STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0255

State of Minnesota,
Respondent,

vs.

Randy Allan Boettcher,
Appellant.

Filed March 17, 2014
Affirmed in part, reversed in part, and remanded
Toussaint, Judge[*]

St. Louis County District Court
File No. 69DU-CR-10-1836

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Schellhas, Judge; and Toussaint, 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

TOUSSAINT, Judge

On appeal from his convictions of four counts of first-degree criminal sexual conduct involving his stepdaughter and five counts of possession of a computer containing a pornographic work involving minors, appellant argues that the district court (1) abused its discretion by admitting irrelevant and unfairly prejudicial *Spreigl* evidence; (2) abused its discretion by denying appellant's motion for a mistrial; (3) abused its discretion by allowing a medical expert to offer opinion testimony concerning the age of the individuals depicted in pornographic images found on appellant's computer; (4) erred by convicting appellant of five counts of possession of a computer containing a pornographic work involving minors and imposing a sentence on each count based on the single behavioral incident of possessing a computer; and (5) erred by imposing a lifetime conditional release term on two of his criminal-sexual-conduct convictions (counts 3 and 4). Because the district court erred by imposing a lifetime conditional release term on counts 3 and 4, we reverse the sentencing decision on counts 3 and 4 and remand for resentencing with respect to the conditional release terms on those counts. We affirm in all other respects.

D E C I S I O N

I.

The district court has broad discretion in determining the admissibility of *Spreigl* evidence. *State v. Asfeld*, 662 N.W.2d 534, 542 (Minn. 2003). We review admission of *Spreigl* evidence for an abuse of that discretion, *State v. Smith*, 749 N.W.2d 88, 93 (Minn.

App. 2008), and will not vacate a verdict unless wrongfully admitted evidence significantly affected the verdict, *State v. Ness*, 707 N.W.2d 676, 691 (Minn. 2006).

Evidence of an accused's prior bad acts or crimes, so-called *Spreigl* evidence, is inadmissible to prove an accused's propensity to commit crimes. *State v. Smith*, 749 N.W.2d 88, 92 (Minn. App. 2008) (citing Minn. R. Evid. 404(b)). But it is admissible for other purposes, including establishing a common scheme or plan, motive, intent, or absence of mistake or accident. Minn. R. Evid. 404(b). In admitting *Spreigl* evidence, the district court must determine that (1) the state has noticed its intent to admit the evidence; (2) the state indicated what the evidence will be offered to prove; (3) clear and convincing evidence proves the defendant participated in the act; (4) the evidence is relevant to the state's case; and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the accused. *Id.*

Boettcher challenges the admission of *Spreigl* testimony of Boettcher's two former stepdaughters, BS and LI. Both testified that Boettcher sexually abused them as children, and LI further alleged that Boettcher forced her to watch a pornographic video while Boettcher sexually abused her. The district court deemed the evidence admissible to prove a common scheme or plan. Boettcher argues that the evidence of these prior sexual assaults—incidents that took place 11 and 18 years ago, respectively—is too old to be relevant to the state's case. Boettcher is correct in noting that the relevancy of *Spreigl* evidence may be affected by its degree of temporal proximity to the charged acts. *See State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005). But temporal proximity is not dispositive of relevance. *See id.* We disagree with Boettcher's argument that the "huge

time gap" between his abuse of BS and LI and the trial in this case renders the prior-act evidence irrelevant to whether he engaged in a common scheme or plan. *See State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993) (holding that evidence of abuse committed over 19 years prior to defendant's trial was "highly relevant" because it showed a pattern of "opportunistic fondling of young girls within the family"). Boettcher's alleged prior acts against his stepdaughters are not irrelevant simply by virtue of having been committed 11 and 18 years prior to trial in this matter.

