STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2390

State of Minnesota,
Respondent,

vs.

Nathaniel Black,
Appellant.

Filed April 29, 2008
Affirmed in part, reversed in part, and remanded
Schellhas, Judge

Hennepin County District Court
File No. 05070255

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, 525 Portland Avenue, Suite 1210, Minneapolis, MN 55415 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Schellhas, Judge; and Crippen, 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

SCHELLHAS, Judge

Appellant challenges his convictions of two counts of first-degree criminal sexual conduct, arguing that the district court erroneously (1) admitted *Spreigl* evidence, (2) refused to instruct the jury as to the purpose of the *Spreigl* evidence, (3) admitted expert testimony, and (4) admitted evidence of appellant's prior convictions for sexual misconduct for impeachment purposes. Appellant also challenges his aggravated sentence, arguing that it was based on judicial fact-finding in violation of *Blakely v. Washington*. Because we conclude that the *Spreigl* evidence was admissible, the district court's refusal to instruct the jury about the purpose of the *Spreigl* evidence was not error, the admission of certain expert testimony was harmless error, and the admission of appellant's prior convictions for sexual misconduct for impeachment purposes was not error, we affirm appellant's conviction. But because we hold that the district court erred in its judicial fact-finding of the aggravating factor in violation of *Blakely v. Washington*, we reverse appellant's sentence and remand for resentencing.

FACTS

On October 30, 2005, appellant Nathaniel Black sexually assaulted a woman, S.D., with whom he had been living for 18 months. On November 1, 2005, S.D. called 911 from a gas-station pay phone and told the dispatcher that she was trying to get her children out of the house because appellant had engaged in nonconsensual anal sex with her and she felt threatened by him. When the police arrived, S.D. told them that appellant had anally raped her, and they arrested him and transported him to the police station.

S.D. followed the police in her own car. At the police station, S.D. again told police that appellant had anally raped her and that she was injured. S.D. was transported to a medical center where she was examined by Nurse Practitioner Jean Peters, a certified sexual-assault nurse examiner for adolescents and adults. Appellant was charged with two counts of criminal sexual conduct in the first degree, pursuant to Minn. Stat. § 609.342, subds. 1(c) (victim had reasonable fear of imminent great bodily harm (Count 1)), 1(e)(i) (2004) (personal injury to victim (Count 2)). The jury convicted appellant on both counts.

At trial, the state offered evidence of two *Spreigl* incidents to refute appellant's claims that S.D.'s testimony was a "fabrication or mistake in perception." The first incident occurred in 1994, when appellant engaged in nonconsensual sexual intercourse with a 15-year-old female acquaintance. As a result of the incident, appellant was charged with first- and third-degree criminal sexual conduct. Pursuant to a plea agreement, appellant was convicted of fourth-degree criminal sexual conduct. The second incident occurred in 1996, when appellant repeatedly engaged in sexual relations with a 15-year-old prostitute with whom he lived. The victim testified that she gave appellant part of her earnings and that he would get angry and beat her if she did not give him the money. She also testified that appellant knew she was only 15 when he engaged in sex with her. As a result of this conduct, appellant was charged with first- and third-degree criminal sexual conduct and receiving profit derived from prostitution and was convicted of all three charges. Appellant testified at trial that he was incarcerated from

February 1996 to September 1996, November 1996 to April 2002, and February 2005 to April 2005.

The district court determined that the evidence of appellant's past sexual misconduct was clear and convincing, appellant participated in the *Spreigl* incidents, the evidence was important to the state's case, and the probative value of the evidence was not outweighed by its potential for unfair prejudice. Over appellant's objection, the district court allowed the state to introduce the *Spreigl* evidence.

Appellant requested that the jury be instructed about the specific purpose for which the evidence of the 1994 and 1996 *Spreigl* incidents was admitted. During one conference with the district court, appellant's counsel said, "I think . . . you should say that it's offered to show common scheme or plan," but his request was rejected. At a later conference, appellant's attorney said

> *State v. Ness* says that the state has to have a very specific reason and not just a vague reason why the *Spreigl's* admissible. So I think what goes along with that, is you have to tell the jury that it's being offered for a specific reason . . . . So I think . . . a very specific exception should be told to the jury.

