STATE OF MINNESOTA
IN COURT OF APPEALS
A09-955

State of Minnesota,
Respondent,

vs.

Daniel Allen Mathias,
Appellant.

Filed May 4, 2010
Affirmed
Harten, Judge*
Concurring specially, Minge, Judge

Olmsted County District Court
File No. 55-CR-07-10934

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaitas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HARTEN, Judge

Appellant challenges his conviction, arguing that the district court abused its discretion in admitting videotape evidence of prior acts and the testimony of a detective. Because we see no abuse of discretion, we affirm.

FACTS

During the night of 24-25 April 2006, J.B., unconscious due to the consumption of alcohol, was subjected to sexual penetration by appellant Daniel Mathias at his residence. J.B. was taken to the hospital, where a nurse collected samples for a sexual assault kit, which revealed semen later determined to match appellant's DNA.

Appellant was charged with third-degree criminal sexual conduct (sexual penetration of a physically helpless victim). He pled not guilty and requested a jury trial. The district court, over appellant's objection, admitted into evidence three redacted videotapes of appellant's previous consensual sexual activity with other women. The testimony of the lead detective was also admitted; appellant did not object.

The jury found appellant guilty as charged. He was sentenced to 117 months. He challenges his conviction, arguing that neither the videotapes nor the detective's testimony should have been admitted.

D E C I S I O N

1. Video Tapes

During a five-day trial, the jury was shown a videotape presentation lasting about twelve and a half minutes. The presentation included unredacted portions of three tapes,

each of which showed appellant about to engage in consensual sex with one of three women.[1] For about two minutes of the presentation, a woman was visible. Parts of the tapes showed appellant setting up the video camera.

J.B. testified that she remembered only one feature of the crime clearly: when she briefly recovered consciousness, she saw a video camera aimed at the couch on which she was lying, which had not been in the room when she passed out. The district court noted that the videotape evidence was admitted because it was "something that [appellant] has done in the past [and] is corroborative of the alleged victim's account that she woke up on [appellant's] couch at his home to find a camera pointed at her."

The admission of evidence is reviewed under an abuse of discretion standard. *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009). A defendant challenging the admission of evidence must show that it was both erroneous and prejudicial. *Id.* If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994).

Evidence of a defendant's crimes, wrongs, or other acts may be admitted as *Spreigl* evidence. *State v. Ness*, 707 N.W.2d 676, 686 n.2 (Minn. 2006) (citing Minn. R. Evid. 404(b)). "[O]ther-acts evidence is admissible . . . to establish that the conduct on which the charged offense was based actually occurred or to refute the defendant's

[1] The district court required the tapes to be redacted to exclude evidence "that any of these women were under the influence or that [appellant] forced himself on any of them, and . . . evidence of the sex itself."

contention that the victim's testimony was a fabrication or a mistake in perception." *Id.* at 688.

> We have repeatedly upheld the admission of *Spreigl* evidence on the issue of whether the act occurred. *See, e.g.*, [*State v.*] *Wermerskirchen*, 497 N.W.2d [235,] . . . 241[-42 (Minn. 1993)]; *State v. Anderson*, 275 N.W.2d 554, 555-56 (Minn. 1978) (admitting *Spreigl* evidence to show common scheme or plan and to refute defendant's allegation that the victim's testimony was a fabrication); *State v. Shuffler*, 254 N.W.2d 75, 76 (Minn. 1977) (stating that the *Spreigl* evidence "was directly relevant to the jury's resolution of *the key factual issue, which was whether defendant had taken indecent liberties with the victim, as she testified, or* whether [the testimony was a fabrication] as defendant testified.").

State v. Kennedy, 585 N.W.2d 385, 391 (Minn. 1998).

The use of *Spreigl* evidence has five requirements: (1) the state must give notice of its intent to use the evidence; (2) the state must specify what the evidence is offered to prove; (3) there must be clear and convincing evidence that the defendant committed 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 outweigh its prejudicial effect. *Ness*, 707 N.W.2d at 686. Appellant challenges only the fourth and fifth requirements.

a. Relevance and Materiality

Appellant makes three arguments to support his assertion that the *Spreigl* evidence was not relevant and material. First, he argues that the evidence was not relevant because the only issue at trial was J.B.'s assertion that she had not consented to appellant's sexual activity and the videotapes showed women who had consented to it; therefore, the videotapes could not be used to show appellant's common scheme or plan. "The use of *Spreigl* evidence to show a common scheme or plan has been endorsed repeatedly, despite the particular risk it poses for unfair prejudice." *Id.* at 687; *see also Kennedy*, 585

N.W.2d at 391 (noting that common scheme or plan evidence is not limited to cases where identity is at issue).

