STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0238

State of Minnesota,
Respondent,

vs.

Wayne Alan Bothun,
Appellant.

Filed January 9, 2023
Affirmed
Worke, Judge

Olmsted County District Court
File No. 55-CR-18-1022

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

James McGeeney, Doda McGeeney, Rochester, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges his criminal-sexual-conduct convictions, arguing that the district court erroneously admitted *Spreigl* evidence. We affirm.

FACTS

Respondent State of Minnesota charged appellant Wayne Alan Bothun with first- and second-degree criminal sexual conduct for sexually abusing A.R.C. several times from November 2017 to February 2018.

A.R.C. was four years old at the time of the offenses and is the daughter of Bothun's former neighbor and friend, A.R. Bothun and A.R. met years before A.R.C.'s birth as neighbors at an apartment complex. A.R. came to trust Bothun as a "good friend[]." She allowed Bothun to help take care of and babysit her children and chose Bothun as A.R.C.'s godfather. A.R.C. knew Bothun as "Uncle Wayne."

Bothun would often babysit A.R.C. at his house where he lived alone. Bothun would often bathe A.R.C. during those times, which A.R. knew about and consented to. In February 2018, A.R.C. disclosed to A.R. that Bothun came into the bathtub with her "in the bare" and that he committed a sexual act on her in his bed.

During a subsequent CornerHouse interview, A.R.C. indicated that she and Bothun would sometimes sit in the bathtub without clothes and that their genitals sometimes touched while in the bathtub. A.R.C. also described how Bothun committed other sexual acts on her on his bed and couch.

Police searched Bothun's residence and found an SD card in a tablet. On the SD card, law enforcement found 28 files, each containing a "child erotica"[1] short story. The state moved in limine to admit the full text from six of the stories. The texts vividly describe sexual interactions between male adults and female children. In each story, the interactions occur through the adult male's relationship to the child as the child's uncle, neighbor, or babysitter, or as a friend of the child's babysitter.

The district court ruled that the state could elicit testimony about the titles of and introductions to the six stories, the length of each story, the age of the female child in each story, and the relationship between the adult male and female child in each story. The district court ruled the testimony admissible "to show [Bothun]'s common scheme or plan and to rebut claims that the alleged victim fabricated the events."

A.R. and A.R.C. testified at Bothun's jury trial in September 2021. A.R. testified about her relationship with Bothun, her knowledge of Bothun's time with A.R.C. and of Bothun's home, and A.R.C.'s disclosures to her. A.R.C. testified that Bothun "would touch [her] with his tongue" "[w]here [she] pee[s]." But she did not remember participating in the CornerHouse interview. And she testified that she and Bothun would sit in the bathtub naked but that she did not remember any bodily contact in the bathtub beyond their feet touching. The CornerHouse interviewer testified that when A.R.C. met with the

[1] In this context, "child erotica" refers to literature "describing adults having . . . sexual relations with children."

interviewer and the prosecutor several weeks before trial, A.R.C. did not remember any sexual contact with Bothun.

The state presented the video of A.R.C.'s CornerHouse interview to the jury. The state also elicited the testimony about the six child-erotica stories from a law-enforcement witness. That witness testified on cross-examination that the files containing the stories were created and last accessed at various times during a period of more than one year from 2010 to 2011.

Bothun testified and denied interacting with A.R.C. in a sexual way. He also denied knowing about the child-erotica stories on the SD card before this case arose.

The jury found Bothun guilty as charged. The district court sentenced him to 172 months in prison. This appeal followed.

DECISION

Bothun argues that the district court erroneously admitted the child-erotica evidence as *Spreigl* evidence. "*Spreigl* evidence" refers to evidence of a criminal defendant's other bad acts offered to prove something other than the defendant's conformity with such behavior. *State v. Tomlinson*, 938 N.W.2d 279, 286 (Minn. App. 2019), *rev. denied* (Minn. Feb. 26, 2020). We review the admission of *Spreigl* evidence for an abuse of discretion. *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016). Bothun has the burden to show that the district court erred and resulting prejudice. *See id.* at 261-62.

A five-step procedure must be followed to properly admit *Spreigl* evidence:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing

> evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 685-86 (Minn. 2006). Bothun challenges the admission of the *Spreigl* evidence on steps two through five. We address each in turn.

