STATE OF MINNESOTA
IN COURT OF APPEALS
A11-900

State of Minnesota,
Respondent,

vs.

Cory L. Dieteman,
Appellant.

Filed April 16, 2012
Affirmed in part, reversed in part, and remanded
Harten, Judge*

Wabasha County District Court
File No. 79-CR-10-874

Lori A. Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

James C. Nordstrom, Wabasha County Attorney, Wabasha, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Worke, 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 and his sentence on two counts of fourth-degree criminal sexual conduct. Because the district court did not abuse its discretion by admitting certain evidence or by denying appellant's request to continue the trial, and because appellant was not deprived of his right to a proper verdict, his right to present a defense, or his right to a fair trial, we affirm his conviction. Because we agree with both parties that appellant should have been sentenced on only one count in that the two counts arose out of a single incident, we reverse the sentence and remand for resentencing.

FACTS

A.S., 14, and appellant Cory Dieteman, 38, both from Nebraska, developed a relationship through motocross racing. Appellant got A.S. onto a racing team sponsored by Dr. David Samani. In May 2009, Samani, appellant, two other male juveniles, A.S. and R.G., and a female juvenile, H.M., travelled from Lincoln, Nebraska to Millville, Minnesota, for a three-day motocross event. The cab of the truck in which they travelled had a driver's seat and a passenger's seat; behind the seats were some floor space, a bunk bed, a television, and a refrigerator.

A.S. testified that one night he and H.M. stayed up late, then went to the cab to watch a movie and go to sleep. They were on the bottom bunk; appellant was on the top bunk. Appellant repeatedly insisted that A.S. join him in the top bunk, and A.S. eventually did so. A.S. ended up lying between appellant and the wall. Appellant then

reached inside A.S.'s clothes and touched his penis for about ten minutes, despite A.S.'s requests that he stop. A.S. wanted to leave, but appellant, who is ten inches taller than A.S., trapped him by raising his leg so A.S. could not get out of the bunk. Eventually, A.S. turned his back to appellant and went to sleep. No one mentioned the incident the next morning, and A.S. did not tell his parents or anyone else about it.

H.M. testified that, on that night,[1] appellant told A.S. that he should not sleep next to H.M. in the bottom bunk; she did not know if anything happened while appellant and A.S. were in the top bunk. She also testified about an incident during the trip when appellant and A.S. were wrestling while H.M. watched from the bottom bunk. She saw appellant put his hand inside A.S's pants and heard A.S. tell appellant to take his hand away; appellant then claimed he was holding A.S.'s stomach, not his penis.

In July 2009, at another motocross meet in Millville, H.M. told her mother about the wrestling incident and about appellant's efforts to get A.S. to sleep with him. Her mother reported the incidents to A.S.'s mother, K.S., who reported it to the police in August 2009.

Appellant was charged with one count of engaging in sexual contact with an individual at least 13 but less than 16 years of age when appellant was more than 48 months older or in a position of authority, and one count of engaging in sexual contact by use of force or coercion. A jury convicted him on both counts, and he was sentenced on both counts. He challenges his conviction, arguing that the district court abused its discretion by (1) wrongfully receiving three types of inadmissible evidence; (2) denying a

[1] The testimony of A.S. and H.M. differed as to which of the three nights this was.

trial continuance; (3) depriving him of his right to a fair verdict by an erroneous jury instruction; (4) depriving him of his right to present a defense by the exclusion of evidence about his altercation with A.S.'s father; and (5) depriving him of his right to a fair trial by the collective trial errors.[2]

D E C I S I O N

1. Admissions of Evidence

Appellant challenges the admission of *Spreigl* evidence from two boys who also alleged that appellant had abused them; sexually explicit material from appellant's cellphone; and testimony from a licensed psychologist about the behaviors of male victims of sexual abuse. The standard of review for all three types of evidence is abuse of discretion. *See State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996) (*Spreigl* evidence); *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (general evidence in criminal cases); *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999) (expert testimony).

