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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-695**

State of Minnesota,
Respondent,

vs.

Michael Wayne Smith,
Appellant.

**Filed May 4, 2010
Affirmed
Bjorkman, Judge
Dissenting, Minge, Judge**

Hennepin County District Court
File No. 27-CR-07-122059

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

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

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, MN (for appellant)

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

UNPUBLISHED OPINION

BJORKMAN, Judge

On appeal from his conviction of aiding and abetting possession of theft tools, appellant argues that the district court erred in admitting evidence of his prior conviction

on a similar charge and that the evidence is insufficient to support his conviction. Because the district court did not abuse its discretion in admitting the *Spreigl* evidence, and because sufficient evidence supports the verdict, we affirm.

FACTS

On the night of November 5, 2007, a witness observed three men attempting to remove a manhole cover on 18th Avenue near the intersection with Jackson Street in Minneapolis. The witness, watching through the window of her home, could not see how the men removed the cover, but she noted that when the manhole cover eventually came off, it did so quickly and without much apparent effort. One man disappeared down into the manhole, and the other two men replaced the cover and returned to a van parked on Jackson Street. The witness called the police.

When the police arrived about 15 minutes later, they found appellant Michael Wayne Smith and his son sitting in the van. Both men ducked when the police turned a spotlight on them, but they complied when officers ordered them out of the van. The police used a crowbar to remove the manhole cover because it weighed close to a hundred pounds and was flush to the ground. At the bottom of the manhole, the police found the third man, Paul Orcutt, and observed a pile of tools: hacksaws, blades, screwdrivers, flashlights, a ladder, water bottles, a come-along tool, and a hat with a light. The officers also saw exposed copper wire. None of the tools belonged to Xcel Energy, the entity responsible for maintaining the manhole.

Smith was charged with aiding and abetting possession of theft tools, in violation of Minn. Stat. §§ 609.05, subd. 1, .59 (2006), and with aiding and abetting damage to or

theft of energy transmission or telecommunications equipment, in violation of Minn. Stat. §§ 609.05, subd. 1 (2006), .593, subd. 1(1) (Supp. 2007). Orcutt faced similar charges and pleaded guilty to theft of energy transmission or telecommunications equipment.

Prior to trial, the state asked the district court to admit evidence of Smith's 2005 conviction for possession of theft tools. The district court applied the *Spreigl* analysis, and concluded that the conviction showed a common plan or intent and was more probative than prejudicial. The district court cautioned the jury that the evidence was "being offered for the limited purpose of assisting you in determining" whether Smith committed the crimes with which he was charged and that the jury was not to convict Smith based on his prior conviction.

At trial, Orcutt testified that he was giving Smith a ride to work on the evening in question and that it was Orcutt's idea to stop at the manhole. Orcutt stated that Smith did not know why they had stopped and was unaware of what Orcutt was doing down in the manhole.

The jury found Smith guilty of the theft-tool-possession charge and the district court sentenced him to 19 months' imprisonment. This appeal follows.

DECISION

I. The district court did not abuse its discretion in admitting the *Spreigl* evidence.

Evidence of other crimes is not admissible to prove that a person acted in conformity with that act on the particular occasion at issue. Minn. R. Evid. 404(b). But evidence of prior bad acts may be admissible when offered for other purposes, such as to

prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.*

This evidence, known as *Spreigl* evidence, is admissible only if five conditions are met:

(1) the state must give notice of its intent to admit 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 its potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 686 (Minn. 2006). If it is a “close call” whether to admit the evidence, then it should be excluded. *Id.* at 685. We review the district court's admission of *Spreigl* evidence for abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996).

Because the first three *Spreigl* elements are not contested, the focus of our analysis is on whether the evidence of Smith's 2005 theft-tool-possession conviction is material and relevant and whether the potential for unfair prejudice outweighs the probative value of the evidence.

The district court permitted the state to introduce evidence of Smith's prior conviction to prove his intent. “[I]ntent is a state of mind in which an act is done consciously, with purpose.” *Ness*, 707 N.W.2d at 687. When evaluating the admissibility of *Spreigl* evidence, “[t]he touchstone of the inquiry is simply an evaluation of whether the evidence is material and relevant and whether the probative value of the

evidence [outweighs] the potential for unfair prejudice.” *State v. Burrell*, 772 N.W.2d 459, 466 (Minn. 2009).

To obtain a conviction for aiding and abetting possession of theft tools, the state had to prove that Smith possessed, or helped Orcutt possess, tools with the intent to use them to commit theft. *See* Minn. Stat. § 609.59. It is undisputed that Smith helped Orcutt remove the manhole cover, replaced it after Orcutt descended into the manhole, and waited for Orcutt. But Orcutt, the only witness to testify in Smith’s defense, stated that Smith did not know what Orcutt was doing in the manhole but was waiting, unknowingly, in the van. Because intent is a primary element of the charged crime, and lack of intent was Smith’s principal defense, evidence demonstrating his intent is both material and relevant.

