STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0575

State of Minnesota,
Respondent,

vs.

Albert J. Welton, III,
Appellant.

Filed February 18, 2014
Affirmed in part, reversed in part, and remanded
Kirk, Judge

Hennepin County District Court
File No. 27-CR-12-23677

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate State Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Kirk, Judge.

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

KIRK, Judge

On appeal from his convictions of two counts of first-degree criminal sexual conduct, appellant Albert J. Welton, III, argues that the district court erred by (1) improperly admitting *Spreigl* evidence and (2) entering judgments of conviction on both counts even though they arose from a single behavioral incident. Appellant also submitted a pro se brief asserting claims based on ineffective assistance of counsel and additional judicial errors. We affirm in part, reverse in part, and remand, directing the district court to vacate one of the two convictions and issue an amended warrant of commitment.

FACTS

On February 5, 2012, D.I. was socializing with friends at a home in the vicinity of 31st Street and 13th Avenue in South Minneapolis and left the house to walk to a nearby convenience store for cigarettes. After she had walked a short distance, she accepted a ride from appellant and voluntarily got into his black Pontiac Grand Prix. D.I. and appellant later engaged in sexual intercourse, and the parties dispute whether the act was consensual.

D.I.'s trial testimony.

At appellant's jury trial, D.I. testified that she left the house shortly before 1:00 a.m., and that she accepted a ride from appellant because she thought she recognized him from the gathering. After she got into his car, appellant told her he had left his money at home, and wanted to stop there before going to a different convenience store. He drove

to an alley in the vicinity of 33rd Street and Stevens Avenue, backed into a parking space, and asked D.I. if she wanted to smoke some marijuana. D.I. accepted. After they had smoked a joint, appellant asked her if she wanted to have sex. Earlier, when D.I. had asked appellant for a cigarette, he had asked her what she was going to give him for it, which D.I. took to be a flirtatious joke. When appellant started talking about sex, she thought he was just flirting with her, so she responded by asking, "[W]hat are you going to give me for it?" She told the jury that her remark was a reference to appellant's earlier comment, that she was just "playing with him," and that she never intended to suggest exchanging sex for money.

After this exchange, D.I. looked out the window, realized the adjacent house was boarded up, and said, "[T]his ain't your house, where are we at[?]" Appellant then attacked her, repeatedly punching her face with a closed fist. At first, D.I. was shocked and confused. She tried to get away but could not get the passenger-side door open. As the struggle continued, she either retreated to the back seat or appellant dragged her there, and she was able to open a rear door. She was halfway out the door when appellant grabbed her by her jeans and pulled her back in. Appellant retrieved something from the front seat that D.I. believed to be a hammer or other weapon, and she feared he would kill her. She told the jury that when she realized appellant was going to rape her, she asked him to at least use a condom, not as an expression of consent, but in hopes of protecting herself from disease. Holding D.I. down, and holding a condom in his teeth, appellant made growling sounds, flung the condom aside, pulled off D.I.'s jeans and underwear, and raped her.

After the rape, as D.I. was trying to put her jeans back on, appellant demanded money. She returned to the front seat to retrieve her purse and a shoe she had lost, and asked appellant to drive her to 25th Street and Bloomington Avenue. Appellant drove off in a different direction, but D.I. could not open the passenger door to get out. Finally, as appellant stopped at a stop sign near 35th Street and Stevens Avenue, D.I. was able to open the door and exit the vehicle. She yelled to people in a nearby car that she had been raped and turned to look at appellant's license plate. Appellant sped off, but not before D.I. was able to memorize his license plate number. A motorist stopped to help and gave D.I. a ride to the nearby home of a friend who accompanied her to Abbott Northwestern Hospital.

Medical examination, investigation, and charges.

At Abbott Northwestern, D.I. underwent a sexual-assault examination. The examiner testified that she noted bruising on D.I.'s face and head, tender areas on her jaw and around her eye, and an injury to her wrist. Photos showing her injuries were admitted into evidence and published to the jury, and semen samples recovered during the exam matched appellant's DNA profile.

