STATE OF MINNESOTA
IN COURT OF APPEALS
A11-850

State of Minnesota,
Respondent,

vs.

Brett Thomas Green,
Appellant.

Filed April 30, 2012
Affirmed
Chutich, Judge

Isanti County District Court
File No. 30-CR-08-1174

Lori Swanson, Attorney General, Jennifer R. Coates, Assistant Attorney General, St. Paul, Minnesota; and

Jeffrey R. Edblad, Isanti County Attorney, Cambridge, Minnesota (for respondent)

Brett Thomas Green, Bayport, Minnesota (pro se appellant)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

CHUTICH, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant Brett Thomas Green contends that the district court committed reversible error by admitting evidence about two *Spreigl* incidents even though no pretrial notice was given. We affirm.

FACTS

In the summer of 2008, A.S. was thirteen years old and living with her grandmother near Braham. The grandmother worked two nights a week at a local gas station and sometimes allowed A.S. to stay overnight with the grandmother's neighbor and friend, Janine W. On one such evening in late July or early August 2008, Janine W. left A.S. and her own son, thirteen-year-old M.W., in the care of Green, who was then nineteen years old and living in Janine W.'s apartment with her and M.W.

Green, A.S., and M.W. spent the evening watching a movie in the living room. A.S. and Green were on the couch, and M.W. was lying on the floor, where he fell asleep. Green kissed A.S. and then asked her if she wanted to do "anything," which she interpreted to mean something sexual. A.S. responded "no," because earlier that day Green told her that he did not have a condom.

Green asked A.S. if she wanted to go into M.W.'s bedroom, where, with their clothes on, they began "kissing and messing around, touching kind of." When Green asked her if she wanted to "f***," she again declined. Green pleaded with her, A.S. relented, and they both removed their own clothing from the waist down.

Green put his finger inside of A.S.'s vagina, and she got on top of him and they "tried to have sex." Green put his erect penis inside her vagina, but he stopped when she said "Ow, no." A.S. then rubbed Green's penis with her hand and Green kissed A.S.'s vagina, with his tongue touching the inside of it. A.S. fell asleep in M.W.'s room, but Green left and slept elsewhere.

On September 22, 2008, the manager of a Braham apartment complex called Braham Police Chief Knowles to report that several tenants told him that Green may be having sexual relations with a young girl named A.S. Chief Knowles interviewed A.S. at her school the next day, where she told him that Green "fingered" her and that she gave him a "hand job." A.S. said that Green asked her to "f***," but that she did not want to because she thought it would be too "tight" and he did not have any condoms. She said that she and Green did not have sex, but acknowledged that Green put his penis inside of her vagina until it hurt.

A.S. further told Chief Knowles that Green knew that she was only thirteen years old because she told Green that several times. She also told Chief Knowles about two other incidents with Green. Once, before the sexual contact at the apartment, Green "grabbed her a**." Another time, after the sexual contact, Green bought cigarettes for A.S. and asked her if he could "get anything" in return, a request that she took to be sexual.

Green was charged with three counts of criminal sexual conduct, including first-degree criminal sexual conduct. At trial, A.S.'s friend, B.L., and A.S.'s grandmother testified that A.S. had told them about the sexual contact with Green. B.L. testified that

A.S. told her that Green performed oral sex on her and that she had "given him a hand job." B.L. also testified that Green and A.S. flirted and wrestled with each other, and found other ways to touch each other. The grandmother testified that A.S. said that Green told A.S. to take off her clothes, touched her, tried to but could not penetrate her, and performed oral sex on her. A.S. did not say whether she touched Green. M.W. also testified, confirming that Green was in charge that evening at the apartment, as well as other details about the evening.

Over Green's objection, the trial court allowed brief testimony by A.S. and the police chief that Green had purchased cigarettes for A.S. and asked if he could "get anything" in return. Chief Knowles also mentioned, without objection, that Green had previously grabbed A.S.'s buttocks.

The jury found Green guilty of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(b) (2008) (criminalizing sexual penetration with a minor who is between 13 and 16 years old, where the actor is more than 48 months older and in a position of authority over complainant), and of the lesser included offenses. The district court sentenced Green to 153 months in prison, the lowest presumptive sentence for that offense, given Green's criminal history score of three. This appeal follows.

D E C I S I O N

I

Green argues that the district court committed reversible error by admitting inadmissible *Spreigl* evidence when (1) A.S. testified, and Chief Knowles confirmed, that, several weeks after the charged incident, Green bought her cigarettes and requested

a sexual favor in return and (2) Chief Knowles testified that A.S. reported to him that Green "grabbed her a**." The state did not give notice of its intent to elicit testimony about either incident, and Green objected to only the evidence about the first incident.

