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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-628**

State of Minnesota,  
Respondent,

vs.

Bryan Anthony McIntyre,  
Appellant.

**Filed April 6, 2010  
Reversed and remanded  
Peterson, Judge**

Olmsted County District Court  
File No. 55-CR-07-9907

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Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Shumaker, Judge.

**UNPUBLISHED OPINION**

**PETERSON, Judge**

In this appeal from convictions of felon in possession of a firearm and illegal transportation of a firearm, appellant argues that the district court erred by admitting

evidence that he was arrested while in possession of a firearm one week before his charged offense. We reverse and remand.

### **FACTS**

On the evening of March 30, 2007, two Rochester police officers stopped a car with four occupants: R.D. was the driver, E.D. was in the front passenger seat, B.D. was in the passenger-side backseat, and appellant Bryan Anthony McIntyre was in the driver-side backseat. As one officer approached the driver, he noticed appellant shaking while trying to light a cigarette. The other officer shined his flashlight onto the floor of the backseat and saw a brown gunstock and a banana-style magazine protruding from under a towel. A Ruger .22-caliber rifle wrapped in a green towel with black electrical tape was resting on the elevated hump in the middle of the floorboard. The rifle was positioned against the right side of appellant's right leg, which was leaning toward the middle of the car. The stock and trigger of the rifle were on appellant's side of the hump; the barrel was on the other side, where B.D. was seated. The stock of the rifle was between appellant's feet and was touching appellant; however, the rifle was within the reach of both appellant and B.D. No fingerprints were found on the rifle.

The officers seized the rifle and removed the four people from the car and searched them. When the police searched appellant, they found a pair of latex gloves and court papers indicating that appellant had been arrested the previous week. All four people denied owning the rifle, and appellant denied knowing that it was in the car. Appellant was charged with felon in possession of a firearm in violation of Minn. Stat.

§ 609.165, subd. 1b (2006), and illegal transportation of a firearm in violation of Minn. Stat. § 97B.045, subd. 1 (2006).

Appellant waived his right to a jury trial, and the case was tried to the court. The parties stipulated to appellant's prior conviction rendering him ineligible to possess a firearm. At trial, R.D., E.D., and B.D. each testified for the state. R.D., who had previously been romantically involved with appellant, testified that she, E.D., and appellant all entered the car at the same time, that there was not a gun in the car before they entered, and that none of them had a gun when they entered the car. When asked whether B.D., who entered the car later, had a gun when he entered the car, R.D. stated that she was not looking in B.D.'s direction when he entered and did not see a gun.

Over appellant's objection, R.D. testified that on March 23, 2007, she saw appellant take a rifle out of the trunk of her car. She testified that she then drove away, and when she returned a short time later, one of her cars was gone. She called the police to report the car stolen, and the police ultimately stopped the car with appellant in it. Also over appellant's objection, the state entered into evidence the criminal complaint that was prepared following the stop. According to the complaint, the police found a loaded and uncased .22-caliber rifle under clothing in the backseat of the car.

E.D., who is R.D.'s brother, testified that he neither possessed nor saw a gun in the car at any time before the police discovered the rifle. E.D. stated that he was asleep when B.D. entered the car and could not confirm nor deny that B.D. placed the rifle in the car.

B.D. testified that he was in the car to buy drugs. He denied owning the rifle and testified that he did not know that there was a gun in the car until after the police stopped

the car. B.D. also testified that when the police were following the car, appellant tried to kick something toward him, but he did not know at that time that what appellant was kicking was a rifle.

The district court found appellant guilty as charged, and sentenced him to a 60-month prison term. This appeal followed.

## **D E C I S I O N**

We review the district court's decision to admit evidence of prior bad acts for abuse of discretion. *State v. Clark*, 738 N.W.2d 316, 345 (Minn. 2007). A defendant challenging the admission of such evidence "bears the burden of showing the error and any resulting prejudice." *Id.* Evidence of a prior bad act "is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). "If it is unclear whether other crimes evidence is admissible, the benefit of the doubt should be given to the defendant and the evidence should be excluded." *State v. Courtney*, 696 N.W.2d 73, 83 (Minn. 2005). To be admissible, evidence of a prior bad act, known in Minnesota as *Spreigl* evidence, "must be relevant and material" and the "probative value of the evidence must not be outweighed by the potential prejudice." *State v. Clark*, 755 N.W.2d 241, 260 & n.6 (Minn. 2008).