Boettcher also argues that the alleged sexual abuse of BS and LI are too dissimilar to the charges in this case to be relevant. This argument is unavailing. The *Spreigl* evidence admitted at trial not only involved sexual abuse, but intra-familial abuse committed by Boettcher. The victims of the prior acts were Boettcher's stepdaughters, just as the victim is in this case. Further, BS and LI were approximately the same age as DS when Boettcher abused her. The prior acts of abuse, and the charged acts, were committed in Boettcher's home usually when the victims' mother was at work. These facts establish marked similarity between the past and charged acts and therefore support admissibility.

Boettcher posits that the prior acts cannot be considered markedly similar to the charged acts because (1) he allegedly blindfolded BS when he sexually abused her yet neither LI nor DS alleged that they had been blindfolded and (2) DS alleges that Boettcher bribed her to submit to sexual acts and neither BS nor LI alleged that they were bribed. This argument presupposes that the law requires absolute similarity rather than "marked similarity" for admission of *Spreigl* evidence. That presupposition is erroneous.

Boettcher further asserts that the prior acts against LI and BS are not markedly similar to the charged acts because DS alleged incidents of vaginal intercourse and one incident of genital-to-genital contact while "[t]he *Spreigl* offenses involved allegations of oral sex, anal sex, and digital penetration." This misstates the record. BS alleged that Boettcher made her engage in multiple instances of oral *and* vaginal intercourse and one instance of anal intercourse. LI, who never lived with Boettcher, alleged that Boettcher made her watch a pornographic video while he digitally penetrated her. During that incident, Boettcher indicated that he would also engage in oral sex with LI. At that moment, LI pushed him away, stopped the incident from progressing, and left the house. The differences between the alleged acts of abuse are insufficient to render the *Spreigl* acts irrelevant.

Boettcher further argues that the probative value of the *Spreigl* evidence is outweighed by the risk of unfair prejudice because the state did not need the evidence to prove its case. *See Ness*, 707 N.W.2d at 690 (holding that the state's need for evidence is one among a number of factors to be considered in deciding whether the danger of unfair prejudice outweighs the probative value). Boettcher suggests that in any case where there is sufficient evidence to support a conviction—for example, the testimony of a single credible witness—*Spreigl* evidence will be extraneous and lack probative value. The governing law contradicts this theory. *See id.* at 690 (explaining that the "need" for *Spreigl* evidence does not mean the lack of sufficient evidence to convict). While DS's testimony is sufficient to sustain Boettcher's criminal-sexual-conduct convictions, her

testimony was contradicted by Boettcher's testimony. We cannot reasonably conclude that the state had no need to strengthen DS's testimony.

Finally, Boettcher argues that the evidence was inadmissible because the jury might have been "lured into a sequence of bad character reasoning by the *Spreigl* evidence" because the prosecutor compared the allegations of BS, LI, and DS in closing argument. Boettcher fails to offer legal citation or analysis in support of the proposition that the prosecutor's comparison was improper. What is more, the district court instructed the jury to consider the testimony of BS and LI for the limited purpose of assisting them in determining "whether [Boettcher] committed those acts with which he is charged in the complaint." Not only do we presume that jurors follow limited-use instructions, *see State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009), but Boettcher fails to point to any evidence indicating that the jury ignored these instructions and relied on the evidence for an improper purpose.

The district court did not abuse its discretion by allowing the state to introduce testimony of BS and LI as *Spreigl* evidence.

II.

Boettcher challenges the district court's denial of his motion for a mistrial. We review a denial of a motion for a mistrial for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). "A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *State v. Mahkuk*, 736 N.W.2d 675, 689 (Minn. 2007) (quotation omitted).

At trial, the state introduced into evidence eight pornographic images recovered from Boettcher's home—one image from a computer hard-drive from his home office and seven images from his laptop computer. The images were received into evidence, described in detail by a police officer on the witness stand, and shown to the jury.

Dr. Sheri Bergeron, M.D., a family physician who specialized in child maltreatment and abuse, testified as to the ages of the individuals in the pornographic images. Dr. Bergeron explained that she employed an accepted scientific method for evaluating the physical development of the individuals in the images and that in her professional opinion the images depicted minors. Boettcher took the witness stand, denying all charges but acknowledging that the pornographic images from his computer appeared to include children.