The district court denied the request. Ultimately, without giving the particular instruction requested by appellant, the district court instructed the jury, per 10 *Minnesota Practice* CRIMJIG 2.01 (2004), that the *Spreigl* evidence could not be used to prove appellant's character and that the evidence was offered for the limited purpose of assisting the jury in determining whether appellant committed the charged crime. Appellant's counsel argued

in closing that the evidence could not be used to prove appellant's character, as did the prosecutor, but neither stated the specific purpose for which it could be used.

The district court also allowed the state to use appellant's prior convictions for sexual misconduct to impeach him.

At trial, Nurse Peters testified that during her examination of S.D., she observed recent bruises on the tops of S.D.'s thighs and fissures or lacerations in the anal area. Based on her eight years of experience as a sexual-assault nurse examiner and nurse practitioner, Nurse Peters testified that she had never seen these kinds of injuries to the rectal area after consensual anal sex. Over appellant's objection, the prosecutor asked Nurse Peters: "Given what [S.D.] told you happened to her, is it your opinion that this was consensual or nonconsensual penetration?" Nurse Peters answered that in her opinion, the anal sex was nonconsensual.

After the jury returned its guilty verdicts on both counts, the district court granted the state's request to seek an upward departure from appellant's presumptive sentence under the Minnesota Sentencing Guidelines over appellant's objection. Pursuant to *Blakely v. Washington*, the same jury was reconvened as a sentencing jury and was charged with determining whether sufficient aggravating factors existed to justify an upward-durational departure in appellant's sentence. One of the aggravating factors the jury was asked to determine was whether children were present in the home. S.D. testified that she knew her four children, ranging in age from 13 to six years old, were in the house on the night appellant assaulted her. The prosecutor argued to the jury that "the question is very specific, were children present in the house, not did the children hear, not

did the children see, not were they in the same room as the rape?" Based in part on the jury's finding that there were children in the house at the time of the offense, the district court sentenced appellant to a mandatory 30-year prison sentence under Minn. Stat. § 609.109, subd. 4(a) (Supp. 2005).

D E C I S I O N

Admission of Spreigl Evidence

Evidence of past crimes or bad acts, known as *Spreigl* evidence, is not admissible to prove the character of a person or that the person acted in conformity with that character in committing an offense. Minn. R. Evid. 404(b); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). But *Spreigl* evidence may be admissible to prove factors such as motive, intent, identity, knowledge, and common scheme or plan. *Kennedy*, 585 N.W.2d at 389. *Spreigl* evidence may also be admitted to show whether the conduct on which the charge was based actually occurred or was "a fabrication or a mistake in perception by the victim." *State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993). This court reviews a district court's decision to admit *Spreigl* evidence under an abuse-of-discretion standard. *State v. Blom*, 682 N.W.2d 578, 611 (Minn. 2004). Appellant bears the burden of showing the error and any prejudice resulting from it. *Kennedy*, 585 N.W.2d at 385. When a district court errs in introducing evidence of prior bad acts, a reviewing court will not reverse unless there is a reasonable possibility that the evidence significantly affected the verdict. *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995).

Before a district court can admit *Spreigl* evidence: (1) the prosecutor must give notice of its intent to admit the evidence consistent with the rules of criminal procedure;

(2) the prosecutor must clearly indicate what the evidence will be offered to prove; (3) the defendant's involvement in the act must be proven by clear and convincing evidence; (4) the evidence must be relevant to the prosecutor's case; and (5) the probative value of the evidence must not be outweighed by its potential for unfair prejudice to the defendant. *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). Only after it determines that the evidence is relevant for a precise, allowable purpose should a court apply the fifth prong's balancing test. *Id.* Appellant argues that the *Spreigl* evidence stemming from both the 1994 and 1996 incidents was not relevant, and that *Spreigl* evidence from the 1996 incident was unfairly prejudicial to his defense.

In this case, the state offered the *Spreigl* evidence to attack appellant's theory of defense that the victim's testimony was a "fabrication or mistake in perception." Use of *Spreigl* evidence in the form of evidence of prior sexual misconduct has frequently been upheld where it has been offered to resolve whether a defendant has taken sexual liberties with the victim, or whether the victim misinterpreted or fabricated the defendant's conduct. *See, e.g., State v. Shuffler*, 254 N.W.2d 75, 75 (Minn. 1977); *State v. Cichon*, 458 N.W.2d 730, 734-35 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990); *State v. McCoy*, 400 N.W.2d 807, 810 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). *Spreigl* evidence of appellant's past sexual misconduct is relevant to this purpose.

