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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-644**

State of Minnesota,
Respondent,

vs.

Kenya Darriel Reynolds,
Appellant.

**Filed May 3, 2011
Affirmed
Shumaker, Judge**

Olmsted County District Court
File No. 55-CR-08-10661

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

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

Mark D. Nyvold, Special Assistant State Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant challenges the district court's admission of *Spreigl* evidence and of his prior conviction for impeachment purposes. He also claims that the grand-jury

indictment was defective and deprived the district court of the authority to impose a life sentence. Because the district court did not rely on or consider *Spreigl* evidence for any purpose in finding appellant guilty, there could be no prejudice to him. Further, the indictment was not defective and the district court had authority to impose a life sentence upon appellant. We affirm.

FACTS

After a bench trial, the district court found appellant Kenya Darriel Reynolds guilty of two counts of criminal sexual conduct in the third degree, and sentenced him to life imprisonment as a repeat sex offender.

We are asked to decide whether the district court committed reversible error by allowing as *Spreigl* and impeachment evidence Reynolds's prior conviction of fourth-degree criminal sexual conduct, and whether the court lacked authority to impose a life sentence because of an alleged defect in the indictment.

In July 2008, at East Park in Rochester, where C.T. and her friends regularly gathered to socialize, C.T. met Reynolds for the first time. Some days later, a group of C.T.'s friends visited her at her apartment. Reynolds joined that group. Although C.T. had recently met Reynolds, she had never been alone with him nor had she ever expressed any sexual interest in him.

During the evening of August 7, 2008, C.T., her two roommates, and two other friends were in her apartment. Reynolds was not among them and he had neither been invited nor was he expected, but he had learned from R.M. that people would be at the apartment that evening.

The individuals intended to spend the night at C.T.'s apartment. Some of them consumed beer and one, N.E., had been drinking heavily all day. They variously went to their respective rooms between 10:00 p.m. and 2:00 a.m. J.K. and N.W. went to one bedroom; C.C. went to the upstairs attic room; C.T. went to the bed in her bedroom; and N.E. passed out on the floor in C.T.'s bedroom. No one else was in the apartment when the individuals went to sleep.

C.T. woke up at about 4:00 a.m. on August 8 with an apparent stranger lying on top of her. He had already penetrated her vagina with his penis. C.T. did not recognize him at first but he told her that it was "H.B.," Reynolds's nickname. C.T. struggled to get up but Reynolds held her down. She told him several times that she did not want to have sex with him, but he placed his hand over her mouth when she raised her voice. After about 15 minutes had passed, during which Reynolds repeatedly announced that he was "almost finished," C.T. was able to get free and run to the upstairs attic room where C.C. was sleeping. She told C.C. what had happened, and then, when she heard Reynolds coming up the stairs, she pretended to be asleep. She then heard Reynolds tell C.C. that he wanted to tell C.T. that he was sorry.

C.T. informed others of what happened, and at 11:00 a.m., she reported the incident to the police. Reynolds admitted to the police that he had sexually penetrated C.T. but contended that she had consented.

The state charged Reynolds by indictment with one count of criminal sexual conduct in the third degree by using force or coercion, and one count of criminal sexual conduct in the third degree with a person who was mentally incapacitated. The

indictment also alleged that Reynolds had a previous sex-offense conviction and that, other than the previous conviction, the offenses involved unspecified aggravating factors that would provide grounds for an upward durational departure from the presumptive sentence and permissible range under the sentencing guidelines.

This appeal followed Reynolds's convictions.

DECISION

Spreigl Evidence

In the bench trial of this case, the district court received, arguably over defense objection, evidence of Reynolds's prior conviction of criminal sexual conduct in the fourth degree. The state offered this evidence under Minn. R. Evid. 404(b) and *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). The form of the *Spreigl* evidence was the complaint in the prior case, containing the narrative of the alleged offense and the original charge of criminal sexual conduct in the third degree.

Reynolds contends that the district court abused its discretion in several ways when it allowed the *Spreigl* evidence. He claims that the *Spreigl* notice was deficient; the prior complaint charged a third-degree crime but the conviction was of a fourth-degree crime involving less egregious elements; no proper purpose for the evidence was shown; the court made no rule 404(b) analysis before allowing the evidence; the *Spreigl* evidence was irrelevant; the evidence of the prior crime was not clear and convincing and its prejudicial effect outweighed its probative value; and the evidence was hearsay and denied Reynolds his constitutional right of confrontation.

Because Reynolds had admitted to an investigating officer that he penetrated C.T.'s vagina with his penis but did so with her consent, the district court surmised that consent was Reynolds's defense and allowed the *Spreigl* evidence as relevant to that defense. The admission of *Spreigl* evidence lies within the sound discretion of the district court, and the ruling will not be reversed absent a showing of a clear abuse of that discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996). In an appeal challenging a *Spreigl* ruling, the appellant bears the burden of showing both error in the admission of the evidence and prejudice resulting from the evidence. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). We will not reverse unless the appellant demonstrates a reasonable possibility that the evidence significantly affected the verdict or finding of guilt. *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995).