Here, the common scheme or plan was appellant's propensity to videotape his sexual activity. Evidence that appellant had videotaped other sexual encounters corroborated J.B.'s testimony that, although she remembered almost nothing else from when she woke up on the couch, *e.g.*, what she was wearing, she had a distinct memory of the video camera "pointed at the couch." The videotape presentation also refuted appellant's statements to an investigator that appellant did not own a video camera and had not used a video camera to tape an encounter with J.B.

Second, appellant argues that the evidence did not show the "marked similarity" *Ness* requires for common scheme or plan evidence because the only similarities were that appellant had sexual acts with other women and used a videotape to record them. *See Ness*, 707 N.W.2d at 688 (quotation omitted). But incidents admitted as evidence of a common scheme or plan may differ from the incident leading to the charged offense. *See, e.g., State v. Rucker*, 752 N.W.2d 538 (Minn. App. 2008), *review denied* (Minn. 23 Sept. 2008).

> [B]oth the *Spreigl* incident and the charged offenses involved appellant's sexual abuse . . . through social organizations, at appellant's apartment. Appellant's position relative to the victims, as a bass player in a church choir in 1993 and as an after-school program worker in the charged offenses, is not a significant difference. Further, while the 1993 incident was a single incident, the record also shows that the victim in that incident was brought to the police a day after the incident occurred. We conclude that the 1993 incident was sufficiently similar to the charged offenses and, thus, relevant.

Id. at 550; *see also Burrell*, 772 N.W.2d at 466 (concluding that evidence of a defendant's prior shooting at men standing on a street corner, at men sitting in a park, at two men he walked past on a street, and at a car was admissible in his trial for the accidental killing of a young girl while he was shooting at a man across the street; although the prior acts did not provide the reason for the charged act, they "shed light on why" the defendant shot at the man and showed the defendant as "a young man caught up in a violent rivalry with another street gang . . . illustrated by the prior shooting incidents"); *State v. Morales*, 764 N.W.2d 621, 630-31 (Minn. App. 2009) (concluding that, when charged offense and *Spreigl* offense both involved planned robberies committed with a gun by multiple participants robbing local businesses that handled cash, differences in the identity of the participants, the location of the offense, and the fact that the victim was shot in one offense and not in the other did not defeat common scheme or plan), *review granted on other grounds* (Minn. 22 July 2009). Thus, the fact that appellant used a video camera to film sexual acts with different women provides sufficient similarity to establish a common plan.

Third, appellant argues that the videotapes were too old to be relevant. A detective testified that the tapes were of events that occurred at least two and a half years before the charged incident. Appellant's counsel claimed they could be 15 or 20 years old, but nothing in the record supports this claim. In any event, there is no specific time beyond which prior incidents may no longer meet the common-scheme standard. *Ness*, 707 N.W.2d at 688-89. Instead, a balancing test is used: the farther removed the incident is in time, the greater must be its similarity to the offense. *Id.* Incidents ten to twelve

years earlier have been found to show common purpose. *See Rucker*, 752 N.W.2d at 550 (incident from 1993 could show common purpose with offenses in 2003-2005). Appellant's practice of using a video camera in his residence to record his sexual activities with different women in previous encounters and his use of a video camera to record the encounter with J.B. provides sufficient similarity to meet the balancing test.[2]

The district court did not abuse its discretion in admitting the videotapes to show a common scheme or plan and to corroborate J.B.'s testimony.

b. Unfairly Prejudicial

The district court gave a cautionary instruction after the videotape presentation:

> [The videotapes are] being offered only for whatever relevance [they] may have as to whether [appellant] committed on April 25, 2006[,] the act with which he is charged in the complaint. [Appellant] is not being tried for and may not be convicted of any conduct other than that alleged in connection with the April 25, 2006 charge. You are not to convict [appellant] on the basis of any judgment you may have or you may make regarding the morality or ethics of his actions on April 25, 2006 or any other date.

Similar language was part of the final jury instructions.