Appellant argues that the 1994 incident was so remote in time as to be irrelevant and impossible to defend against. In order for *Spreigl* evidence to be relevant, it must be proximate in time to the charged offense. *Kennedy*, 585 N.W.2d at 390-91. Minnesota courts have not firmly established how old an act must be before it is inadmissibly

remote, and *Spreigl* evidence as old as 19 years has been held admissible. *Ness*, 707 N.W.2d at 688-89. But even *Spreigl* evidence that is remote in time may be relevant if: (1) the defendant was incarcerated, and thus unable to commit any other crimes for a significant portion of that time; (2) intervening acts show a repeating or ongoing pattern of very similar conduct; or (3) the defendant was convicted of a crime based on that act, thus reducing the prejudice of having to defend against claims of that act later in time. *Id.* at 689. As to incarceration, a court may, for the purposes of its analysis, subtract the length of incarceration from the time that has passed since the charged offense. *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007). Appellant was incarcerated for a total of approximately six years from 1994 to the time of the charged offense and was convicted of criminal sexual conduct a second time in 1996. The district court properly considered these factors in determining that the 1994 incident was relevant despite the time gap between it and the charged offenses.

Appellant also argues that the 1996 incident was not "markedly similar" to the charged offense, because it did not involve nonconsensual sex and because it involved a minor instead of an adult. "*Spreigl* evidence need not be identical in every way to the charged crime." *Kennedy*, 585 N.W.2d at 391. Rather, it need only be sufficiently related to the charged offense in "time, place, or modus operandi." *Id.* at 390. This court has held that evidence of past sexual misconduct need not be of the same type as the charged offense in order to be relevant. *State v. Boehl*, 697 N.W.2d 215, 219 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005). In both the 1996 incident and the current incident, appellant physically abused women with whom he had personal

relationships. We hold that the district court did not err in determining that the 1996 *Spreigl* evidence was relevant.

Appellant further argues that the evidence from the 1996 incident portrayed him as a "pimp" to the 15-year-old and was therefore unfairly prejudicial. The balancing test for admissibility of prejudicial *Spreigl* evidence differs from the test for admissibility of prejudicial evidence in general under Minn. R. Evid. 403. *Ness*, 707 N.W.2d at 685-86. The five-part *Spreigl* test requires exclusion of evidence where the potential for unfair prejudice outweighs the probative value of the evidence; the test under rule 403 excludes evidence where the potential for unfair prejudice *substantially* outweighs the probative value. *Id.* at 686*; compare* Minn. R. Evid. 404(b), *with* Minn. R. Evid. 403. Because the five-part *Spreigl* test applies here, evidence of the 1996 incident was inadmissible if the potential for unfair prejudice outweighed its probative value by even the slightest degree. *See Ness*, 707 N.W.2d at 686 ("[T]he probative value of the evidence must not be outweighed by its potential prejudice to the defendant."). Although the portrayal of appellant as a "pimp" was undoubtedly prejudicial to appellant, the *Spreigl* relevance analysis focuses on *unfair* prejudice. *Bolte*, 530 N.W.2d at 197. Unfair prejudice "does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *Id.* at n.3 (quotation omitted). In this case, the district court found that the 1996 incident, like the charged offense, was marked by appellant's sexual abuse of a woman with whom he had a personal relationship. The victim of the 1996 incident testified that appellant would beat

her if she did not give him money from her earnings as a prostitute, and that appellant repeatedly had sex with her although he knew she was a minor. The physical abuse in the 15-year-old victim's relationship with appellant would have been difficult to prove without revealing the reason why appellant would beat her. Therefore, evidence of the 1996 *Spreigl* incident was not unfairly prejudicial as to outweigh its probative value.