Spreigl Evidence

The state introduced evidence from two boys, B.W., then 13, who alleged that appellant had abused him when he was 10 or 11, and T.W., then 17, who alleged that appellant had abused him when he was 13 or 14. Appellant challenges this evidence on three grounds.

First, *Spreigl* evidence requires clear and convincing evidence that the defendant participated in the prior act. *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006).

[2] Appellant also challenges his sentence. Respondent State of Minnesota agrees that appellant was erroneously sentenced on both charges because they arose out of a single behavioral incident.

Appellant asserts that B.W.'s trial testimony that he (B.W.) was "kind of asleep and kind of not" and found it hard to remember what actually happened when appellant put his hand under B.W.'s clothes and touched him, was not "clear and convincing" evidence that appellant participated in a prior bad act with B.W.[3] But B.W.'s testimony of what happened was complete, detailed, and consistent. He testified that he was at appellant's house watching a movie around 10:00 or 11:00 p.m.; he was getting sleepy; he felt himself being picked up and set on appellant's lap; appellant touched first his upper body, then his waist, then his "privates" with his hand under B.W.'s jeans and boxers; appellant's hand remained there about five minutes and moved around; B.W. knew something was wrong but was too sleepy to do anything; and B.W. tried to twist appellant's hand off but appellant was holding him down. B.W.'s testimony constituted clear and convincing evidence that appellant had participated in sexual contact with him.

Second, *Spreigl* evidence requires that the state clearly categorize what the evidence is offered to prove, such as a common plan or scheme. *Ness*, 707 N.W.2d at 686-87.[4] Appellant argues that the testimony from B.W. and T.W. did not prove

---

[3] We note that appellant's objection pertains not to the district court's decision to admit B.W.'s testimony as *Spreigl* evidence but rather to B.W.'s testimony. Appellant did not challenge the admissibility of the testimony after it was given or seek a cautionary jury instruction. Thus, it is at least arguable that the admission of B.W.'s testimony should be reviewed under the plain-error standard rather than the abuse-of-discretion standard used for *Spreigl* evidence. *See* Minn. R. Crim. P. 31.02 (plain error standard); *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (holding that, before an appellate court reviews an unobjected-to error, the error must meet the three-prong test for plain error).

[4] Appellant relies on *Ness*, 707 N.W.2d at 689 (holding that admission of prior sexual misconduct was error). But *Ness* is distinguishable: in that case, the prior acts had occurred 35 years before the charged offense. *Id.* Here, the events with B.W., T.W., and A.S. all occurred within two or three years.

evidence of a common plan or scheme because those incidents were not markedly similar to the incident with A.S. But *Spreigl* evidence does not need to be identical to the crime charged, *id*. at 688, and the differences appellant relies on are not significant. All three incidents involved appellant putting his hand under the clothes and onto the penises of boys between 11 and 14. The incident with B.W. was markedly similar in that the victim was not allowed to escape or stop the touching, and the T.W. incident was markedly similar to the wrestling incident about which H.M. testified. Moreover, the incidents with B.W. and T.W. were "sufficiently relevant to the charged crime" involving A.S. to be admissible because appellant denied any sexual conduct with A.S. *See State v. Rucker*, 752 N.W.2d 538, 549-50 (Minn. App. 2008) (holding that district court may admit *Spreigl* evidence when defendant denies any sexual conduct occurred if the court is satisfied that the earlier crime is sufficiently relevant to the charged crime), *review denied* (Minn. 23 Sept. 2008).

Third, the probative value of *Spreigl* evidence must not be outweighed by its potential for unfair prejudice. *Ness*, 707 N.W.2d at 686. Appellant argues that the testimony of B.W. and T.W. was inadmissible because it was really offered to show that appellant had a propensity for inappropriately touching adolescent boys. *See* Minn. R. Evid. 404 (b) ("Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith."). But appellant completely denied A.S.'s account of the occurrences and argues that A.S.'s testimony lacked credibility. Testimony from B.W. and T.W. that appellant did to them something

very similar if not identical to what A.S. claimed appellant did to him would have been relevant to A.S.'s credibility. The *Spreigl* testimony had significant probative value.