In determining whether *Spreigl* evidence is relevant and material, the district court should consider the issues in the case, the reasons and need for the evidence, and whether

there is a sufficiently close relationship between the prior offense and the charged offense in terms of time, place, or modus operandi. *Courtney*, 696 N.W.2d at 83. “[T]he district court must identify the precise disputed fact to which the *Spreigl* evidence would be relevant.” *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006) (quotations omitted). Only after it determines that the evidence is relevant for an allowable purpose should a court apply the balancing test. *Id.* Appellant argues that because the *Spreigl* evidence is relevant only to show a propensity to possess a firearm, it is inadmissible.

In response to appellant’s objection to the *Spreigl* evidence, the prosecutor noted that the “defense has raised . . . the defense of no possession” and stated:

This . . . evidence . . . goes to the very question of: Could this have been a mistake? Does the defendant know what he’s doing – knowledge or mistake of fact or absence of mistake? What the evidence will show is that . . . [appellant] was in possession of crack cocaine, and he was in possession of a .22 caliber rifle. . . . [The] next witness will testify that this was actually a drug transaction for cocaine, that he was buying cocaine from these individuals. So this dovetails exactly with the type of conduct that [appellant] was stopped for the week before, except it wasn’t a sale, it was a possession the week before. It fits his modus operandi exactly.

The district court allowed the *Spreigl* evidence, stating:

I do find, based on the information provided along with the notice, and based upon the fact that we do have a witness here, I believe there is, in fact, clear and convincing evidence of the incident that occurred a week prior. The information is relevant and material to the state’s case, and the probative value of the evidence outweighs the potential for unfair prejudice, and I am going to allow it.

The court did not explain how the information was relevant and material to the state’s case.

The state's first proffered reason why the *Spreigl* evidence is relevant was to prove appellant's knowledge. To obtain a conviction for possession of a firearm by an ineligible person, the state must show either actual or constructive possession of a firearm and that the person possessing the firearm was ineligible. *State v. Loyd*, 321 N.W.2d 901, 902 (Minn. 1982). Appellant was also charged with violating Minn. Stat. § 97B.045, subd. 1(1)-(2), which prohibit transportation of a firearm in a motor vehicle unless the firearm is "unloaded and in a gun case expressly made to contain a firearm" or "unloaded and in the closed trunk of a motor vehicle."

When police stopped the car, appellant denied knowing that the rifle was in the car. The state argues that the *Spreigl* evidence "showed that appellant was knowledgeable about .22 caliber rifles." But the state does not even attempt to explain how showing that appellant is knowledgeable about .22-caliber rifles also shows that appellant knew that the rifle was in the car. Appellant did not claim that he did not know that the rifle was a .22-caliber rifle; he claimed that he did not know that the rifle was in the car. Without some explanation why the *Spreigl* evidence would tend to show that appellant knew that the rifle was in the car, the evidence was not admissible to prove knowledge.

The state also argued that the *Spreigl* evidence was relevant to prove absence of mistake. But appellant did not raise mistake as a defense; he claimed that he did not possess the firearm. The state contends that defense counsel's assertions during closing argument that B.D. seemed to be in control of the rifle were, in essence, an argument that the state had made a mistake by prosecuting appellant and had charged the wrong man.

Based on this characterization of defense counsel's argument, the state argues that the *Spreigl* evidence is probative because it shows that the state did not prosecute the wrong person. But it is apparent that defense counsel was not arguing that the state had made a mistake in its charging decision; counsel was arguing that the evidence did not prove that appellant, rather than B.D., was in possession of the rifle. Also, the state cites no authority that suggests that *Spreigl* evidence is admissible to show the absence of mistake by the state, rather than the defendant. Mistake was not a disputed issue, and the evidence was not admissible to prove absence of mistake.

Finally, the state argued that the *Spreigl* evidence is relevant to show a common scheme or plan or that the charged offense matches appellant's modus operandi in the *Spreigl* offense. When determining whether prior acts are admissible to show a common scheme or plan, the prior misconduct must "have a marked similarity in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688 (emphasis omitted) (quotation omitted). "[I]f the prior crime is simply of the same generic type as the charged offense, it ordinarily should be excluded." *State v. Wright*, 719 N.W.2d 910, 917-18 (Minn. 2006) (quotation omitted). The state contends that the similarities between the two incidents include that the firearm in both incidents was a loaded .22-caliber rifle, uncased and covered by fabric in the backseat of R.D.'s car.