Because appellant pleaded guilty to a lesser offense in connection with the 1994 *Spreigl* incident, he argues that no evidence should have been admitted regarding the more serious charges he faced. Acquitted conduct is not admissible as *Spreigl* evidence. *State v. Wakefield*, 278 N.W.2d 307, 308 (Minn. 1979). Appellant argues that his plea of guilty to fourth-degree criminal sexual conduct should be treated as an acquittal of the greater charges of first- and third-degree criminal sexual conduct. Specifically, appellant argues that lack of consent was not an element of the crime to which he pleaded guilty and that, therefore, no evidence of nonconsensual sexual conduct in connection with the 1994 *Spreigl* incident should have been admitted. Although in the special concurrence in *Wakefield* it was argued that evidence of any *Spreigl* offense where the defendant was not prosecuted should be excluded, Minnesota courts have refused to adopt this approach. *See, e.g.*, *State v. Kasper*, 409 N.W.2d 846, 847 (Minn. 1987); *State v. Lande*, 350 N.W.2d 355, 358 (Minn. 1984); *State v. McAdoo*, 330 N.W.2d 104, 106 (Minn. 1983). Because appellant was not acquitted of the greater offenses charged in connection with the 1994 *Spreigl* incident, *Wakefield* does not preclude admission of the conduct related to the greater offenses as *Spreigl* evidence.

Finally, appellant argues that the district court improperly considered the state's need for the *Spreigl* evidence in determining its admissibility. In examining the probative value of evidence versus its potential for prejudice, the district court stated that it "must consider how crucial the *Spreigl* evidence is to the state's case," and that the prior incidents "bear strong similarities" to the charged offense and could allow the jury to place the charged offense in "its proper context." Appellant argues that the court erroneously used an "independent necessity" test in determining that the evidence was admissible. In *Ness*, the court stated that "the time has come to dispense with an *independent* necessity requirement." 707 N.W.2d at 689 (emphasis added). But the *Ness* court did not advocate abandoning the consideration of the prosecution's need in determining whether *Spreigl* evidence is admissible; instead, it reasoned that "[t]he prosecution's need for [*Spreigl*] evidence should be addressed in balancing probative value against potential prejudice, not as an independent necessity requirement." *Id.* at 690. In this case, the district court examined the importance of the evidence to the state's case as a part of its analysis of whether its probative value was outweighed by its potential for unfair prejudice, not as an independent-necessity requirement. The district court ruled that the state's need for the evidence enhanced its probative value, and that any unfair prejudice would be mitigated by a limiting instruction to the jury. The district court expressed the balancing test for prejudice in terms consistent with *Ness*, and we find no error it its application of the test.

Jury Instructions on Spreigl Evidence

The refusal to give a requested jury instruction lies within the discretion of the district court and will not be reversed unless the district court has abused that discretion. *State v. Dobbins*, 725 N.W.2d 492, 506 (Minn. 2006). The focus of the analysis is on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). To determine whether the district court erred in its refusal to give jury instructions, this court reviews the instructions in their entirety to examine whether they fairly and adequately explain the law pertaining to the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). If refusal to give a requested jury instruction was erroneous, this court must determine whether the error was harmless. *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004). If this court determines that the district court erred in excluding the jury instruction, appellant will be entitled to a new trial unless this court determines beyond a reasonable doubt that the error did not have a significant impact on the jury's verdict. *Id.*

Before closing arguments, appellant's counsel requested that the jury be instructed as to the "very specific reason" for admission of the *Spreigl* evidence but did not describe the specific reason in his request. The district court refused and instead issued the standard 10 *Minnesota Practice*, CRIMJIG 2.01 (2004) instruction. This court has held that a district court errs when it denies a defendant's request for a specific limiting jury instruction regarding *Spreigl* evidence. *State v. Babcock*, 685 N.W.2d 36, 41 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004); *see also State v. Broulik*, 606 N.W.2d 64, 70 (Minn. 2000) (holding that "the limited purpose instruction is only required if requested by the defendant," and concluding there was no error where there was no request). Citing *State v. Ture*, 681 N.W.2d 9, 18 (Minn. 2004), the state argues that a