The following day, one juror informed the district court that he believed that "alleged minor" in image number 4 is an "adult porn star." He stated that he thought that image 7 might also depict the same adult, but that he was not sure. He explained that he is familiar with this individual from having seen her before. The juror shared this information with the bailiff and the judge, did not mention it to anyone on the jury, and was concerned that it was "outside the evidence." The district court thanked the juror and discharged him from the jury. In response to the discharge, Boettcher moved for a mistrial, which was denied.

On appeal, Boettcher asserts that the dismissed juror's belief about the age of the individual in images 4 and 7 warrants a mistrial because it undermines Dr. Bergeron's credibility. But Boettcher fails to explain how the subjective belief of a dismissed juror,

which contradicts sworn testimony that was subject to cross-examination, results in an unfair trial. The record establishes that the dismissed juror did not share his belief with any members of the jury. And Boettcher had ample opportunity to cross-examine and impeach Dr. Bergeron. Furthermore, Boettcher had opportunity to re-call Dr. Bergeron to the witness stand following the dismissal of the juror. He did not do so, instead moving for a mistrial. A mistrial is not warranted simply by virtue of the defense determining, but not pursuing, a new avenue for impeaching Dr. Bergeron's testimony. As such, it was well within the district court's discretion to deny the motion for a mistrial.

III.

Boettcher challenges the admissibility of Dr. Bergeron's expert opinion as to the ages of the individuals depicted in the pornographic images on Boettcher's computer. He failed to raise this objection at trial. "The admission of expert testimony is within the broad discretion accorded a trial court." *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999). Where a defendant fails to object to the admission of evidence, our review is under the plain-error standard. *See* Minn. R. Crim. P. 31.02. The plain error standard requires the defendant to show (1) an error, (2) that was plain, and (3) that affected the accused's substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). The third prong is satisfied when there is a "reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Vance*, 734 N.W.2d 650, 660 n.8 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012). When those three prongs are met, we may correct the error only if it "seriously affects the

fairness, integrity, or public reputation of judicial proceedings." *Strommen*, 648 N.W.2d at 686 (quotation omitted).

Expert testimony is admissible to "assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702; *see also Ritt*, 599 N.W.2d at 811 ("The basic requirement of Rule 702 is the helpfulness requirement." (quotation omitted)). If the subject of expert testimony is within the knowledge and experience of a lay jury and that testimony will not add precision or depth to the jury's ability to reach conclusions about that subject, then the testimony does not meet the helpfulness requirement. *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980).

Boettcher contends that, although he made no objection at trial, the district court committed legal error by allowing Dr. Bergeron to testify because determining a person's age is within the experience of the jury. Even on issues within a lay jury's knowledge and experience, expert testimony may be admissible if it will aid the jury's ability to decide issues of fact. *See State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011). Unlike a lay juror, Dr. Bergeron did not base her opinion of the ages of the individuals depicted in the computer images on common life experiences. Rather, Dr. Bergeron relied on her medical training and professional experience in assessing the physical characteristics of those individuals and applied an analytical method to develop an opinion as to their ages. We cannot conclude that Dr. Bergeron's expertise and opinion failed to add any depth or precision to the jury's ability to make the factual determination with which it was tasked. Dr. Bergeron's opinion was sufficiently helpful to the jury, and we discern no error on the part of the district court by allowing this line of testimony.

IV.

Boettcher challenges his convictions of five counts of possession of child pornography, and the imposition of a sentence on each count, based on the single behavioral incident of possessing a computer.