Officer James Mota interviewed D.I. immediately after the sexual-assault exam and testified D.I. told him that she accepted a ride; the driver took her to an alley near 33rd Street and Stevens Avenue; they smoked marijuana together; he then beat her and raped her; and she escaped by jumping out of the car. D.I. described the car and provided a license-plate number.

In July 2012, several months after the incident, Sergeant Darren Blauert interviewed D.I. Sergeant Blauert showed her a photo lineup including appellant, and she identified appellant as her attacker. Police ran the license-plate number D.I. had provided to Officer Mota and found it matched a black Pontiac Grand Prix registered to appellant. On July 25, appellant, who was in custody on another matter, was charged with two counts of first-degree criminal sexual conduct.

***Spreigl* evidence.**

Before trial, the state sought admission of *Spreigl* evidence from an alleged sexual assault against another woman, J.K. The *Spreigl* incident occurred on April 25, 2012, two months after the incident involving D.I. Appellant moved to exclude the evidence, and the district court conducted a *Spreigl* hearing on the third day of the trial. During the hearing, J.K. testified that while she was working as a prostitute, a man in a black Pontiac Grand Am engaged her services. She rode in his car to an alley near 33rd Street and Stevens Avenue, where he went to the trunk to retrieve a condom. When he got back in the car and she demanded payment in advance, the man attacked her with a wooden paddle or bat of some kind, threatened to kill her, raped her, and then demanded money. The district court admitted the *Spreigl* evidence, and J.K. gave substantially the same testimony at trial.

Appellant's trial testimony.

Appellant asserted a consent defense. He testified that on the night of the incident he was driving home from a trip to the liquor store when he saw D.I. walking along the sidewalk. He stopped to talk to her and she told him "she was trying to get some

money." She got in the car, and they discussed exchanging sex for money. The time was shortly after 10:00 p.m., and appellant had pulled over along Portland Avenue. The two shared some marijuana and he offered D.I. $20 in exchange for sex. She accepted the money, they moved to the back seat of the car, and she retrieved a condom from her purse. They had sex in the back seat of the car, and he wore the condom, but it broke and he discarded it. They returned to the front seat, and appellant dropped D.I. off at Lake Street and 15th Avenue. Appellant testified that the sex was consensual, that he never threatened D.I. or hit her, and that he never demanded money.

On November 30, 2012, a jury convicted appellant of both counts. On January 2, 2013, the district court adjudicated guilt and sentenced appellant to 360 months in prison.

D E C I S I O N

I. The district court did not err by admitting the state's *Spreigl* evidence.

Appellant first argues he is entitled to a new trial because the district court erred by admitting the *Spreigl* evidence. We review a district court's *Spreigl*-evidence decisions for an abuse of discretion. *State v. Scruggs*, 822 N.W.2d 631, 643 (Minn. 2012). The proper remedy for erroneous admission of unfairly prejudicial *Spreigl* evidence is a new trial. *State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009). But to receive that remedy, appellant must show both erroneous admission and unfair prejudice. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). To demonstrate prejudice, he must show that there is a "'reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.'" *State v. Clark*, 738 N.W.2d 316, 347 (Minn. 2007) (quoting *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995)).

The Minnesota Rules of Evidence bar admission of other-acts evidence, known as *Spreigl* evidence, offered "to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). But other-acts evidence is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id*. Certain procedural safeguards must be satisfied before other-acts evidence may be admitted for one of the permissible purposes. These were first articulated in caselaw, *e.g.*, *Ness*, 707 N.W.2d at 685–86, but are now codified in rule 404(b), which provides that

> such evidence shall not be admitted unless 1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; 2) the prosecutor clearly indicates what the evidence will be offered to prove; 3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; 4) the evidence is relevant to the prosecutor's case; and 5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Appellant concedes that the state satisfied the first three requirements, but asserts that it failed to satisfy requirements four and five.

A. Requirement four: relevance to the prosecutor's case.

The state's memorandum in support of its *Spreigl* motion asserted that the evidence was offered to prove "identity, lack of mistake, and common scheme or plan." Identity, as it turned out, was not at issue: faced with DNA and other evidence proving identity, appellant conceded that point by admitting that he had intercourse with D.I. Lack of mistake was not truly at issue either, because appellant did not assert a mistake defense. *See State v. Wermerskirchen*, 497 N.W.2d 235, 241–42 (Minn. 1993) (noting

that other-acts evidence is admissible to refute a defendant's contention that the victim's testimony was based on a mistake in perception); *cf. Fardan*, 773 N.W.2d at 328 (Meyer, J., dissenting) (citing *Boyd v. State*, 924 A.2d 1112, 1128 (Md. 2007)) (noting the rule articulated by a foreign court that the rule 404(b) mistake exception generally does not apply unless defendant asserts a mistake defense).