In *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007), the supreme court concluded that the district court abused its discretion in admitting *Spreigl* evidence under the common-scheme-or-plan exception when the only similarities between the prior and current offenses were that "(1) both acts involved the use of a gun to threaten the victims;

(2) both acts occurred in the victims' bedrooms; and (3) both acts involved vaginal penetration or attempted vaginal penetration.” The court explained that in previous cases affirming the admission of *Spreigl* evidence, the fact-finder had been “presented with details tending to establish a more distinctive modus operandi.” *Id.* at 347.

The similarities identified by the state are insufficient to establish a distinctive modus operandi. Both offenses involved a loaded .22-caliber rifle. But a firearm is an element of both offenses, and there would have been no offenses without the firearms, and there is nothing distinctive about the firearms involved in the two offenses. It was not the same .22-caliber rifle in both incidents, and .22-caliber rifles are commonly available. Also, there is nothing distinctive about the rifles being loaded and uncased. With respect to the fabric covering in both incidents, the facts are not similar; on March 23, the rifle was found beneath a pile of clothing, while on March 30, the rifle was wrapped in a towel with electrical tape. Finally, with respect to the fact that the gun was found in the backseat of R.D.’s car, the incidents are not particularly similar; on March 23, appellant was driving one of R.D.’s cars alone, with the firearm in the backseat, and on March 30, appellant was a backseat passenger in R.D.’s car, and there were three additional people in the car, including R.D., who was driving. Although the two incidents share some similarities, the similarities are not sufficient to establish a distinctive modus operandi, and the *Spreigl* evidence was not admissible to show a common scheme or plan.

We conclude that because the state failed to establish a purpose for which the *Spreigl* evidence was admissible and the district court did not identify a precise disputed



fact to which the *Spreigl* evidence was relevant, the district court abused its discretion in admitting the *Spreigl* evidence. Because the state has not established an allowable purpose for which the evidence was admissible, it is not necessary for us to consider whether the probative value of the evidence was outweighed by its potential prejudice. But we must still consider whether the error of admitting the evidence was prejudicial.

*Prejudice of wrongfully admitted evidence*

“[I]f there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted, then the error in admitting the evidence was prejudicial error.” *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995) (quotation omitted). However, the admission of *Spreigl* evidence is less prejudicial if the trial is to the court rather than a jury. *See Irwin v. State*, 400 N.W.2d 783, 786 (Minn. App. 1987) (noting postconviction court’s finding that probative value of *Spreigl* evidence outweighed prejudicial effect particularly because case was tried to court), *review denied* (Minn. Mar. 25, 1987).

The state’s case was weakened by the fact that appellant did not have exclusive control over the car where the rifle was found. *See Bolte*, 538 N.W.2d at 198 (stating that strength of state’s case is relevant factor in determining prejudicial effect of improperly admitted *Spreigl* evidence). Because both B.D. and appellant had access to the place where the rifle was found, the state was required to prove that there was a strong probability, inferable from the evidence, that appellant was consciously exercising dominion and control over the rifle. *State v. Porter*, 674 N.W.2d 424, 429 (Minn. App. 2004). The evidence did not establish a specific reason to conclude that appellant was

consciously exercising dominion and control over the rifle, rather than simply riding in the car while B.D., or one of the other occupants, was in possession of the rifle. The rifle was resting on the middle hump in the floorboard within the reach of both appellant and B.D., and only B.D.'s testimony suggested that the rifle was in appellant's possession. Both appellant and B.D. testified that they did not know that there was a gun in the car until after the police stopped the car. Also, the district court's findings suggest that the court considered the March 23 incident to be significant. The findings of fact state: "Just one week prior to this incident, on March 23, 2007, [appellant] had a similar gun and placed it in [R.D.'s] car without her knowledge or permission." Under these circumstances, we conclude that there is a reasonable possibility that the verdict may have been more favorable to appellant if the *Spreigl* evidence had not been admitted.

**Reversed and remanded.**