When, after conviction we determine that the trial court erred in admitting other crime evidence, our role is to examine the entire trial record and determine "whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict; . . . if 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."

Id. (quoting *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994)).

The supreme court in *Bolte* described factors it considered in assessing the possible effect of the other-crimes evidence on the verdict. These included the amount of evidence linking the appellant to the crime; the weakness of the defense; the strength and credibility of the defense's evidence; and the prosecutor's reliance on the evidence in

final argument. *Id.* at 198. The court concluded that, considering these and other factors, the other-crimes evidence did not significantly affect the verdict.

Our analysis of the record here compels two conclusions that make it unnecessary to address Reynolds's contentions point by point. First, we are confident from a careful review of the district court's own detailed analysis of the evidence that it did not rely on the *Spreigl* evidence in reaching its finding that Reynolds is guilty of the charges. Second, even if the district court relied on the *Spreigl* evidence to some slight degree, there is no reasonable possibility that the evidence significantly affected the court's findings.

The district court incorporated into its findings a memorandum in which it extensively analyzed the evidence in light of the respective contentions of the state and the defense. The court noted that the state relied on six points to prove the charges. Five of those points related to the behavior of C.T., Reynolds, and others; C.T.'s prior consistent statements; physical evidence; and the lack of any motive by C.T. to fabricate a story. The sixth point pertained to the *Spreigl* incident. After summarizing the state's arguments, the court summarized Reynolds's arguments. At that point, there was no indication that the court had relied on the position of either party.

Then the court stated that it "finds the arguments of the State to be persuasive." This statement was followed by a detailed analysis and evaluation of the parties' respective arguments in the context of the evidence adduced at trial. That analysis includes no reference whatsoever to the *Spreigl* evidence. Rather, the analysis is limited to the state's first five points and Reynolds's efforts to rebut those points. The omission

of any mention of the *Spreigl* evidence from the court's evaluation of the nature, strengths, weaknesses, and credibility of the evidence compels the conclusion that the court did not consider that evidence at all in finding Reynolds guilty. Without a clear showing that the district court relied upon or used the *Spreigl* evidence in some way in reaching its finding of guilt, there can be no showing of prejudice.

Even if we assume for the sake of discussion that the district court relied in some way on the *Spreigl* evidence, Reynolds has not shown prejudice. The evidence against him, described with particularity in the court's memorandum, was substantial, if not overwhelming. The inculpatory evidence that is uncontradicted by any direct evidence is that C.T. had been sleeping and awoke with the realization that Reynolds had already penetrated her vagina with his penis. There is no evidence in the record to show or even to permit an inference that there was no vaginal penetration or that C.T. was awake when the penetration occurred. Reynolds's rebuttal was confined to inferences that C.T. was not credible because she did not behave as if she had been raped and that C.T. might have a motive to portray consensual sex with Reynolds as nonconsensual. Reviewing the record, we, as did the district court, view those proffered inferences as untenable, even implausible. Even assuming the erroneous admission of the *Spreigl* evidence, there is no reasonable possibility that the outcome would have been more favorable to Reynolds had the evidence not been received. He has failed to show any prejudice from the admission of this evidence.

Impeachment Evidence

Reynolds argues that the district court abused its discretion by admitting his prior conviction for impeachment because he did not testify. We review the court's ruling for an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

A prior qualifying conviction of a crime is admissible for the limited “purpose of attacking the credibility of a witness” Minn. R. Evid. 609(a). The rule implicitly applies only to a witness who testifies. *Id.* To the extent that the district court allowed the evidence for impeachment, the court abused its discretion. The evidence could yet have been admissible under rule 404(b) or as an element of the crime charged in count 1. But we need not consider admissibility under either of those alternative grounds because, as we have explained, the district court did not rely on the prior conviction for any purpose. Reynolds argues that “[a] significant likelihood . . . existed here that even though [he] did not testify, the court somehow used the prior conviction, not for impeachment, but in deciding the issue of guilt or non-guilt.” To credit this argument, we would have to ignore the court's detailed explanation of its evidentiary assessment and speculate that nevertheless the court “somehow” improperly used the conviction for substantive purposes. The argument has no merit.

Reynolds also claims that the ruling to allow his prior conviction had the effect of causing him not to testify. There is nothing in the record by way of motion, argument, or statement of Reynolds or his defense attorney showing why he chose not to testify. It is possible that the court's ruling affected that choice, but there are any number of other reasons a criminal defendant might exercise his right not to testify. Among those reasons

is that he simply would not appear to be believable. Reynolds invites us to select the court's ruling as the reason he chose not to testify, and that invitation is based on nothing in the record. We decline to speculate, and we conclude that this argument is without merit.

