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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-933**

State of Minnesota,
Respondent,

vs.

Cory Daniel Bell,
Appellant.

**Filed June 4, 2012
Affirmed; motion granted
Stauber, Judge**

Sherburne County District Court
File No. 71CR092113

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Leah G. Emmans, Assistant County Attorney, Elk River, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaitas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

Appellant challenges his convictions of criminal sexual conduct, burglary, and assault, arguing that the district court abused its discretion by granting the state's motion

to admit *Spreigl* evidence and by denying appellant's motion to assert an alternative-perpetrator defense. He also moves to strike a document from respondent's brief.

Because we see no abuse of discretion, we affirm. Because the document in respondent's brief is not part of the district court's record, we grant the motion to strike.

FACTS

In July 2006, L.H. was sleeping in her bedroom while her five-year-old daughter slept in the next room. L.H. awoke in the early morning to find that a man was in her room and was holding a knife to her neck. He threatened to kill her if she said anything, penetrated her digitally and with his penis, forced her to perform oral sex, performed cunnilingus on her, and bit her breast. The man left when L.H. said that she was expecting a babysitter to arrive.

L.H. went to a hospital where a sexual-assault nurse took forensic samples, including a sample from her breast. L.H. had difficulty describing her assailant because it had been very dark in her room. She said he was in his 20's, was about 5'8" or 5'9", weighed about 180 pounds, had very short hair and little or no body hair, and smelled of a sweet type of alcohol. L.H. could not rule out the assailant being someone she knew. Police interviewed J.A., a friend of L.H. who had consensual sexual contact with her a year earlier. Nothing they found connected him to the incident in L.H.'s bedroom.

In June 2008, K.G. and his wife were sleeping in their bedroom in the house where they lived with their daughter and two sons. K.G. awoke to find a man standing over him, holding a knife to his throat. He jumped up and confronted the intruder who then attempted to escape. K.G. was cut by the knife. One of K.G.'s sons followed the man

out of the house and subdued him until police arrived. The man was identified as appellant Cory Daniel Bell. As a result of the incident with K.G., appellant was convicted of first-degree burglary and second-degree assault. After his conviction, appellant submitted a DNA sample that determined that he could not be excluded as a contributor to the saliva sample found on L.H.'s breast, although 99.999995% of the population could be excluded.

Appellant was then interviewed in connection with the L.H. incident, which he initially referred to as a rape. But when told of the DNA evidence linking him to the incident, appellant said that the incident was not a rape. He also asked when L.H. would be notified. Appellant did not assert any error in the DNA test or deny involvement in the incident.

Appellant moved pre-trial to assert an alternative-perpetrator defense, naming J.A. as the alternative perpetrator; the state moved to introduce *Spreigl* evidence. Appellant's motion was denied, and the state's motion was granted. A jury convicted appellant of first-degree criminal sexual conduct (sexual penetration, fear of imminent bodily harm), first-degree criminal sexual conduct (sexual penetration, use of a dangerous weapon), first-degree burglary, and second-degree assault.

He challenges his conviction, arguing that the district court abused its discretion by granting the state's motion to admit *Spreigl* evidence and by denying his motion to admit alternative-perpetrator evidence. Appellant also moves to strike a document not in the district court record from the state's brief.

DECISION

I. *Spreigl* evidence

An appellate court “reviews the district court’s decision to admit *Spreigl* evidence for an abuse of discretion.” *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). Appellant has the burden of proving that admitting the evidence was error and that the error resulted in prejudice. *See id.*

“The use of *Spreigl* evidence to show a common scheme or plan has been endorsed repeatedly. . . .” *Id.* at 687. For example, it has been used “to establish that the conduct on which the charged offense was based actually occurred or to refute the defendant’s contention that the victim’s testimony was a fabrication or a mistake in perception.” *Id.* at 688 (citing *State v. Wermerskirchen*, 497 N.W.2d 235, 241–42 (Minn. 1993)). “[T]he common scheme or plan exception includes evidence only of offenses that have a *marked similarity* in modus operandi to the charged offense.” *Id.* (quotation omitted). “[T]he closer the relationship between the other acts and the charged offense, in terms of time, place, or modus operandi, the greater [its] relevance and probative value.” *Id.*

Here, the two offenses were less than two years apart, the record shows that the charged offense occurred in July 2006 and the act on which the *Spreigl* evidence was based occurred in June 2008. Thus, they were close in time. *See id.* at 689 (noting that events 19 years earlier and 35 years earlier were not close in time). Both offenses occurred in the city of Elk River. Thus, they were close in proximity. Finally, as the district court found, “[b]oth incidents involve entry into a residence in the early morning

hours[.] [B]oth incidents involve a knife. Both incidents involve a crime of violence against an occupant of the residence. In both incidents, the perpetrator of the offense had consumed alcohol before the commission of the offense.” Moreover, both incidents did not merely “involve” a knife; the knife was held to the neck of a sleeping person. Thus, there was a similarity in modus operandi.