Setting aside the state's first two purposes, we consider whether the *Spreigl* evidence could be properly admitted under the third purpose: "common scheme or plan." Rule 404(b) does not identify "common scheme or plan" as an exception permitting admission of other-acts evidence. But caselaw has long recognized that *Spreigl* evidence showing a common scheme or plan is admissible in relation to exceptions the rule *does* enumerate. In *Ness*, the supreme court stated:

> The use of *Spreigl* evidence to show a common scheme or plan has been endorsed repeatedly . . . . This exception was originally reserved for those offenses which could be described as preplanned steps in a larger scheme of which the charged offense was another step. The exception evolved, however, to embrace evidence of offenses which, because of their marked similarity in modus operandi to the charged offense, tend to corroborate evidence of the latter.

707 N.W.2d at 687–88 (quotations and citations omitted). The *Ness* court cautioned that when evaluating the relevance of *Spreigl* evidence, a district court should "look to the real purpose for which the evidence is offered, and ensure that that purpose is one of the permitted exceptions to the rule's general exclusion of other-acts evidence." *Id*. at 686 (quotation omitted). Thus, the common-scheme-or-plan exception is better understood as an exception within an exception that must be pegged to one of the permissible purposes

specifically enumerated in rule 404(b). The district court found that the proffered *Spreigl* evidence was relevant "to show [appellant]'s *intent* to act without consent." (Emphasis added.) In *State v. DeBaere*, the supreme court found that where a defendant asserts a consent defense in a sexual-assault case, "other-crime evidence show[ing] a pattern of similar aggressive sexual behavior by defendant against other women in the community . . . [is] highly relevant to the issue of consent." 356 N.W.2d 301, 305 (Minn. 1984). It is also directly relevant to appellant's theory of the case, because he asserted a consent defense.

Caselaw development regarding common-scheme-or-plan *Spreigl* evidence requires that in order to be relevant, the *Spreigl* incident must "have a *marked similarity* in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688 (quotation omitted). Appellant asserts that the assault on D.I. and the assault on J.K. do not meet this requirement. This assertion is contrary to the record, as demonstrated by the district court's recitation of the similarities:

> [T]he victims were young women, they were alone, they were—they both got into a vehicle. They were attacked to the point of injury. [The e]vents occurred within blocks of each other and within about three months of each other. After a beating, of some sort, the defendant would have penetrated the victim vaginally without a condom and ejaculated. And when the assault was complete, the victims either had to somehow escape the vehicle or exit the vehicle. . . . They were not returned to the place where they were picked up. Each of these victims was also asked for money at some point while inside the vehicle.

Additionally, both incidents occurred in a black Pontiac, and appellant claimed that both incidents amounted to a consensual exchange of sex for money.

Because the two incidents were markedly similar, we conclude that the *Spreigl* evidence was relevant to the prosecution's case, and that the fourth procedural safeguard in rule 404(b) was satisfied.

B. Requirement five: probative value outweighs prejudicial potential.

Appellant also asserts that the probative value of the *Spreigl* evidence was outweighed by the potential for unfair prejudice. The required analysis on this point includes, in relevant part, the prosecution's need for the evidence. *Ness*, 707 N.W.2d at 690. Appellant argues that there was more than enough other evidence to prove appellant's identity, that the state therefore did not need the *Spreigl* evidence to prove his involvement, and that the scant need for the *Spreigl* evidence was therefore clearly outweighed by its inherent prejudicial potential. This argument is without merit because the *Spreigl* evidence was not admitted to prove identity, which was not at issue. The district court admitted the evidence because it was relevant to show appellant's intent to act without consent, which directly relates to the consent defense asserted by appellant. The record does not include overwhelming non-*Spreigl* evidence on the question of consent. Additionally, appellant's counsel cross-examined D.I. about the points in her testimony that were suggestive of consent, including her "what are you going to give me for it" comment and the circumstances regarding her request that he use a condom. We conclude that the *Spreigl* evidence's probative value outweighed its prejudicial potential, satisfying the fifth procedural safeguard prescribed by rule 404(b).