Appellant argues that this language was too vague because it directed the jurors to consider the evidence only in terms of relevance to the offense with which appellant was charged and that it "painted [appellant] in a highly unfavorable light" as having "unquenchable sexual desires." But the jurors were explicitly told that their own opinions of appellant's morals and ethics as evinced in either the *Spreigl* evidence or the charged offense were not to serve as a basis for judgment.

[2] Appellant also argues that the district court "never explicitly considered the prosecution's need for the evidence." But *Ness* dispensed with the requirement to show need. *See Ness*, 707 N.W.2d at 689-90.

2. Detective's Testimony

The lead detective, asked whether he knew through his own observation if appellant owned a video camera, testified, "It was a well known fact that [appellant] always had a video camera or a surveillance camera that was pointed to the front of his residence so that he could see who was coming and going." The detective also testified that he had not asked for appellant's consent to search his residence without a warrant because "[w]ith [his] past dealings with [appellant, he] knew that consent would not be given and that by tipping [appellant] off to a possible investigation [he] could lose some evidence." Appellant's attorney did not move to strike to any of this testimony.

When a defendant fails to object to the admission of evidence, this court reviews under the plain error standard. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). If those three prongs are met, this court will correct the error only if it seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id*.

Appellant argues that it was plain error to admit the testimony because it was character evidence that suggested appellant was a criminal with a criminal past. *See* Minn. R. Evid. 404(a)(1) (prohibiting attacks on a defendant's character unless the defendant has put his character into evidence). But owning a video camera and denying consent to a warrantless search are not indicia of criminality or defective character.

Appellant also argues that the evidence was erroneously admitted because it was hearsay. *See* Minn. R. Evid. 801(c) (prohibiting out-of-court statements offered to prove the truth of the matter asserted). But the detective testified only that appellant's possession of a video camera was commonly known; he was not testifying to a source other than his awareness of common knowledge that appellant owned a video camera.

Appellant argues further that the testimony was irrelevant. *See* Minn. R. Evid. 401 (requiring evidence to be relevant to be admitted). But evidence that appellant was known to use a video camera was relevant to J.B.'s testimony. Appellant's objection to evidence that he "would have destroyed evidence if tipped off to an investigation" misstates the detective's testimony: he did not say appellant would have destroyed evidence but that evidence "might" be lost if appellant were tipped off.

Finally, appellant argues that the evidence was unfairly prejudicial. *See* Minn. R. Evid. 403 (requiring exclusion of unfairly prejudicial, confusing, or misleading evidence). But appellant's claim that the evidence included "the suggestion that [appellant] was a well-known criminal" is again a mischaracterization. The detective neither said nor implied that appellant was a well-known criminal. Appellant's ownership of a video camera and the latent possibility that he could destroy evidence do not imply that he was a well-known criminal.

We conclude that the admission of the detective's unobjected-to testimony was not plain error.[3] Neither the admission of this testimony nor the admission of the videotape presentation was an abuse of the district court's discretion.

Affirmed.

[3] The fact that the testimony cannot meet the plain error test renders moot the state's argument that, by failing to object to the testimony at trial, appellant waived his right to challenge it on appeal.

MINGE, Judge (concurring specially)

I join in part two of the opinion affirming the admission of the detective's testimony. I concur in the result on the *Spreigl* issue, part one, and write separately.

Here, appellant challenges the credibility of J.B.'s complaint that she was the victim of a sexual assault. It is undisputed that J.B.'s memory of her encounter with appellant is limited. One key item of her testimony is that she saw a video camera pointing at the couch where she was lying. The prosecution argues that J.B. neither consented to sex with appellant nor would have consented to the recording of that encounter. Appellant denies owning a video camera and asserts J.B.'s claim that she saw a video camera is the product of her inaccurate memory. The videotapes demonstrate that appellant has had a video camera and that he used it to record prior sexual encounters. This videotape evidence supports J.B.'s testimony and undermines appellant's denials.

Use of *Spreigl* evidence is prejudicial if it shows prior bad acts. Although many of us disapprove of promiscuity and videotaping sexual activity, there is no showing that such conduct is illegal or a bad act or that testimony regarding such conduct is prejudicial. The tape footage shown to the jurors did not contain any display of patently offensive or illegal activity. It showed preparation for what may have been consensual sex. Thus, the prejudicial nature of the 12 minutes of video is unclear. The video simply indicates that J.B.'s disputed claim that she saw a video camera is not necessarily imagined.

Because of the limited portion of videotape shown to the jury and its ambiguous implications, I concur that the district court did not abuse its discretion in admitting that evidence.