Notice of intended use

Bothun argues that the district court erred by admitting the *Spreigl* evidence to show a "common scheme or plan" when the state did not explicitly assert that theory of relevance. "[T]he underlying purpose of the [*Spreigl*] notice is to avoid surprise to the defendant by giving him time to prepare a defense to the charges." *State v. Riddley*, 776 N.W.2d 419, 427 (Minn. 2009) (quotation omitted). Notice defects do not require reversal when there was "substantial compliance with the notice requirements and lack of prejudice to the defendant." *State v. Bolte*, 530 N.W.2d 191, 199 (Minn. 1995).

Here, there was substantial compliance with the *Spreigl* notice requirement. The record shows that Bothun had notice of the state's intent to offer the child-erotica evidence to show "motive" no later than December 2018 when the state submitted its first *Spreigl* motion. The district court granted that motion. In March 2020, the state moved to expand the admitted child-erotica evidence to show, among other things, Bothun's "modus operandi of his clandestine sexual abuse" of A.R.C., and "to rebut any" claim that A.R.C. fabricated the allegations. In late May 2021, the district court clarified that the *Spreigl* evidence was admissible to show whether Bothun had a scheme or plan. Bothun's trial did not begin until September 8, 2021.

For just under three years before Bothun's trial, he had notice of the state's intent to offer the *Spreigl* evidence. He had several months to specifically prepare to address a common-scheme theory. Bothun was "aware of the facts" necessary to address the *Spreigl* evidence for a sufficient period before trial. *Riddley*, 776 N.W.2d at 427-28; *Bolte*, 530 N.W.2d at 199. In any event, he only asserted at trial that he did not know the child-erotica stories were on his SD card. He did not address the purpose of the *Spreigl* evidence at trial. Because Bothun has not shown how any notice defect "adversely affected" his preparation or strategy, we conclude that any notice defect was harmless. *Riddley*, 776 N.W.2d at 427; *State v. Bell*, 719 N.W.2d 635, 641-42 (Minn. 2006) (explaining that procedural defects when admitting evidence generally are implicitly harmless if the evidence is otherwise admissible).

Clear and convincing evidence

Bothun next claims that the evidence was insufficient to find by clear and convincing evidence that he committed the *Spreigl* acts.

Evidence is clear and convincing "when it is highly probable that the facts sought to be admitted are truthful." *Ness*, 707 N.W.2d at 686. Here, police found the SD card containing the child-erotica stories in a tablet that Bothun admitted he bought "before 2009." The tablet was in Bothun's personal office at his home where he lived alone. The SD card's "formatted name" was "WBOTHUN-1GB." And besides the child-erotica stories, the SD card contained several of Bothun's financial documents, Bothun's resume, and documents from Bothun's divorce. Based on the evidence at trial, the district court could permissibly find it highly probable that Bothun possessed the child-erotica stories at

the time of the offenses. The district court did not abuse its discretion by ruling this sufficient to admit the evidence.

Relevance and materiality

Bothun contends that the *Spreigl* evidence was not relevant and material to show a common scheme or plan and rebut claims that the victim fabricated the allegations. Bothun claims that because the *Spreigl* acts did not involve him committing child sexual abuse, the *Spreigl* evidence did not fit under a "common scheme or plan" theory of relevance.

To assess whether *Spreigl* evidence is relevant and material to the state's case, the district court must "identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *Id.*; Minn. R. Evid. 401 (defining "relevant evidence" as evidence tending to make more or less probable the existence of any consequential fact). "This entails isolating the consequential fact for which the evidence is offered, and then determining the relationship of the offered evidence to that fact and the relationship of the consequential fact to the disputed issues in the case." *Ness*, 707 N.W.2d at 686.

Evidence beyond the alleged victim's accusations is often scarce in cases of child sexual abuse. *State v. Wermerskirchen*, 497 N.W.2d 235, 240-41 (Minn. 1993). Thus, *Spreigl* evidence that shows "a design (not a disposition)" to commit the charged conduct is broadly allowed in child-sexual-abuse cases. *Id.* at 240-42. Put differently, such evidence "prove[s] [a] common scheme or plan and . . . thereby prove[s] the . . . doing of the act charged"— also called the "corpus delicti"—disproving the theory that the charged conduct is "a fabrication or a mistake in perception by the victim." *Id.* (quotation omitted). Hence, admitting common-scheme evidence is "proper at least whe[n] the corpus delicti is

truly in issue and . . . the other [act] is sufficiently relevant to the charged crime." *Id.* at 242.