Generally, a defendant cannot be convicted multiple times of the same offense based on the same act or course of conduct. *State v. Hodges*, 386 N.W.2d 709, 710 (Minn. 1986). And, ordinarily, when multiple offenses arise from a single behavioral incident the district court may impose punishment for only one of the offenses. Minn. Stat. § 609.035, subd. 1 (2010). But the well-established multiple-victim exception permits a district court to impose multiple sentences for convictions arising out of a single behavioral incident if (1) the offenses involve multiple victims and (2) multiple sentences do not unfairly exaggerate the criminality of the defendant's conduct. *State v. Marquardt*, 294 N.W.2d 849, 850-51 (Minn.1980). Pursuant to this doctrine, an offender may be convicted of multiple counts of possession of child pornography, and receive a sentence on each count, based on a single behavioral incident implicating multiple victims. *State v. Rhoades*, 690 N.W.2d 135, 136, 139 (Minn. App. 2004).[1] We review whether the multiple-victim exception applies de novo. *State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006).

[1] Boettcher asks that we overrule our decision in *Rhoades*. Without any supportive authority or analysis, he merely states that *Rhoades* was "wrongly decided." We disagree. Our decision in *Rhoades* is entirely consistent with the well-established body of law on the multiple-victim exception, and we decline to disturb that decision.

Boettcher first argues that the multiple-victim exception does not apply here because there is no evidence that the children depicted in the pornography were victimized by his possession of those images. But children depicted in pornography are victimized by the mere act of possession, and the multiple-victim exception does not include a direct-harm element. *Rhoades*, 690 N.W.2d at 139.

Boettcher further argues that multiple sentences are not permitted because "the state failed to offer any evidence that the pornographic images depicted different minors." The record belies this assertion. The state introduced the images, and they were received into evidence and shown to the jury. A reasonable juror could find that the children in the five images upon which Boettcher's convictions are based depict five different children. The jury was best positioned to weigh the evidence and make that determination.

Under the multiple-victim exception, it was within the district court's discretion to impose a sentence for each of Boettcher's counts of possession of a computer containing child pornography. The district court did not err by entering a conviction on five counts of possession and imposing a sentence on each count.

V.

Boettcher challenges the district court's imposition of a lifetime conditional release period on two of his criminal-sexual-conduct convictions (counts 3 and 4). An offender is subject to a lifetime conditional release term at sentencing for criminal sexual conduct when "the offender has a previous or prior sex offense conviction." Minn. Stat. § 609.3455, subd. 7(b) (2010). An offender has a prior sex offense "if the offender

was convicted of committing a sex offense before the offender has been convicted of the present offense, regardless of whether the offender was convicted of the first offense before the commission of the present offense, and the convictions involved separate behavioral incidents." *Id.*, subd. 1(g) (2010). On established facts, the application and interpretation of a statute is reviewed de novo. *State v. Marinaro*, 768 N.W.2d 393, 397 (Minn. App. 2009), *review denied* (Minn. Sept. 29, 2009).

The state offers a strained interpretation of section 609.3455 as creating a "prior or previous conviction" whenever a district court enters multiple sex offense convictions in a single case and the conduct underlying the offenses took place at different times, as it did in this case (e.g., the conviction on count 2 was based on conduct on or about May 2009 and the conduct underlying count 3 took place on or about September 2009). Pursuant to this interpretation, the state posits that Boettcher's convictions were entered at different times, thereby creating a temporal gap between the convictions themselves. In the state's words, "The trial court entered the conviction for the May 2009 [offense] before adjudicating Appellant guilty of the later offenses, thus rendering the May 2009 offense a prior sex offense conviction." We wholly disagree.

While the district court noted in open court that it was adjudicating Boettcher guilty of nine offenses and proceeded to list the adjudications one at a time, this does not create a temporal gap between the entries of the convictions. Boettcher's convictions resulted from a single trial and were recorded in a single warrant of commitment. The convictions therefore occurred at the same time. Consequently, the district court erred by imposing lifetime conditional release periods on counts 3 and 4, because Boettcher had

no sex-offense convictions prior to this trial. We accordingly reverse and remand for resentencing with respect to the conditional release terms on counts 3 and 4.

Affirmed in part, reversed in part, and remanded.