district court need not give a requested *Spreigl* instruction if the requested instruction is an incomplete statement of the limited purposes for which the evidence was admitted. In *Ture*, the district court refused to give the defendant's requested jury instruction that *Spreigl* evidence could only be used to establish identity because identity was not necessarily the only reason the *Spreigl* evidence was admitted. Instead, the district court instructed the jury using an adaptation of 10 *Minnesota Practice*, CRIMJIG 3.16 (2004) to the facts of the case. The supreme court affirmed the district court. *Ture*, 681 N.W.2d at 18; *see also State v. Martinez*, 694 N.W.2d 86, 89-90 (Minn. App. 2005) (explaining the difference between the holdings in *Ture* and *Babcock*), *review denied* (Minn. July 19, 2005). The state attempts to liken the facts in this case to those in *Ture* because at one point during the trial, appellant stated that the district court should instruct the jury that the evidence was being offered to show a "common scheme or plan." But in a later conference with the district court, appellant requested that "a very specific exception [for the *Spreigl* evidence] should be told to the jury." Appellant did not specify the exception about which the jury should be instructed. We believe the state misapplies *Ture*. In making his request without specifying the exception, appellant's request was tantamount to a request that the district court adapt CRIMJIG 3.16 to the facts of the case. This request is like the request made in *Babcock*, where the defendant made a general request that the jury be instructed as to the purposes for which *Spreigl* evidence was admitted without mentioning a purpose in his request. 685 N.W.2d at 41. The *Babcock* court ruled that the district court erred in refusing to so instruct the jury. *Id.* Because appellant essentially requested that the district court instruct the jury about how the *Spreigl*

evidence against appellant could be used, the district court erred in refusing to grant that request.

"Erroneous jury instructions merit a new trial if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007) (quotation omitted). When faced with an erroneous refusal to give a jury instruction, the reviewing court must "examine all relevant factors to determine whether, beyond a reasonable doubt, the error did not have a significant impact on the verdict." *State v. Shoop*, 441 N.W.2d 475, 481 (Minn. 1989). In determining whether an erroneous jury instruction was harmless beyond a reasonable doubt, we consider whether: the instruction mandated that the jury draw a particular inference; the parties were free to argue for any conclusion they pleased; and the jury was properly instructed on the burden of proof and presumption of innocence. *Fields*, 730 N.W.2d at 785. We presume that jurors have followed the district court's instructions. *Id.* In this case, the jury instruction given did not mandate that the jury draw a particular inference; the parties were free to argue for any conclusion they pleased and to argue about the use of the *Spreigl* evidence; and the jury was properly instructed as to the burden of proof and presumption of innocence.

Where a district court (1) instructs a jury that the *Spreigl* evidence could only be considered for the limited purpose of determining whether appellant committed the charged offense and that he could not be convicted based on the previous occurrences; (2) defense counsel explains the limiting use of the *Spreigl* evidence during closing arguments; and (3) the record is replete with evidence against appellant, the error in

refusing to give a requested jury instruction on *Spreigl* evidence is harmless error. *State v. Heath*, 685 N.W.2d 48, 60 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004), *cert. denied*, 546 U.S. 882 (2005); *see also State v. DeYoung*, 672 N.W.2d 208, 212-13 (Minn. App. 2003). In *Babcock*, for example, this court held that the failure to instruct the jury on the purpose of *Spreigl* evidence was not harmless error, because the district court had concluded that the state presented a "severely challenged case," and because the purpose of the *Spreigl* evidence was not mentioned in closing arguments. 685 N.W.2d at 43.

But *Heath* is closer to the case at hand. In *Heath*, the district court refused to modify the language of the jury instructions after defendant requested that they be altered to reflect that the *Spreigl* evidence was being introduced solely to show knowledge. Instead of giving the jury CRIMJIG 3.16 without the requested modification, the court relied on CRIMJIG 2.01. *Heath*, 685 N.W.2d at 60. This court found the error harmless because the court offered a blanket cautionary instruction that warned jurors not to convict the defendant for the crimes he may have committed in the past; defense counsel urged the jury not to consider the defendant's prior acts as proof of his guilt for the present offense, and the record reflected a strong case against the defendant. *Id.* In this case, similar to *Heath*, both parties mentioned in their closing arguments that the *Spreigl* evidence could not be used to prove appellant's character, although neither party specifically stated how it was to be used. And in this case, the record is replete with evidence against appellant: S.D.'s testimony was corroborated by photographs of her injuries; Nurse Peters, who examined S.D., testified about her physical observations; and

S.D.'s 13-year-old daughter testified that a day or two before Halloween, she was awakened by her mother screaming and crying and saying "no" and "stop it." We conclude that beyond a reasonable doubt the district court's error did not significantly impact the jury's verdict and, therefore, the error is harmless. Because the error was harmless, a new trial is not warranted.