Here, the issue was whether the child sexual abuse occurred—that is, corpus delicti. The *Spreigl* evidence tended to show Bothun's "design" to commit the child sexual abuse by showing that Bothun fantasized about sexually abusing children in the contexts described in the stories, which are like the context in which the jury found he sexually abused A.R.C. *Id.* at 240, 242; *State v. Chouinard*, No. A13-1910, 2014 WL 7011115, at *1-3 (Minn. App. Dec. 15, 2014) (affirming admission of defendant's statement that he wanted to have sex with a 13-year-old girl as common-scheme evidence because it showed his "extant pedophilic stimulation and his express desire to act on that stimulation at some point"), *rev. denied* (Minn. March 25, 2015)[2]; *United States v. Vosburgh*, 602 F.3d 512, 519-22, 537-38 (3rd Cir. 2010) (affirming admission of child-erotica pictures found on defendant's hard drive because they "suggested that [he] harbored a sexual interest in children"). Therefore, the *Spreigl* evidence tended to prove corpus delicti, rebutting the claim that A.R.C. fabricated the allegations.

Although possessing child-erotica stories in and of itself is not alone criminal, we do not understand *Wermerskirchen* as limited to criminal *Spreigl* acts. Minn. R. Evid. 404(b) (governing "[e]vidence of another crime, *wrong*, *or act*" (emphasis added)); *Ness*, 707 N.W.2d at 688 (noting that *Wermerskirchen* "held that *other-acts* evidence" is

[2] Nonprecedential opinions are not binding but may be persuasive. Minn. R. Civ. App. P. 136.01, subd. 1(c).

admissible under common-scheme doctrine (emphasis added)). We therefore conclude that the child-erotica evidence was relevant as common-scheme evidence.

But for *Spreigl* evidence to be both relevant and material, there must be a "sufficiently close relationship between the charged offense and the *Spreigl* [act] in time, place, or modus operandi."[3] *Ture v. State*, 681 N.W.2d 9, 15 (Minn. 2004) (quotation omitted). "The closer the relationship between the events, the greater the relevance of the evidence and the lesser the likelihood it will be used for an improper purpose." *Id.* Moreover, common-scheme evidence must meet a heightened standard of relevance—the *Spreigl* act "must have a *marked similarity* in modus operandi to the charged offense." *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007) (quotation omitted).

Here, given the "centrality" of the corpus-delicti issue, the approximately six- to seven-year time gap between the *Spreigl* acts and the charged conduct fell well within the temporal proximity that the supreme court has held sufficient for admission. *Blom*, 682 N.W.2d at 612 (holding 16-year-old *Spreigl* act sufficiently relevant because of its similarity to the charged offense when defendant spent three of those years incarcerated and *Spreigl* evidence went to central issue). Time considerations favored admission.

Place considerations also favored admission. Bothun abused A.R.C. in his Rochester home where police found the SD card containing the child-erotica stories. Before that, Bothun met A.R. as a neighbor elsewhere in Rochester. Bothun later moved

[3] "Modus operandi" in this context is not to be confused with that term's use in cases involving so-called "'signature' crime[s]." *See State v. Blom*, 682 N.W.2d 578, 612 (Minn. 2004).

to the house in Rochester where he abused A.R.C. blocks away from where she had recently moved with her mother and siblings. *State v. Landin*, 472 N.W.2d 854, 860 (Minn. 1991) (holding charged murder and another murder sufficiently related in part because "both incidents took place in the Twin Cities").

The *Spreigl* acts also bore marked similarities to the charged acts. The child-erotica stories involved an adult male sexually abusing a female child. Several of the children in the stories are the same or close to the same age as A.R.C. when Bothun abused her. The stories involved the adult male abusing a position of trust with the child—including as an uncle, neighbor, babysitter, or friend of the child's babysitter. Bothun did the same as A.R.'s friend and neighbor and thereby A.R.C.'s godfather, neighbor, and babysitter known as "Uncle Wayne." *Tomlinson*, 938 N.W.2d at 287 (observing "marked similarities" in modus operandi of defendant's charged conduct and *Spreigl* acts in part because "victims were all young girls" and defendant "gained access to them through a relationship with their parent or grandparent").