Appellant also claims that the wrongfully admitted *Spreigl* evidence affected the verdict, thus entitling him to a new trial. *See State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009) ("To warrant a new trial, the erroneous admission of *Spreigl* evidence must create a reasonable possibility that the wrongfully admitted evidence affected the verdict.") (quotation omitted). Before it heard the *Spreigl* evidence, the jury was told that the evidence about acts in 2007 and 2008 in Nebraska was "being offered for the limited purpose of assisting [them] in determining whether [appellant] committed the acts [in Minnesota in 2009] with which he [was] charged . . . ." This was reiterated at the end of the trial, when the jury was told "not to convict [appellant] on the basis of any occurrences in 2007 and 2008." Jurors are presumed to follow a district court's instructions. *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998). Having twice been instructed that appellant was not to be convicted on the basis of the *Spreigl* testimony, the jury was unlikely to let that testimony significantly affect its verdict.

Text Message and Cellphone Evidence

The state offered evidence of sexually explicit text messages sent from appellant's cell phone to B.G., another adolescent boy. Appellant objected to this evidence. The district court admitted it, saying, "[a] 38-year-old man sending sexually suggestive stuff to a teenager certainly . . . is relevant to the question of . . . sexual grooming." Appellant argues that the evidence was unfairly prejudicial. But the fact that evidence is damaging does not mean that it is unfairly prejudicial: "unfair prejudice is evidence that persuades

by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted). Appellant does not show that this evidence gave the state an unfair advantage.

Finally, intent is an element of the crimes with which appellant was charged. *See* Minn. Stat. § 609.341, subd. 11(a) (2010) (sexual contact requires that an act be committed with sexual or aggressive intent).[5] A jury may infer intent from the totality of the circumstances. *Fardan*, 773 N.W.2d at 321. The cellphone evidence was part of the totality of the circumstances from which the jury could infer sexual intent or lack thereof in appellant's touching of A.S.

Expert Witness Testimony

Expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Minn. R. Evid. 702. The district court admitted the testimony of a licensed psychologist who had never met A.S. and who testified about the behaviors of sexually abused boys. Specifically, she testified that older children are more likely to delay disclosing sexual abuse than younger children; boys are less likely to disclose sexual abuse than girls; boys tend to feel that the abuse derogates their masculinity either because they could not fight off an abuser or because a male selected them for sexual abuse; disclosure of abuse may continue over a period of

[5] Appellant now argues that the evidence was not relevant because intent did not need to be proved, since it could be inferred from the manner of touching, but he did not raise this argument to the district court. It is therefore waived on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that appellate courts do not generally address issues not presented to and considered by the district court).

time because of an initial reluctance to disclose the more unpleasant aspects of the abuse and increasing comfort with the disclosure process; and adolescents who have an ongoing relationship with an abuser may not disclose because they do not want to disturb the relationship. This testimony could have been helpful to a jury in understanding why A.S. behaved as he did in not disclosing the abuse. Such testimony is "admissible in the proper exercise of discretion by the trial court," *State v. Obeta*, 796 N.W.2d 282, 291 (Minn. 2011) (quotation omitted), and numerous cases have upheld its admission. *See, e.g., State v. Sandberg*, 406 N.W.2d 506, 511 (Minn. 1987) (upholding admissibility of expert testimony concerning the behaviors of adolescent sexual assault victims); *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76-77 (Minn. App. 1998) (upholding admissibility of expert testimony regarding emotional and behavioral characteristics of sexually abused children).

Again, appellant claims that this evidence unfairly prejudiced him, but he does not show that it gave the state an unfair advantage or persuaded the jury by illegitimate means. *See Bell*, 719 N.W.2d at 641 (stating that unfair prejudice is evidence that persuades by illegitimate means and gives one party an unfair advantage).