Admissibility of Expert Witness Testimony

District courts have broad discretion in admitting expert testimony, and this court will only reverse if it finds abuse of that discretion. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999); *see also State v. Grecinger*, 569 N.W.2d 189, 194 (Minn. 1997). Expert witnesses are allowed to give testimony in the form of opinion or inference. Minn. R. Evid. 704; *State v. Chambers*, 507 N.W.2d 237, 238 (Minn. 1993). "[O]pinion testimony is not objectionable merely because it embraces an ultimate issue to be decided by the jury." *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982) (citing Minn. R. Evid. 704). But expert witnesses may not give "ultimate conclusion testimony which embraces legal conclusions or terms of art" when such testimony is not helpful to the jury. *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005); *Saldana*, 324 N.W.2d at 230-31.

Appellant argues that Nurse Peters's testimony was inadmissible "vouching testimony" when responding to the prosecutor's question: "Given what [S.D.] told you happened to her, is it your opinion that this was consensual or nonconsensual penetration?" Nurse Peters answered, "nonconsensual." Her answer assumed that she believed that S.D. was telling the truth. "Expert testimony concerning the credibility of a witness should be received only in 'unusual cases.'" *Saldana*, 324 N.W.2d at 231.

Except in rare circumstances, such opinion evidence invades the jury's province to make credibility determinations. *Id.* A witness is not permitted to vouch for the credibility of another witness. *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). "[T]he credibility of a witness is for the jury to decide." *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). Where a witness testifies that another witness is speaking truthfully, that testimony impermissibly intrudes on the jury's responsibility to judge the veracity of a witness's testimony. *Id.* We conclude that Nurse Peters's testimony that, based on what S.D. had told her, the anal sex was nonconsensual constituted an endorsement of the truth of S.D.'s testimony, and we hold that it was erroneously admitted as vouching testimony.

Where evidence is erroneously admitted at trial and the defendant makes an objection to the evidence, the defendant is entitled to a new trial unless we determine, beyond a reasonable doubt, that the error did not significantly impact the verdict. *State v. Bauer*, 598 N.W.2d 352, 367 (Minn. 1999). This court makes an independent review of the record in determining whether an error is harmless. *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003).

In this case, the record reveals that the admission of Nurse Peters's vouching testimony was harmless error. First, the cross-examination of an expert witness can mitigate any error in admitting their testimony. *State v. Ross*, 451 N.W.2d 231, 236 (Minn. App. 1990) (finding harmless error where doctor testifying about sexual abuse was thoroughly cross-examined), *review denied* (Minn. Apr. 13, 1990). Nurse Peters was cross-examined extensively at trial and was cross-examined again after redirect examination. Second, where the testimony represents a small part of the trial as a whole,

the error may be harmless. *State v. Soukup*, 376 N.W.2d 498, 503 (Minn. App. 1985), *review denied* (Minn. Dec. 30, 1985). The trial transcript reveals that Nurse Peters's vouching testimony on direct examination amounts to four lines in the transcript, while the entirety of her direct examination comprises 55 pages of a 777-page trial transcript. Moreover, in addition to Nurse Peters's testimony, the record is replete with evidence against appellant, as previously summarized. Although the vouching testimony was inadmissible, we conclude, beyond a reasonable doubt, that it did not significantly impact the jury's verdict. Therefore, the district court's error in admitting the vouching testimony was harmless.

Admission of Prior Convictions as Impeachment Evidence

Evidence of prior convictions that do not involve false statements or dishonesty may be admitted if the probative value of the evidence outweighs its prejudicial effects. Minn. R. Evid. 609(a). Whether the probative value outweighs the prejudicial effects is a matter within the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985). We review a district court's decision to permit impeachment by prior conviction under an abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). This court will reverse evidentiary rulings if there has been a clear abuse of discretion by the district court. *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979).

In determining whether the probative value of the evidence outweighs the likelihood of unfair prejudice, a district court must make findings based on the five-factor test in *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978). These five factors include:

(1) the impeachment value of the prior convictions; (2) the date of the convictions and defendant's subsequent history; (3) the similarity of the convictions to the charged crime; (4) the importance of defendant's testimony; and (5) the centrality of the issue of defendant's credibility. *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007) (citing *Jones*, 271 N.W.2d at 537-38). In this case, the district court made its determination based on its findings that: (1) the prior convictions had significant impeachment value because appellant and S.D. were the only parties to the event, and the convictions would better enable the jury to judge appellant's credibility; (2) appellant spent nearly seven of the ten years since his first conviction in custody; (3) the state agreed not to delve into the underlying details of appellant's convictions; (4) even if appellant did not testify, he would have the opportunity to explain his legal theory to the jury through his own witnesses or through cross-examination; and (5) appellant's credibility was a central issue in the case. Appellant argues that the similarity of the crimes to the charged offense, and the importance of defendant's testimony should have persuaded the district court to exclude the evidence.