Evidence of other crimes, wrongs, or acts is "not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b) (adopting rule set out in *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965)). *Spreigl* evidence may be admissible for the limited purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* Such evidence is properly admitted only if the following five requirements are met:

> 1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; 2) the prosecutor clearly indicates what the evidence will be offered to prove; 3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; 4) the evidence is relevant to the prosecutor's case; and 5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Id.; *accord State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006).

Decisions to admit *Spreigl* evidence are reviewed for an abuse of discretion. *Ness*, 707 N.W.2d at 685. If the admission of rule 404(b) evidence is erroneous and the erroneously admitted evidence significantly affected the verdict, we must reverse. *Id.* at 691.

Purchase of cigarettes for A.S. in exchange for some type of "payment."

At trial, Green objected to the introduction of A.S.'s testimony about Green purchasing cigarettes for her and requesting a sexual favor in return. He contended that the evidence was irrelevant and also involved a prior bad act—purchasing cigarettes for a minor—on which no *Spreigl* notice was given.

The trial court overruled the objection, concluding that the evidence was relevant because the evidence made it more likely than not that the charged conduct occurred. In overruling the *Spreigl* aspect of the objection, the court found that purchasing cigarettes was not "such a significant bad act as to be any part of the jury's consideration." The court found that the act was "just the circumstances of the case" and that the jury was not "liable to make the mistake of convicting him . . . based on the fact that he bought her cigarettes."

Green now claims that introduction of this evidence was erroneous because none of the five *Spreigl* procedural safeguards were satisfied and no cautionary instructions were given before or after the testimony was admitted. He contends that this wrongfully admitted evidence significantly affected the jury's verdict as it created an unfairly prejudicial impression that if Green had asked for sexual favors at the time, he must also have sexually assaulted A.S. in the apartment. Green also asserts that it bolstered A.S.'s version of the events.

To be sure, the trial court did not explicitly analyze all the *Spreigl* procedural requirements before admitting the evidence.[1] The court found, however, that the evidence was relevant and that its probative value outweighed any unfair prejudicial effect. We conclude that these key *Spreigl* determinations are correct. Additionally, although the prosecution gave no *Spreigl* notice, Green was not surprised by the cigarette purchase allegation because it was set forth in the Amended Complaint, filed almost two years before trial, minimizing the potential for prejudice. *See State v. Volstad*, 287 N.W.2d 660, 662 (Minn. 1980) (holding that the admission of unnoticed *Spreigl* evidence was not error when, among other things, "the incident was specifically mentioned in the complaint"). Thus, several of the key *Spreigl* safeguards were met.

Even if we conclude that this evidence was not properly admitted, the evidence did not significantly affect the jury's verdict. A.S. testified clearly and consistently about the sexual contact by Green. By contrast, her testimony about the cigarettes, as well as the police chief's confirmation that A.S. had reported the incident to him, were very brief and not significant to the state's case. This minor episode was not unduly emphasized because the prosecutor did not mention the cigarette purchase during her opening statement or closing argument. *See State v. Courtney*, 696 N.W.2d 73, 84 (Minn. 2005) (concluding that wrongfully introduced other crimes evidence was not reasonably likely to have significantly affected the jury's verdict where, among other things, the state "did not dwell on the other crimes evidence in its closing argument"); *State v. Bolte*, 530

[1] Before trial, the trial court did rule that a previous third-degree criminal sexual conduct conviction involving sexual contact by Green with an underage female was inadmissible *Spreigl* evidence.

N.W.2d 191, 198 (Minn. 1995) (concluding that potential for prejudice is reduced where state did not rely on *Spreigl* statements during closing arguments). Thus, even if the evidence was erroneously admitted, its admission was harmless.[2]

Nor did the lack of cautionary instructions prejudice Green. *See State v. Word*, 755 N.W.2d 776, 785 (Minn. App. 2008) (holding plain error analysis applies when no cautionary instructions are requested or given in cases involving *Spreigl* or relationship evidence). Green did not request that the jury be so instructed and, indeed, such an instruction may well have drawn unwarranted attention to the minor incident.

Report by A.S. to police chief that Green had "grabbed" her buttocks.

At trial, Green did not object to Chief Knowles's single statement that A.S. reported that, before the evening in the apartment, "there was also an incident . . . where [appellant] grabbed her a**." The failure to object to the admission of evidence generally waives the right to raise that issue on appeal. *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001).

This court may review the admission of such evidence under the plain-error test, which asks whether there was error, whether the error was plain, and whether the error affected the substantial rights of the defendant. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Regarding the last consideration, Green bears a "heavy burden of persuasion to show that the error was prejudicial and affected the outcome of the case."

