly upset.

In addition, Sara Brusletten, a forensic interviewer with a masters in social work who trains others on interviewing children about sexual abuse, interviewed I.K. at length about the sexual abuse. For several reasons, Brusletten concluded that I.K. had likely been abused:

(1) I.K.'s accounts of the abuse were credible because she provided sensory details, described how it felt, how the "salty stuff" at the end of appellant's penis tasted, and how she heard appellant say "ah" after the salty stuff. In Bursletten's professional experience, sensory details such as these indicate

real experience and demonstrate advanced sexual knowledge beyond that of a typical seven-year-old.

(2) I.K. spontaneously drew and wrote down things about the abuse.

(3) I.K. consistently described the abuse through words, drawings, and dolls.

Moreover, this overwhelming evidence was not credibly opposed. The district court addressed appellant's request at sentencing that he be given a downward dispositional departure. The court noted on the record that although it was not the fact-finder, it did not find appellant's testimony denying the abuse to be credible. We agree. Also, at the sentencing hearing, the district court indicated that, after the trial, the jurors had volunteered that they were "put off" by appellant's testimony.

We conclude that, in this trial that lasted more than four days and involved 17 witnesses, the prejudicial impact of the *Spreigl* evidence was slight. The evidence was not presented in such a way as to inflame the jury's prejudices. Although the state retrieved hundreds of files containing child erotica from appellant's computer, the prosecution introduced only a short video clip from one of those files. In addition, the focus of the testimony regarding the video was a detailed technical discussion of computers by the police expert who, when questioned about the video, simply stated that it showed two girls naked on a bed engaging in various acts. Moreover, the acts depicted in the video were not at all similar to the alleged crime appellant was charged with. The video showed two post-pubescent girls engaging in sexual acts; it did not show a seven-year-old engaging in sexual acts with an adult male. Although the prosecution referred to the video during closing argument, the heart of its case and closing argument was I.K.'s

credibility and the complete lack of motive for her to fabricate the abuse. Finally, the district court appropriately instructed the jury to limit the use of this evidence and not to convict based on it.

Based on the entirety of the record, we conclude that the admission of this evidence was harmless error.

III.

Appellant argues that the district court abused its discretion by denying appellant access to certain nonpublic records relating to I.K., following the court's in camera review. We disagree.

A district court may order that relevant nonpublic information be disclosed to the defendant if the defendant makes a showing that the information sought would be material or favorable to his defense. Minn. R. Crim. P. 9.01, subd. 2(3). Where confidential information is involved, the preferred procedure is for the district court to review the evidence in camera. *State v. Burrell*, 697 N.W.2d 579, 604-05 (Minn. 2005). This allows the district court to balance the defendant's interest in obtaining all relevant evidence with the public's interest in keeping documents confidential. *Id*. at 604. Appellate courts will not reverse a district court's decision to grant or deny evidentiary rulings absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

The district court conducted an in camera review of the mother's parenting journal and I.K.'s school, counseling, and child-protection records. After this review, the district court ruled that there was not good cause to disclose I.K.'s counseling or child-protection

records. Although the district court made no specific ruling on the record as to the discoverability of I.K.'s school records and her mother's parenting journal, it apparently determined that there was not good cause to disclose these records because it did not disclose them to appellant.

We have reviewed the documents examined by the district court. We conclude that the court did not abuse its discretion by not disclosing these records to appellant on the grounds that the records were not relevant, were nonsubstantive, or duplicated other information provided to appellant.

IV.

In his pro se brief, appellant argues that he is entitled to a new trial because of alleged discovery violations by the state. Specifically, appellant contends that following a late disclosure by the state, the district court allowed a state's witness to testify as to why I.K. was not given a Sexual Assault Resource Services (SARS) exam.

When a district court finds there has been a discovery violation, it may "enter such order as it deems just in the circumstances." Minn. R. Crim. P. 9.03, subd. 8. We review a district court's decision regarding discovery violations for an abuse of discretion. *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998).

Here, the district court reviewed the late disclosure and allowed the witness to testify because appellant was not prejudiced by the testimony. The court explained its ruling by stating that the court did not "see any prejudice to the defense" in having the state call a witness "to explain that . . . a SARS exam . . . wasn't done and that that was the doctor's decision." The court further stated that the witness "isn't being asked to

testify on any opinion that goes directly to the issue of whether (I.K.) was a victim of a sexual assault or anything relating to [appellant's] involvement[.]"

On this record we cannot say the district court abused its discretion in allowing the witness to testify.

Affirmed.

MINGE, Judge (concurring in part, dissenting in part)

I concur in parts I, III, and IV (probable cause, access to nonpublic records, SARS witness) and in that portion of part II concluding that the admission of child pornography as *Spreigl* evidence was error. However, I respectfully dissent from the majority's decision that the erroneous admission of child-pornography evidence was harmless.

When a district court erroneously admits *Spreigl* evidence, a new trial is not warranted unless "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995).[1] Factors that courts consider include whether the evidence of appellant's guilt was overwhelming and whether the prosecutor relied on the erroneous evidence in closing arguments. *Id*. at 198-99.

The child-pornography evidence in this case was especially damning because (1) child pornography is (justifiably) viewed with great distaste in our society; and (2) the evidence was presented to the jury in a particularly powerful way: the state played a video for the jury in its case in chief that showed two minor girls engaging in sexual acts with each other and the state repeatedly referred to appellant's possession of child pornography during its closing arguments. Commentators have recognized that evidence of crimes "of a sexual nature and crimes victimizing children . . . are likely to strike raw

[1] The supreme court has occasionally used the harmless-beyond-a-reasonable-doubt standard for erroneously admitted *Spreigl* evidence. *State v. Shannon*, 583 N.W.2d 579, 585-86 (Minn. 1998). Because I find that the error was not harmless under the more demanding test in *Bolte*, it follows that the error would also not be harmless under the easier test in *Shannon*.

nerves and bring high risks of prejudice in any kind of prosecution." 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:30, at 776 (3d ed. 2007).

Moreover, evidence of appellant's guilt was challenged. Although I.K.'s testimony contains the information necessary to convict appellant of first-degree criminal sexual conduct, there was no physical evidence of abuse. The case turned on credibility. Evidence of appellant's guilt, while strong, was not overwhelming. There is a reasonable possibility that the dramatic, but improper, use of child pornography as *Spreigl* evidence significantly influenced the jury.

I would reverse appellant's conviction and remand for a new trial.