There was no abuse of discretion in admitting the *Spreigl* evidence, the cellphone evidence, or the expert's testimony.

2. Denial of the Request for a Continuance

We review a refusal to grant a continuance for an abuse of discretion. *See, e.g.*, *State v. Stone*, 767 N.W.2d 735, 744 (Minn. App. 2009) ("Despite the Sixth Amendment's guaranty of compulsory process, it is not an abuse of discretion to refuse to

grant a continuance to locate a witness when doing so would not likely result in actually securing the witness's presence at trial."), *aff'd*, 784 N.W.2d 367 (Minn. 2010).

After appellant demanded a speedy trial, his trial was scheduled for 13 December 2010. He then withdrew the demand and asked for a continuance until mid-January so he could locate a witness in Nebraska. This continuance was granted, and trial was set for 10 January 2011. On 7 January 2011, appellant requested another continuance to ensure that all of his witnesses would be present for trial. He said he was unable to get service on Samani and that someone at the prosecutor's office had told R.G. not to appear for trial. Appellant claimed both Samani and R.G. were essential witnesses because they had been on the trip to Minnesota and could impeach the testimony of A.S. and H.M.

The district court granted appellant's request for an evidentiary hearing on his request for a continuance. At the hearing, the prosecutor explained that she had told Samani he would not need to testify for the state, but she had not told him he did not need to comply with the defense subpoena. The paralegal who spoke to R.G. likewise explained that she had told him he would not need to testify for the state but had not told him that he did not have to comply with the subpoena. The request for another continuance was denied.

In any event, because neither R.G. nor Samani was present when the alleged abuse occurred in the top bunk, neither of them could have testified that it did not happen. They could have testified only that they did not witness it; this would have been neutral evidence without a significant effect on the outcome of the trial.

The district court did not abuse its discretion in denying the continuance.

3. Jury Instructions

Because appellant did not object to the jury instructions, this court reviews them under the plain error standard. *Griller*, 583 N.W.2d at 740. This requires a showing that there was (1) an error (2) that was plain and (3) that affected the defendant's substantial rights. *Id.* An error is not plain if there is no binding precedent establishing the relevant law. *State v. Jones*, 753 N.W.2d 677, 688-89 (Minn. 2008). If the three *Griller* prongs are met, this court will grant relief only if the error seriously affected the "fairness, integrity, or public reputation of judicial proceedings." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (quotation omitted).

The district court instructed the jury that "each juror must agree with th[e] verdict. Your verdict must be unanimous." During its deliberations, the jury asked the district court two questions. After conferring with counsel, the district court told the jury:

> The questions, as I have them here, are as follows:
>
> Are we determining that two incidents happened here or just one incident? And then [the question] references one [incident] being en route . . . and the other one at the campground.
>
> And the second question which is related to the first says: Two verdicts. Number 1, force? Number 2, not force? Same incident or different incidents?
>
> Your verdict must be based on what you find the facts to be at the campground. That is the focus of the case, and you must apply the law . . . to the facts as you find them to be at the campground.
>
> . . . .
>
> Your verdict must be based on what you find to have happened at the campground. . . . [T]hose dates at the campground is what your verdict must be based on. It must be based on what you find the facts to be as they relate to that location and that timeframe.

Appellant argues that this instruction was plain error because it "would allow for conviction even if the jurors did not agree that the state proved one specific act beyond a reasonable doubt." But the jury was explicitly instructed to consider only what happened at the campground: appellant's acts elsewhere were irrelevant. If the jurors had disagreed over what happened at the campground, they could not have delivered a unanimous verdict of appellant's guilt.