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[2] The state separately argues that the evidence was admissible as general relationship evidence under Minn. R. Evid. 404(b). *See State v. Bauer*, 598 N.W.2d 352, 364 (Minn. 1999); *State v. Boyce*, 284 Minn. 242, 260, 170 N.W.2d 104, 115 (1969). Given our conclusion above, we see no need to address this alternative argument.

Vick, 632 N.W.2d at 685 (quotations omitted). Moreover, when a district court is not afforded a pretrial opportunity to consider the admissibility of *Spreigl* testimony and the defendant fails to object to the testimony at trial, it is generally not plain error for the court to decline to intercede sua sponte by striking the testimony or providing a cautionary instruction. *Id.* at 685. Thus, the trial court did not err in this case by not striking sua sponte Chief Knowles's single statement or providing a cautionary instruction.[3]

II

Green raises a number of issues in his pro se supplemental and pro se reply briefs that we conclude are meritless.

Sufficiency of the evidence.

Green argues that the evidence is insufficient to convict him because A.S. gave four different versions of the sexual touching. Assessing the credibility of a witness is exclusively the function of the jury, however. *State v. Thao*, 649 N.W.2d 414, 421 (Minn. 2002). We must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *Id*. "[I]nconsistencies in the evidence are also resolved in favor of the state." *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990). In addition, the law imposes no requirement that the testimony of a sexual assault victim be corroborated. Minn. Stat. § 609.347, subd. 1 (2008).

[3] Even if error occurred, Green cannot satisfy his heavy burden of showing that admission of this single statement affected the outcome of the case. The reference was of a passing nature, the prosecutor asked no follow up questions, and the statement was never mentioned in closing.

The jury found A.S.'s testimony to be credible, and the record supports such a conclusion. Despite the slight variations in her reports to different witnesses, she consistently reported that appellant performed oral sex on her and touched her by placing his finger in her vagina, satisfying a key element of first-degree criminal sexual conduct. The evidence was also sufficient to prove that appellant was in a position of authority over A.S. at the time of the sexual contact. *See* Minn. Stat. § 609.341, subd. 10 (2008) (defining "position of authority" to include any person who is "charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of the act"); *State v. Skinner*, 450 N.W.2d 648, 654 (Minn. App. 1990) (concluding that babysitter was in position of authority).

Prosecutorial misconduct.

Green complains of prosecutorial misconduct, but fails to point to any specific instance of misconduct. Because a reading of the transcript shows no improper conduct by the prosecutor, this issue is waived. *See State v. Sontoya*, 788 N.W.2d 868, 876 (Minn. 2010) (declining to consider issue on merits where appellant failed to cite either the record or legal authority to support claim); *State v. Bartylla*, 755 N.W.2d 8, 23 (Minn. 2008) (noting that "[a]n assignment of error based on mere assertion and not supported by any argument or authorities . . . is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection") (quotations omitted)).

Alleged Spreigl incidents.

Green argues that B.L.'s testimony that Green and A.S. wrestled, tickled, and touched each other constituted inadmissible *Spreigl* evidence. He also contends that the jury heard inadmissible *Spreigl* evidence when B.L.'s older brother testified that Green dated A.S. Because Green did not object to this evidence, the plain-error standard applies. *See Vick*, 632 N.W.2d at 684–685. The evidence was not offered as *Spreigl* evidence, and the district court did not commit plain error in declining to intercede sua sponte by striking the testimony or by providing a cautionary instruction. *See id*.

False testimony.

Green's argument that a new trial is necessary because "false testimony" was admitted at trial is simply another attack on A.S.'s credibility. The jury found A.S. credible and Green presents no evidence that A.S. has recanted her testimony or that she falsely testified at trial. *See State v. Smith*, 541 N.W.2d 584, 588 (Minn. 1996); *State v. Caldwell*, 322 N.W.2d 574, 584–85 (Minn. 1982).

Calling Green "defendant" at trial.

Without citing any authority, Green claims that he was prejudiced by being referred to as "defendant" at trial. While a prosecutor cannot disparage a defendant, the use of the term "defendant" is not disparaging in and of itself. As the district court properly concluded here, the term "defendant" is not prejudicial, when the term accurately described Green, and the jury was thoroughly instructed that the defendant is presumed innocent of the charges unless and until he is proved guilty beyond a reasonable doubt.

Probable cause and photographic evidence.

Green's claims concerning probable cause and photographic evidence are baseless. He was fairly apprised of the charges against him. *See State v. Alexander*, 290 Minn. 5, 9–10, 185 N.W.2d 887, 890–91 (1971) (holding that where defects in complaint are challenged for first time on appeal, complaint will be interpreted as valid whenever reasonably possible). In addition, no photo was ever admitted into evidence.

Affirmed.