C. Prejudicial effect on the verdict.

Finally, to show that he is entitled to a new trial, appellant would have to demonstrate that the *Spreigl* evidence was erroneously admitted, *and* that he was prejudiced by its admission. *Id*. at 685. Appellant makes vigorous and detailed arguments to support the conclusion that the *Spreigl* evidence likely had a substantial effect on the verdict. But because the district court did not abuse its discretion by deciding to admit the evidence, that decision was not erroneous. Because admission of the evidence was not error, we need not consider whether the evidence affected the verdict. We therefore hold that appellant is not entitled to a new trial based on admission of the *Spreigl* evidence.

II. The district court erred by adjudicating multiple convictions.

Appellant next argues that the district court erred by entering judgments of conviction on both counts even though they arose from a single sexual assault. We agree.

Apart from exceptions that do not apply here, Minn. Stat. § 609.04 (2012) provides that a defendant may be convicted of the crime charged or an included offense, but not both. The supreme court has held that section 609.04 bars multiple convictions for offenses charged under different sections of a statute even though neither charge was a lesser-included offense. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (citing *State v. Bowser*, 307 N.W.2d 778, 779 (Minn. 1981)). Appellant was charged with violating Minn. Stat. § 609.342, subds. 1(c) (count one: sexual assault under circumstances causing reasonable fear of harm), and 1(e)(i) (count two: sexual assault with injury). Neither count is a lesser-included offense in relation to the other, but

section 609.04, as interpreted in *LaTourelle* and *Bowser*, bars multiple convictions nonetheless.

In *LaTourelle*, the supreme court also instructed the district courts on how to proceed when a jury finds a defendant guilty of two crimes for the same act and section 609.04 bars adjudication of guilt on both verdicts:

> [T]he proper procedure to be followed by the [district] court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated and sentence imposed, with credit, of course, given for time already served on the vacated sentence.

343 N.W.2d at 284. This passage seems to equate a guilty verdict with a conviction, but the supreme court has made clear that the second "conviction" prohibited by law is the district court's adjudication of guilt, not the jury's guilty verdict. *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999).

During the sentencing hearing, the district court recited the guilty verdicts, stated that appellant was "standing convicted of said crime," and pronounced sentence. The district court did not clearly state whether it was adjudicating guilt on one or both verdicts, and the prosecutor requested clarification. The court's response did not clarify the issue, but we resolve the ambiguity by looking to the district court's written judgment of conviction. *See Pflepsen*, 590 N.W.2d at 767 (stating that appellate courts "look to the official judgment of conviction . . . as conclusive evidence of whether an offense has

been formally adjudicated"). That document unambiguously indicates that appellant was convicted on both counts. The warrant of commitment also indicates two convictions, but reflects a sentence for count one only.

We conclude that appellant was convicted of two crimes for a single act of criminal sexual conduct in violation of section 609.04. We therefore reverse appellant's second conviction and remand to the district court with direction to vacate the second conviction and issue a new warrant of commitment reflecting the change.

III. Appellant's pro se claims do not provide grounds for relief.

Appellant submitted a pro se supplemental brief asserting numerous specific claims of ineffective assistance of counsel and four claims of judicial error. We address each in turn.

A. Ineffective-assistance claims.

Appellant generally asserts that his appointed counsel did not conduct an adequate investigation. Specifically, he asserts that counsel did not request criminal-history reports for D.I. or J.K., failed to investigate the locations relevant to the case, did not investigate additional potential witnesses, failed to secure the clothing D.I. was wearing when she arrived at the hospital, did not adequately highlight inconsistencies in the testimony of D.I. and J.K., and did not call an "expert witness in reference to sexual assaults to further [appellant's] claims of innocence/consen[sual] sex." Several of these claims are plainly contradicted by the record. Others, to the extent they are consistent with the record, do not provide grounds for relief because we generally do not consider ineffective-assistance claims based on trial strategy, and the extent of counsel's

investigation is considered part of trial strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). Appellant's complaint that counsel did not call an expert witness lacks merit because whether D.I. consented to the sexual act is not properly the subject of expert testimony. Witnesses for each side testified on the issue of consent, and both sides had full opportunity for cross-examination.