We conclude that the *Spreigl* evidence was sufficiently relevant and material for admission as common-scheme evidence to prove corpus delicti and rebut the theory that A.R.C. fabricated the allegations.[4]

[4] The district court also ruled the *Spreigl* evidence admissible to show motive, which Bothun argues was error. Any error in admitting the *Spreigl* evidence as proof of motive was harmless because the jury was not instructed that it could consider the evidence for that purpose. *Cf. State v. Frisinger*, 484 N.W.2d 27, 31 (Minn. 1992) (holding district court's failure to give jury cautionary instruction on proper use of *Spreigl* evidence harmless when "the prosecutor did not suggest that the jury use the other-crime evidence for an improper purpose."). Additionally, the district court ruled that the *Spreigl* evidence could show intent if Bothun testified that he touched A.R.C.'s intimate parts while bathing

Probative value versus potential for unfair prejudice

Bothun argues that even if the *Spreigl* evidence was relevant and material, its potential for unfair prejudice outweighed its probative value.

"[P]rejudice" in this context does not mean the damage to a party's case "from the legitimate probative force of the evidence." *State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015) (quotation omitted). "[I]t refers to the unfair advantage" resulting from the evidence's capacity "to persuade by illegitimate means." *Id.* (quotation omitted).

Here, the child-erotica evidence "complete[d] the picture" of Bothun by showing that he fantasized about committing child sexual abuse and how he would accomplish it. *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005) (quotation omitted). This tended to legitimately establish that the sexual abuse occurred and in turn rebut the claim that A.R.C. fabricated the allegations. Without the *Spreigl* evidence, the state's case rested on the CornerHouse interview video, A.R.C.'s forgetful and undetailed testimony, and A.R.'s minimally corroborative testimony. Given the proper purpose of the *Spreigl* evidence and the state's "need" for the evidence, we conclude that the probative value of the *Spreigl* evidence was high. *Ness*, 707 N.W.2d at 689-90.

In contrast, the potential for unfair prejudice was relatively low. The *Spreigl* evidence here did not involve Bothun committing child sexual abuse—only possessing writings suggesting that he fantasized about committing child sexual abuse. The state first

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her. But Bothun never admitted that, and the jury also was never instructed that it could consider the *Spreigl* evidence as proof of intent. Admitting the *Spreigl* evidence for any improper purpose was harmless.

moved to admit the titles of 28 stories from the SD card before asking the district court to admit the full text of six stories. Yet, the district court only admitted testimony describing the titles of, introductions to, and relevant details of the six stories.

The district court also instructed the jury twice that it could consider the *Spreigl* evidence only to determine whether Bothun committed the charged acts and not as proof of Bothun's character or that he acted in conformity with that character. The court admonished the jury that convicting Bothun of anything other than the charged offenses "might result in unjust double punishment." These cautionary instructions reduced the risk of unfair prejudice. *See Tomlinson*, 938 N.W.2d at 287-88 (noting that cautionary instructions reduce risk of unfair prejudice); *State v. Fardan*, 773 N.W.2d 303, 317 (Minn. 2009) (stating that juries presumably follow instructions). The court further reduced the risk of unfair prejudice by informing the jury before closing argument that "[b]eing in possession of the[] stories is not a crime." *Vosburgh*, 602 F.3d at 538 (explaining that court minimized risk of unfair prejudice by telling jury that defendant was not on trial for possessing child-erotica pictures and that the pictures were not illegal). The prosecutor reminded the jury of this during his rebuttal—noting that the First Amendment protects free speech—and reiterated the district court's other *Spreigl* instructions. He also correctly told the jury that it could specifically consider the *Spreigl* evidence to determine whether A.R.C. was "fabricating" the allegations.

We conclude that the risk of unfair prejudice from the *Spreigl* evidence did not outweigh the evidence's probative value. As a result, the district court did not abuse its discretion by admitting the evidence.

Affirmed.