Form of Indictment

Finally, Reynolds claims that the grand-jury indictment failed to specify an aggravating factor, thereby precluding the district court from imposing a life sentence on him. The aggravating factor in this case was that the offense took place in the victim's zone of privacy, her bedroom in her residence. The state argues that Reynolds waived this claim because he failed to object either before or during the trial. Minnesota Rules of Criminal Procedure 17.06, subd. 2, provides that an objection to an indictment must be made by a pretrial motion. Failure to include any objections to an indictment in a motion pursuant to Minn. R. Crim. P. 10.01, subd. 2, constitutes a waiver, unless the objection is for lack of jurisdiction or failure of the indictment to charge an offense. Minn. R. Crim. P. 10.01, subd. 2. Reynolds concedes that he did not challenge the indictment before this appeal. However, he claims he did not waive this issue because the indictment did not state an offense subject to a life sentence since it did not contain a specific aggravating factor and therefore the district court imposed an unauthorized sentence.

Reynolds relies on *State v. DeWalt* to support his argument. 757 N.W.2d 282 (Minn. App. 2008). In *DeWalt*, the state charged the appellant by criminal complaint with two counts of first-degree criminal sexual conduct, alleging the element of heinous removal of the victim from one place to another and no safe release, an aggravating factor

that made the offense punishable by a sentence of life imprisonment under Minn. Stat. § 609.3455, subd. 3 (Supp. 2005). *Id.* at 284. The district court imposed an enhanced sentence of life imprisonment for first-degree criminal sexual conduct because it found, based on the jury verdict, that the conviction included a “heinous element” authorizing a life sentence. *Id.* at 287-88. This court reversed the enhanced sentence and remanded for resentencing, concluding that the district court lacked authority to impose an enhanced life sentence when appellant was not charged by indictment. *Id.* at 289-90.

Unlike in *DeWalt*, the state charged Reynolds by indictment. And nothing in *DeWalt* indicates that the indictment would have been deficient without the specific aggravating factor – the heinous element. *DeWalt* merely held that the state must charge an offense by indictment for the district court to have authority to impose an enhanced criminal sentence of life imprisonment. *Id.* at 289. The state charged Reynolds by indictment, and the indictment included an offense punishable by life in prison. Reynolds was also on notice of the specific basis for the aggravated departure from the state’s notice of motion dated December 23, 2008, one day after the grand jury returned Reynolds’s indictment.

DeWalt instructs that *Apprendi v. New Jersey*, *Blakely v. Washington*, and their progeny require that “any fact that increases punishment beyond that prescribed by statute must be tried to a jury and proved beyond a reasonable doubt.” *Id.* at 288 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004)). Reynolds waived his right to a jury trial to determine guilt and to determine sentencing. The district court found that Reynolds had

invaded C.T.'s zone of privacy by entering her bedroom without her knowledge or consent, and that act constituted an aggravating factor allowing the enhancement of Reynolds's sentence.

Reynolds's argument also assumes that the sentence that the prosecution seeks to impose must be included in the charging document. Failure to cite a specific sentencing statute in an indictment does not violate a defendant's due-process rights when the indictment gives the defendant sufficient notice of his potential sentence. In *McCollum v. State*, the Minnesota Supreme Court held that due process does not require a reference to the sentencing statute in an indictment. 640 N.W.2d 610, 618 (Minn. 2002). The sentencing statute in *McCollum*, which was not cited in the indictment, provided that the court shall sentence a person to life imprisonment without possibility of release upon conviction of first-degree murder while committing kidnapping under section 609.185(3) (2000), which was charged in the indictment. *Id.* Because the indictment informed the defendant of the charges against him, he had fair notice that he faced life in prison even without reference to the sentencing statute. *Id.*

Similarly, in *State v. Chauvin*, the supreme court held that, assuming the state's failure to cite the sentencing statute in the complaint amounted to error, such error was harmless where the defendant failed to show how the error prejudiced his defense and for several weeks before trial knew that the state would seek to enhance his sentence. 723 N.W.2d 20, 31 (Minn. 2006). The supreme court stated it was unable to identify a way in which the lack of a citation to the sentencing statute in the complaint prejudiced the defense. *Id.*

Therefore, an indictment that provides a defendant with fair notice of his potential punishment if convicted does not violate the defendant's right to due process under the United States and Minnesota constitutions. Fair notice does not require an indictment to cite a specific sentencing statute or a specific possible sentence. As long as the sentence "was readily ascertainable from the indictment" the defendant has fair notice of the potential sentence. *McCollum*, 640 N.W.2d at 618.

Reynolds's sentence was readily ascertainable from the indictment. The indictment expressly stated that the penalty for either count 1 or 2 is life imprisonment. The indictment clearly indicated that Reynolds was being charged under Minn. Stat. § 609.344, subd. 1(c)(d) (2008), and cited the specific sentencing statute, Minn. Stat. § 609.3455, subd. 4(a)(2)(i) (2008). Minn. Stat. § 609.344, subd. 2 (2010), makes an explicit reference to Minn. Stat. § 609.3455 as a potential sentencing statute. Moreover, the portion of the sentencing statute referred to in the indictment requires the court to impose a mandatory life sentence. Minn. Stat. § 609.3455, subd. 4(a)(2)(i). We conclude that Reynolds's due-process rights were not violated, because the indictment informed him of the statute he was being charged under and cited the specific sentencing statute, which gave Reynolds sufficient notice of his potential life sentence.

Affirmed.