Appellant also asserts that "counsel failed to request all of his discovery." The state argues that defense counsel did formally request discovery, citing an entry in the Register of Actions. But the entry cited is actually the *state's* formal discovery request. Nonetheless, this claim is without merit because (1) the extent to which defense counsel chooses to delve into the state's evidence is a function of counsel's trial-strategy discretion as to the scope of the investigation, and (2) there are no facts in the record to suggest that the state withheld information or that defense counsel was not reasonably diligent in conducting an investigation.

Finally, appellant argues that his counsel failed to impeach the *Spreigl* witness with evidence of an alleged Illinois conviction for "deceptive practice." This claim appears to assert that J.K. had been convicted of a crime of dishonesty that might have been used to impeach her, but it relies on facts not in the record. J.K. openly admitted on the stand that she is a prostitute, but prostitution is not a crime of dishonesty. Nothing in the record indicates that she has been convicted of any crime that would be admissible for impeachment purposes.

B. Judicial-error claims.[1]

Appellant argues that the district court erred by granting two continuances because the resulting delays violated his speedy-trial right. To determine whether the delay constitutes a denial of the speedy-trial right, we consider the length of the delay, the reason for it, whether defendant asserted his speedy-trial right, and whether defendant was prejudiced by the delay. *State v. DeRosier*, 695 N.W.2d 97, 109 (Minn. 2005).

Appellant demanded a speedy trial on August 17, 2012, but consented to a continuance requested by his attorney at the *Rasmussen* hearing. The trial, which had been scheduled to begin on October 8, was moved to November 5. That date is after the expiration of the 60-day speedy trial period, which expired on October 16. On November 2, the district court continued the trial due to a conflict with another trial on the prosecutor's calendar. Trial commenced on November 26.

Appellant's claim is waived as to the delay from October 8 until November 5, for which he gave consent. The second delay, from November 5 to November 26, amounted to 21 days, which is not insignificant, but not onerous either, in the context of the case. The district court had good cause to reschedule, given the conflict with another trial on the prosecutor's calendar. And most importantly, appellant points to no facts showing that he was prejudiced by the delay. We therefore conclude that the rescheduling of appellant's trial did not violate his speedy-trial right.

[1] We note that the first two claims appellant presents under the heading of "judicial error" are actually constitutional claims.

Appellant next asserts that the district court erred by rejecting his request for appointment of substitute counsel. Appellant did express dissatisfaction with his counsel at the *Rasmussen* hearing but he never requested appointment of substitute counsel. Even if his *Rasmussen*-hearing comments are construed as a request for substitute counsel, he waived the issue by acquiescing to the representation. *See State v. Munt*, 831 N.W.2d 569, 587 (Minn. 2013) (where defendant acquiesced in counsel's continued representation, district court did not err by not inquiring further into substitution request).

Appellant also argues that the district court erred by permitting the state to use his prior convictions for impeachment purposes. We review such claims under a "clear abuse of discretion" standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). Prior convictions are admissible for impeachment if the district court determines that their probative value outweighs their prejudicial effect. Minn. R. Evid. 609(a)(1). To make that determination, the district court should consider the factors laid out in *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978). This claim is without merit because (1) the district court completed a detailed analysis of the *Jones* factors before deciding to admit one out of the six prior convictions; (2) the district court excluded all priors older than ten years, in keeping with the time limit in Minn. R. Evid. 609(b); and (3) the one conviction the district court admitted occurred in 2005, well within rule 609's time limit. We conclude that the district court did not clearly abuse its discretion because the court completed the *Jones* analysis and its decision is consistent with the time limits in the rules of evidence.

Finally, appellant asserts that the district court erred in the calculation of his criminal-history score. Appellant did not raise this issue below, did not adequately brief

the issue on appeal, and has therefore waived it. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that an appellate court will generally not consider matters not raised before the district court); *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

Affirmed in part, reversed in part, and remanded.