As to the importance of appellant's testimony, although the tendency of impeachment evidence to dissuade a defendant from testifying should be weighed against admitting it, the court may allow it if the defendant's theory comes into evidence anyway. *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). The district court noted that appellant's defense that the sex was consensual was apparent throughout the trial. Appellant's credibility in arguing that the sex was consensual was crucial to his defense. Recent supreme court cases emphasize that when "credibility is a central issue in the

case, the fourth and fifth *Jones* factors weigh in favor of admission." *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006); *see also State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (holding that because defendant's credibility was the main issue, there would have been significant need for impeachment evidence). Because appellant's credibility was of critical importance to his defense, the importance of his testimony does not outweigh the probative value of the impeachment evidence against him.

Any similarity of the prior convictions to the charged offense would otherwise tend to weigh against admission. "[T]he greater the similarity, the greater the reason for not permitting use of the prior crime to impeach." *Jones*, 271 N.W.2d at 538. The district court noted that enough similarity existed to present a danger that the jury might convict appellant based on those crimes, but also noted, citing *State v. Frank*, 364 N.W.2d 398, 399 (Minn. 1985), that rape convictions have been allowed to impeach a defendant on a sexual-assault charge. When the other *Jones* factors weigh in favor of admission, similarity of the prior convictions to the charged offense should not preclude admission. *Frank*, 364 N.W.2d at 399; *Brouillette*, 286 N.W.2d at 707; *State v. Vanhouse*, 634 N.W.2d 715, 720 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). We hold that the district court did not abuse its discretion in admitting evidence of three prior convictions of sexual misconduct in 1994 and 1996 for impeachment purposes.

Validity of Aggravating Factor under Blakely v. Washington

This court reviews statutory construction and interpretation of the sentencing guidelines de novo. *State v. Zeimet*, 696 N.W.2d 791, 793 (Minn. 2005); *State v. Garcia* 302 N.W.2d 643, 646-47 (Minn. 1981). This court may also review a sentence to

determine whether it is appropriate and warranted by the district court's findings of fact. Minn. Stat. § 244.11, subd. 2(b) (2006).

At issue in this case is whether the jury made the appropriate findings of fact to support the district court's decision to issue a mandatory 30-year sentence. Any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000); *State v. Petschl*, 692 N.W.2d 463, 469-70 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005). A jury must find all facts on which a sentence beyond this maximum will rely. *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 2537 (2004) (stating that a judge may not impose a sentence that the jury's verdict alone does not allow; the jury must find all facts essential to the punishment).

Minnesota courts have held that the presence of children may make the victim more vulnerable to the assailant, *State v. Johnson*, 450 N.W.2d 134, 135 (Minn. 1990); *State v. Hart*, 477 N.W.2d 732, 737 (Minn. App. 1991), *review denied* (Minn. Jan. 16, 1992), and that offenses committed in front of children are outrageous acts that victimize the children as well as the victim, *State v. Winchell*, 363 N.W.2d 747, 748, 750-51 (Minn. 1985); *State v. Profit*, 323 N.W.2d 34, 36-37 (Minn. 1982). But appellant argues that the jury's mere finding that children were in the house was not adequate to support an upward departure from the sentencing guidelines. We agree.

We conclude that the jury must make a finding as to the existence of an aggravating factor, not merely an underlying fact.[1] Thus, it is necessary for the jury to deliberate on the existence of the aggravating factor itself. Here, the aggravating factor was not the mere presence of children in the house when S.D. was assaulted, but S.D.'s vulnerability as a result of the children's presence. We therefore conclude that the instructions and questions on the verdict form given to the jury were inadequate. Because the jury in this case was not required to deliberate on the existence of the aggravating factor, i.e., S.D.'s vulnerability as a result of the children's presence, we reverse and remand for resentencing.

Affirmed in part, reversed in part, and remanded.

[1] We note that the current verdict forms in 10 *Minnesota Practice*, CRIMJIG 8.01 (2006), require the jury to make a finding as to the existence of an aggravating factor, not merely an underlying fact.