Smith’s prior conviction of possession of theft tools supplies an evidentiary basis from which the jury could infer that Smith was aware of Orcutt’s activities and intended to help Orcutt steal the copper wire. The 2005 conviction was based on Smith’s presence, at night, in a vehicle in which officers found flashlights and a bent screwdriver that had been used for breaking into cars. The facts that the prior conviction was only two years earlier and involved Smith’s nighttime possession of some of the same theft tools are relevant. These facts indicate Smith’s state of mind—that he knowingly aided Orcutt’s criminal activity by waiting in a dark van at night while Orcutt was down in the manhole for 15 minutes.

Having concluded that evidence of Smith’s 2005 conviction is probative of his intent, we next consider whether the probative value is outweighed by unfair prejudice to

Smith. The evidence is admittedly prejudicial because there is a chance that it could be used to establish that Smith has a propensity to commit theft. But the prejudice was tempered by the cautionary instruction, which explicitly advised the jury was not to find Smith guilty based on his prior conviction. *See State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998) (stating that cautionary instruction lessens any prejudice from introduction of *Spreigl* evidence). In addition, the value of the evidence in this case is highly probative, outweighing any prejudicial value. *See Pierson v. State*, 637 N.W.2d 571, 580-81 (Minn. 2002) (holding that prior-act evidence was more probative than prejudicial where defendant presented an innocent- or unknowing-mind defense); *State v. England*, 409 N.W.2d 262, 264-65 (Minn. App. 1987) (same). Because Smith's prior conviction of possession of theft tools makes it more likely that he acted knowingly on the night in question, the evidence is highly probative.

On this record, we conclude that the district court did not abuse its discretion in admitting the *Spreigl* evidence.¹

II. Sufficient evidence supports the jury's verdict.

In considering a claim of insufficient evidence, we painstakingly review the record to determine whether, when viewed in a light most favorable to the verdict, the evidence and reasonable inferences that could be drawn from it are sufficient to allow the jury to reach its verdict. *State v. Brown*, 732 N.W.2d 625, 628 (Minn. 2007). Circumstantial evidence warrants stricter scrutiny, but it is entitled to the same weight as direct evidence.

¹ Because we conclude that the district court did not abuse its discretion in admitting the *Spreigl* evidence on this issue of intent, we do not decide whether the evidence shows a common scheme or plan.

State v. Bauer, 598 N.W.2d 352, 370 (Minn. 1999). The question on review is whether the facts in the record would permit the jury, giving due regard to the presumption of innocence, to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted. *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010).

Smith was convicted of aiding and abetting the possession of theft tools:

Whoever has in possession any device, explosive, or other instrumentality with intent to use or permit the use of the same to commit burglary or theft may be sentenced to imprisonment for not more than three years or to payment of a fine of not more than \$5,000, or both.

Minn. Stat. § 609.59. A person is criminally liable for the crimes of another when “the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05, subd. 1.

Smith argues that the state did not prove that he possessed a theft tool. Possession may be actual or constructive. *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001) (discussing possession of firearms). Constructive possession is established when officers find an item in a location within a defendant’s exclusive control or when there is a strong probability, inferable from the evidence, that the defendant consciously exercised dominion and control over the item. *Id.*

Smith argues that the jury could not reasonably infer Smith’s guilt beyond a reasonable doubt because no tool capable of opening the manhole was found at the scene, and the men were not seen carrying tools or bags to hold tools. We disagree. The testimony of the police officers and Xcel Energy personnel that they were unable to open

the manhole cover without a tool supports an inference that the three men must have used a tool to access the manhole. This is further supported by the witness's testimony that the manhole cover came off easily and quickly for the three men. Smith's assertion that the state did not provide sufficient evidence that Orcutt exercised any dominion over the tools that were recovered in the manhole because his fingerprints were not found on the tools also fails. Orcutt was down in the manhole for 15 minutes while Smith waited, and Orcutt pleaded guilty to theft of copper wire. Moreover, all three men were wearing gloves when the police discovered them, so it is not surprising that Smith's fingerprints were not found on the numerous tools located at the scene of the copper wire theft. On this record, the jury could reasonably infer that Smith possessed or helped Orcutt possess one or more of the tools.

Viewing the evidence in the light most favorable to the verdict, we conclude that there was sufficient evidence to support the jury's determination.

Affirmed.

MINGE, Judge (dissenting)

I dissent. The conviction is for aiding and abetting in the crime of possessing theft tools. The prosecution never identified what tools were theft tools. The record is confused. The *Spreigl* evidence of appellant's prior conviction for possession of theft tools is not helpful. It is akin to character evidence. It indicates his propensity for night-time, street thievery. Given the lack of clarity of what tools were the basis for the charge and the confusing function of the *Spreigl* evidence, I would reverse and remand for retrial without the evidence of the prior conviction.