Appellant relies on *State v. Stempf*, 627 N.W.2d 352, 357 (Minn. App. 2001) (concerning a defendant who was found to have possessed methamphetamine both in a truck and at his workplace but who was charged with only one count of possession). *Stempf* is distinguishable in two significant respects. First, in *Stempf*, the state "present[ed] two different factual scenarios as alternatives for proving a single element of a crime." *Id*. at 355. Here, the state explained in its opening statement that the two counts on which appellant was charged "do not relate to two separate acts. They are simply different ways of looking at the same act that occurred [at the campground.]" Second, the jury in *Stempf* did not ask whether it was to consider one or both acts, so some jurors might have convicted the defendant based on one incident and some based on another, thus violating his right to a unanimous verdict. *Id*. at 358. Here, the jury asked and was explicitly instructed that only one act was relevant and that it was to consider only that one act. *Stempf* does not compel reversal.

Appellant was not deprived of his right to a unanimous verdict.

4. Exclusion of Testimony on the Altercation

Appellant argues that the exclusion of cross–examination testimony of K.S., A.S.'s mother, about an altercation between appellant and A.S.'s father deprived appellant of his right to present a defense. The abuse of discretion standard applies to evidentiary rulings "even when it is claimed that the exclusion of evidence deprived the defendant of his constitutional right to present a complete defense." *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006).

Appellant testified that, at a motocross practice in Nebraska in August 2009 (three months after the abuse), A.S. had ridden his bike past appellant, causing appellant to crash. After the crash, A.S.'s father had begun a fight with appellant. Another person broke up the altercation, and before A.S.'s father left, he told appellant that "he wasn't finished with [appellant] and he was going to take care of [appellant] . . . ."

A.S.'s mother, K.S., was present when this occurred. In July 2009, K.S. had heard of H.M.'s account of appellant's abuse of A.S. from H.M.'s mother, but had not discussed it with A.S. or reported it to the police. Some days after the altercation, without discussing the abuse allegation with A.S., she reported the abuse to the police, although she had no first-hand knowledge of it. Appellant claimed that A.S. and his parents had a financial motive to accuse appellant of abuse because he had said he would sue them for the damages he sustained in the crash. Appellant wanted to cross-examine K.S. on the incident.

The district court sustained the state's objection to appellant's proposed cross-examination of K.S., citing the lack of a causal connection between the altercation at the

racetrack and K.S.'s reporting the sexual abuse of A.S. to the police.[6] Appellant argues that this prevented him from presenting a defense because he could not elicit K.S.'s possibly corroborating testimony as to her motive for telling the police about appellant's abuse of A.S. Appellant relies on *Penkaty*, 708 N.W.2d at 202 (holding that, when a defendant was aware of a victim's prior acts of violence, "police officers' testimony about [the victim's] prior acts of violence was admissible to show that [the defendant] was reasonably put in apprehension of serious bodily harm."). Although the defendant and his family had testified about the victim's prior acts of violence, the police officers' testimony was not cumulative because they had no personal stake in the case and they may have been more credible to the jury. *Id.* at 203. Appellant argues that K.S.'s testimony about the altercation and her subsequent alleging his abuse of A.S. to the police would have been more persuasive than his testimony. But K.S. had no first-hand knowledge of the abuse at the time she spoke to the police; she had been in Nebraska when the abuse occurred in Minnesota, she had never discussed it with A.S., and she heard of it from H.M.'s mother, who heard of it from H.M., two months afterwards.

Cross-examination testimony about an altercation in August in Nebraska would not have been relevant to a trial about earlier sexual abuse incidents in May in Minnesota. The district court did not abuse its discretion in excluding this testimony.

[6] Appellant's attorney said, "I think the Court's right on this one" and indicated that he would revisit the issue if he found new information that would support his theory.

5. Cumulative Errors

Finally, appellant argues that the cumulative effect of all these errors deprived him of a fair trial. But appellant has not successfully shown any error in the admission or exclusion of evidence, the instruction of the jury, or the denial of his second request for a continuance. We see no basis for reversing his conviction and remanding for a new trial. However, we reverse the sentence that the parties agree was incorrectly imposed on both counts and remand for sentencing on one count.

Affirmed in part, reversed in part, and remanded.