STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1891

State of Minnesota,
Respondent,

vs.

Darrell Lewis Stewart,
Appellant.

Filed February 17, 2009
Reversed and remanded
Peterson, Judge

Chippewa County District Court
File No. 12-CR-06-876

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Lawrence Hammerling, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

PETERSON, Judge

In this appeal from his conviction of first-degree criminal sexual conduct, appellant argues that the district court erred by admitting evidence of his prior conviction of second-degree criminal sexual conduct. We reverse and remand.

FACTS

In late 2000, V.H. was nine years old and lived with her father. Her father had been friends with appellant Darrell Lewis Stewart for many years. On New Year's Eve in 2000, appellant and his children stopped at V.H.'s father's house and invited V.H. and her brother to a New Year's Eve party. V.H.'s brother was sick and did not go, but V.H. went to the party. Appellant's children stayed at the party overnight, but appellant told his children that he was taking V.H. home.

Appellant took V.H. home in his van. According to V.H., somewhere along the way, appellant stopped the van in the driveway of a farm. He told V.H. that she had to perform oral sex on him or he would "shove it in [her] mouth." He then went to the back seat and removed his pants. V.H. performed oral sex on appellant for about one-half hour before he ejaculated in her mouth. Appellant thanked V.H. and told her not to tell anybody about what happened.

In March 2001, V.H. began acting out in school, and Chippewa County Family Services became involved. Jennifer Dirksen was assigned as V.H.'s caseworker. In July 2002, Dirksen closed V.H.'s file. In 2003, V.H.'s father was arrested for methamphetamine possession and began serving four years in prison. While V.H.'s

father was in prison, V.H. began living with her stepmother. Because V.H. experienced difficulties living with her stepmother, Dirksen reopened V.H.'s case in 2003. V.H. was placed with Roland and Jean Sibert.

In July 2006, V.H. was again living with her stepmother and receiving respite care from the Siberts. At V.H.'s request, Roland Sibert took V.H. to meet with Dirksen. During their meeting, V.H. described the New Year's Eve 2000 incident. Dirksen reported the incident to the Chippewa County Sheriff's Department, and a sheriff's deputy interviewed V.H. Because of the time interval between the offense and V.H.'s report, no physical evidence was collected. V.H. had not told anybody about the incident before she told Dirksen. V.H. testified that she did not report the incident because she was afraid that her father would kill appellant.

Appellant was charged by complaint with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2000). The state filed notice of its intent to use appellant's prior conviction of second-degree criminal sexual conduct as *Spreigl* evidence. Appellant objected, but the district court granted the state's motion to use the *Spreigl* evidence.

A two-day trial occurred in May 2007. At the close of the state's case, the court admitted evidence of appellant's prior criminal-sexual-conduct conviction and read the following stipulation of facts regarding the conviction:

> First, [appellant] has the nickname Dee, D-e-e. The victim in the prior crime was a three and a half year old girl. The three and a half year old girl and her mother had been at [appellant's] residence the summer of 2004. The crime occurred in the summer of 2004. The crime occurred when

> [appellant] was alone with the three and a half year old girl. The girl stated that the event occurred in Dee's bedroom at Dee's residence. The girl told her mother and later a Corner House forensic interviewer that Dee had put his weenie, her word for penis, in her mouth and that Dee had made her touch his weenie while the two of them were in Dee's bedroom at Dee's house. The girl said that Dee had put weenie's on TV and Dee and she were watching TV where people were doing what she and Dee were doing.

These stipulated facts are the only information in the record regarding the prior conviction. Before reading the stipulated facts, the district court read a cautionary instruction to the effect that the evidence was being introduced for the limited purpose of helping the jury determine whether appellant committed the acts with which he was charged. Appellant did not testify. The jury found appellant guilty, and he was sentenced to a 146-month prison term. This appeal follows.