Appellant argues that the incidents were not *markedly* similar because one assault was physical, in that the victim was cut by the knife, while the other was sexual, and while the victim was threatened with a knife, she “was not harmed by any weapon.” But both offenses resulted in first-degree burglary convictions because appellant entered a dwelling with a weapon while others were present and committed a crime while in the building. *See* Minn. Stat. § 609.582, subd. 1(c) (2006) (providing that first-degree burglary is committed by a person who enters a residence without consent while someone who is not an accomplice is in the building and the person commits a crime while in the residence). Appellant also argues that the victims had little in common. But it is the similarity of the perpetrator’s acts, not of the victims, that is relevant.

Appellant also argues that the prior incident was unfairly prejudicial because, although it did not show a similar modus operandi, it indicated that he is “capable of extreme violence” and “painted [him] in an extremely unfavorable light.” But evidence of appellant’s treatment of L.H. alone would have shown the jury that he is capable of violent behavior and would have painted him in an unfavorable light. Moreover, nearly the entire trial was devoted to appellant’s acts with L.H.; the *Spreigl* evidence was brief and not sufficiently prominent to be “unfairly prejudicial.”

Further, the jury was twice instructed as to the purpose of the *Spreigl* evidence.

Before it heard the witness, the jury was instructed that:

[T]he next witness will be presenting testimony with respect to an occurrence from June 28, 2008.

Now, this evidence is being offered to you for the limited purpose of assisting you in determining whether [appellant] committed the acts with which [he] is charged in the complaint that's before us here today.

[Appellant] is not being tried for, and may not be convicted of, any offense other than the charged offenses. You're not to base your decision on the basis of any occurrence on June 28, 2008. To do so might result in unjust double punishment or consequences.

....
The State's purpose in presenting this evidence is to assist you in determining identification and to assist you in determining whether there might be a common scheme or plan.

In the final instructions, the jury was instructed:

[T]he State has introduced evidence of an occurrence on June 28, 2008, at Elk River, Minnesota. As I told you at the time this evidence was offered, it was admitted for the limited purpose of assisting you in determining whether [appellant] committed those acts with which [he] is charged in the complaint. The State has offered the evidence for purposes of identity and common scheme or plan. [Appellant] is not being tried for and may not be convicted of any offense other than the charged offenses. You are not to convict [appellant] on the basis of any occurrence on June 28, 2008, at Elk River, Minnesota. To do so might result in unjust double punishment.

Appellant's assertion that "no cautionary instruction could possibly have prevented the jury from convicting [appellant] based on the [*Spreigl*] incident alone" is unavailing.

The district court did not abuse its discretion by admitting the *Spreigl* evidence.

II. Alternative-perpetrator evidence

A district court evaluates alternative-perpetrator evidence “under the ordinary evidentiary rules as it would any other exculpatory evidence.” *State v. Jones*, 678 N.W.2d 1, 16 (Minn. 2004). “Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

“Alternative-perpetrator evidence is admissible if it has an inherent tendency to connect the alternative party with the commission of the crime.” *Jones*, 678 N.W.2d at 16. This “avoids the use of bare suspicion and safeguards the third person from indiscriminate use of past differences with the deceased.” *Id.* (quotation omitted). Appellant claims that the evidence he offered had this “inherent tendency” to connect J.A. with the crime. Specifically, he argues that J.A. had a sexual encounter with L.H. a year before the assault and they were still friends at the time of the assault; J.A. had previously been at L.H.’s house; J.A. met the physical description of the assailant given by L.H.; and J.A. had been drinking at the house of a friend who lived only 30 minutes away from L.H.’s house.

Even assuming all these statements are true, they fail to explain why appellant’s DNA was found on L.H. and why J.A.’s DNA was not found on her or at the scene. Many people would fit the very general description L.H. gave of her assailant. Appellant also argues that the involvement of J.A., a police officer, in a shooting incident earlier that evening had an “inherent tendency” to connect him with the assault of L.H., but he does not support or explain this argument.

The district court observed that “there is no evidence that [J.A.] was at or near [L.H.’s] residence on the date of the crime.” To challenge this observation, appellant relies on *State v. Ferguson*, 804 N.W.2d 586, 593 (Minn. 2011) (holding that “exclusion of the alternative perpetrator evidence denied [defendant] his constitutional right to present a complete defense and entitle[d] him to a new trial”). But *Ferguson* is factually distinguishable. There, a number of witnesses were able to provide detailed physical descriptions of the assailant and of his car, and both the alterative perpetrator and the car matched those descriptions. *Id.* at 592. The victim’s mother telephoned the police to say that she had heard the assailant was known as C.J., which were the initials of the alternative perpetrator. *Id.* at 588. The alternative perpetrator “was listed as C.J. in [the victim’s] cell phone contacts, he had a tattoo of the letters C.J. on his arm, and three days before the shooting, [the victim] spoke to him on the telephone. “ *Id.* at 591. Here, the physical description of the assailant came from only one source, the victim, and it was very general; there was no car description; no one connected the alternative perpetrator to the crime; and the alternative perpetrator’s last contact with the victim had been weeks earlier. Appellant’s reliance on *Ferguson* is misplaced.

The district court did not abuse its discretion by excluding alternative-perpetrator evidence.

III. Motion to strike

The record on appeal includes papers that were presented to the district court. Minn. R. Civ. App. P. 110.01. Appellant moves to strike a document in the state’s

appendix, and the state has not opposed the motion. Because the document was not presented to the district court and is not part of the record, we grant appellant's motion to strike.

Affirmed; motion granted.