D E C I S I O N

We review the district court's decision to admit *Spreigl* evidence for abuse of discretion. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). An appellant who claims that the district court erred in admitting *Spreigl* "evidence bears the burden of showing the error and any resulting prejudice." *Id.* at 389. In determining whether there was prejudice, this court's "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." *State v. Clark*, 738 N.W.2d 316, 347 (Minn. 2007) (quotation omitted).

Minnesota courts generally exclude evidence "connecting a defendant with other crimes, except for purposes of impeachment . . . if he takes the stand on his own behalf."

State v. Spreigl, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). However, evidence of prior crimes may be admitted "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). "If it is unclear whether other crimes evidence is admissible, the benefit of the doubt should be given to the defendant and the evidence should be excluded." *State v. Courtney*, 696 N.W.2d 73, 83 (Minn. 2005).

Appellant argues that the district court erred in finding that the *Spreigl* evidence was relevant and material to the state's case and its probative value was not outweighed by its potential prejudice. *See State v. Asfeld*, 662 N.W.2d 534, 542 (Minn. 2003) (listing requirements for admission of *Spreigl* evidence). He contends that the *Spreigl* incident was not relevant because it lacked a marked similarity to the charged offense in time, place, and modus operandi and that the evidence of child sexual abuse was inherently prejudicial and the risk of prejudice outweighed any probative value of the evidence.

"In determining the relevancy and materiality of other crimes evidence, the trial court should consider the issues in the case, the reasons and need for the evidence, and whether there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in time, place, or modus operandi." *Courtney*, 696 N.W.2d at 83. The state offered the *Spreigl* evidence to show a common scheme or plan. "When determining whether past misconduct is admissible under the common scheme or plan exception, the misconduct must have a marked similarity in modus operandi to the charged offense." *Clark*, 738 N.W.2d at 346 (emphasis omitted) (quotation omitted). "The past crime does not have to be a 'signature' crime. . . . However, if the prior crime

is simply of the same generic type as the charged offense, it ordinarily should be excluded." *State v. Wright*, 719 N.W.2d 910, 917-918 (Minn. 2006) (quotations omitted).

In determining whether the evidence is probative, the supreme court has rejected an "independent need" requirement based on the strength of the prosecution's other evidence. *State v. Ness*, 707 N.W.2d 676, 689 (Minn. 2006). Instead, "[t]he prosecution's need for other-acts evidence should be addressed in balancing probative value against potential prejudice." *Id.* at 690.

The district court determined that, while the charged offense and the *Spreigl* offense were not "particularly similar" in terms of time or place, there was a marked similarity in modus operandi between the two offenses. It also determined that the evidence would "be used to refute the anticipated testimony of [appellant] that the alleged victim's statement in this case is a fabrication or a mistake in perception."

1. Relevance of the Spreigl Evidence

We agree with the district court that the *Spreigl* offense and the charged offense are not closely related in time or place. The acts were separated by three and one-half years, and the *Spreigl* offense occurred in the bedroom of appellant's home, while the charged offense occurred in appellant's van in an isolated rural area. But we disagree with the district court's determination that the two offenses have a marked similarity in modus operandi.

The district court found a marked similarity between the *Spreigl* offense and the charged offense based primarily on four similarities: (1) sexual penetration of pre-adolescent girls; (2) misconduct occurring when the girl was placed in appellant's care by

the parent, (3) misconduct occurring when appellant was alone with the girl, and (4) appellant required the girl to perform oral sex on him. The district court determined that the *Spreigl* evidence "will be offered to prove a common scheme or plan under which [appellant] would gain the trust of the young girl's parent to the point where the parent would entrust the girl's care to [appellant], and then [appellant] would isolate the girl and perform sexual acts with her."

The act of gaining the parents' trust is central to the district court's determination that the *Spreigl* evidence is relevant to proving that appellant engaged in a common scheme or plan, rather than simply committed the same generic type of crime twice. But the record does not support the determination that in either the charged offense or the *Spreigl* offense, appellant attempted to gain the trust of the victim's parent in order to commit the offense. In the charged offense, appellant and V.H.'s father had been friends since 1983, which was several years before V.H. was born. And on the night of the charged offense, appellant offered to take both V.H. and her brother to the party. These facts are inconsistent with a plan or scheme to gain the trust of V.H.'s father so that appellant could isolate V.H. and perform sexual acts with her. Similarly, although the limited available facts regarding the *Spreigl* offense show that the victim's mother had been at appellant's house, they do not demonstrate any effort by appellant to gain the mother's trust in order to be alone with the victim. Accordingly, the state did not show that the two offenses are markedly similar in modus operandi and, therefore, the *Spreigl* evidence is not relevant to proving a common scheme or plan.

2. Probative Value Weighed Against Risk of Unfair Prejudice

Appellant argues that the prejudicial effect of the *Spreigl* evidence outweighs its probative value. Even if *Spreigl* evidence is relevant, it is not admissible unless "the probative value of the evidence outweighs any potential for unfair prejudice." *State v. Doughman*, 384 N.W.2d 450, 454 (Minn. 1986) (quotation omitted). The danger of unfair prejudice arises from the risk that the jury will convict the defendant, not because the state "has proven him guilty of the crime charged, but because he is a likely person to do such acts." *State v. Nutt*, 381 N.W.2d 480, 485 (Minn. App. 1986) (quotation omitted), *review denied* (Minn. Mar. 27, 1986).

The district court determined that the probative value of the *Spreigl* evidence outweighed the risk of unfair prejudice because the state had a relatively weak case based only on V.H.'s word against appellant's and because it was anticipated that appellant would argue that V.H. was mistaken or lying. But the district court's assessment of the probative value of the *Spreigl* evidence was based on its determination that the evidence was relevant to proving a common scheme or plan. Because the state did not show that the *Spreigl* evidence was relevant to proving a common scheme or plan, the risk of unfair prejudice outweighed any probative value of the evidence. The potential prejudicial effect of the *Spreigl* evidence of a conviction for a crime involving sexual abuse of a child was great. *See Ness*, 707 N.W.2d at 689 (acknowledging "the inherently prejudicial nature" of allegations of sexual child abuse); *see also Nutt*, 381 N.W.2d at 485 (noting the "extreme prejudicial impact" of a previous act of sexual misconduct with young boys). And the evidence had no probative value because it did not show a common

scheme or plan. Therefore, we conclude that the district court abused its discretion when it admitted the *Spreigl* evidence.

3. Prejudice Resulting from Wrongfully Admitted Evidence

Appellant argues that "[a]ny doubt the jury had about the state's case against [appellant] most likely vanished once the jury learned that [appellant] previously was convicted of a sex offense involving a young girl." Respondent argues that any potential error was harmless because of the compelling nature of V.H.'s testimony and the district court's cautionary instructions to the jury regarding the use of the evidence. When we determine that the district court erred in admitting *Spreigl* evidence, we then examine the entire record to

> 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.

State v. Bolte, 530 N.W.2d 191, 198 (Minn. 1995) (quotation omitted).

We conclude that there is a reasonable possibility that the verdict might have been more favorable to appellant if the *Spreigl* evidence had not been admitted. V.H. was the only witness to the charged offense, and there was no corroborating physical evidence. More significantly, the defense attacked V.H.'s credibility based on the circumstances involving her decision to report the crime when she did and the fact that after the charged offense allegedly occurred, V.H. spent time alone with appellant without incident. The case hinged on V.H.'s credibility, and the *Spreigl* evidence bolstered V.H.'s credibility.

Furthermore, because the *Spreigl* evidence did not show a common scheme or plan, the district court's cautionary instruction that the *Spreigl* evidence was being introduced for the limited purpose of helping the jury determine whether appellant committed the acts with which he was charged was not sufficient to prevent the jury from misusing the evidence.

Reversed and remanded.