**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A11-2233**

State of Minnesota,
Respondent,

vs.

Daniel James Osten,
Appellant.

**Filed February 11, 2013**
**Affirmed**
**Crippen, Judge**[*]

Sherburne County District Court
File No. 71-CR-10-133

Lori Swanson, Attorney General, St. Paul, Minnesota; and

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

Richard P. Ohlenberg, St. Louis Park, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, 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

**CRIPPEN**, Judge

On appeal from his conviction of first-degree criminal sexual conduct and from the order denying his postconviction petition, appellant argues that (1) the district court abused its discretion by admitting *Spreigl* evidence; (2) he was denied the effective assistance of counsel; (3) the district court abused its discretion by not allowing into evidence a videotaped statement of the victim; (4) there was insufficient evidence to support the jury's finding of guilt; and (5) his sentence constitutes cruel and unusual punishment. We affirm.

## FACTS

The district court jury convicted appellant Daniel Osten of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subds. 1(a), 2(a) (2008), for engaging in sexual penetration with C.N., a 12-year-old boy, on multiple occasions between July 2009 and January 1, 2010. After a *Blakely* hearing, the jury found the existence of the following three aggravating factors: (1) multiple forms of penetration; (2) offense in the victim's zone of privacy; and (3) appellant's prior conviction of a crime of violence. The district court then sentenced appellant to 360 months in prison, which is an upward departure from the presumptive sentence.

After appellant filed this appeal, this court granted appellant's motion to stay the appeal and remand the case for postconviction proceedings. Appellant filed a petition for postconviction relief, claiming that he was denied the effective assistance of counsel, based on counsel's failure to call witnesses or to properly assert an alibi defense. The

district court denied the petition, concluding that appellant's "claims are argumentative assertions without factual support that fail to show prejudice to [appellant], and . . . do not give rise to the need for an evidentiary hearing and do not give rise to the grounds for the relief sought." This appeal was then reinstated.

**D E C I S I O N**

1. *Spreigl* evidence.

Appellant challenges the district court's decision to admit evidence of his prior convictions of first- and third-degree criminal sexual conduct. The admission of evidence of other crimes or bad acts, so-called *Spreigl* evidence, is reviewed for an abuse of discretion. *State v. Clark*, 738 N.W.2d 316, 345 (Minn. 2007). If the evidence was erroneously admitted, an appellate court must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009). If such a possibility exists, then the error is prejudicial, and a new trial is required. *State v. Rucker*, 752 N.W.2d 538, 549 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008).

Generally, *Spreigl* evidence is inadmissible to prove that a defendant acted in conformity with his character. Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). But the evidence may be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. Minn. R. Evid. 404(b). The supreme court has developed a five-element test to determine whether *Spreigl* evidence should be admitted, requiring the state's notice that it intends to use the evidence, the

state's offer of what the evidence will prove, the presentation of clear and convincing evidence of the defendant's participation in the act, a court determination that the evidence is relevant and material, and the court's decision that the probative value of the evidence is not outweighed by its potential prejudice to the defendant. *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006).

Here, the state's *Spreigl* evidence consisted of a plea transcript in which appellant pleaded guilty to third-degree criminal sexual conduct and admitted in the plea hearing that he performed oral sex on an eight-year-old boy. Relevant to this offense, the state also introduced the testimony of R.G., who testified that appellant became a friend of his mother's when he was eight or nine years old. R.G. testified that appellant eventually started paying special attention to him and started buying him things like ice cream. R.G. further testified that appellant engaged in oral and anal sex with him when he was eight to ten years old, and that the abuse continued for about six years.

The district court concluded that the *Spreigl* evidence was being admitted for the purpose of showing an absence of mistake or accident and showing a common scheme or plan. The court also concluded that the state had given sufficient notice and that the evidence was relevant. Finally, the court concluded that the probative value of the evidence is not outweighed by its potential for prejudice because "in this circumstance we have a situation where it's basically one person's word against another person's word. And under those circumstances, I think the jury is entitled to understand the full picture."

Appellant challenges the district court's decisions on the relevance of the *Spreigl* evidence and that its probative value is not outweighed by its potential prejudice to

appellant. Appellant further argues that the there is a reasonable probability that the wrongfully admitted evidence significantly affected the verdict.

a. Relevancy to the state's case.

"The use of *Spreigl* evidence to show a common scheme or plan has been endorsed repeatedly . . . ." *Ness*, 707 N.W.2d at 687. "[I]n determining whether a bad act is admissible under the common scheme or plan exception, it must have a marked similarity in modus operandi to the charged offense." *Id.* at 688. But *Spreigl* evidence need not be identical to the charged offense. *Id.*

Appellant argues that evidence of his prior convictions of criminal sexual conduct were not markedly similar to his alleged abuse of C.N. But the current allegations against appellant involved appellant (1) befriending the parents of a 12-year-old boy and later coming to their house to socialize; (2) paying special attention to the boy and buying him presents; and (3) engaging in oral and anal intercourse with the boy over a period of time. These allegations are markedly similar to the testimony of R.G., who testified that appellant socialized with R.G.'s mother and eventually babysat her children; paid special attention to R.G. and bought him presents; and engaged in oral and anal intercourse with R.G. Moreover, appellant denied any sexual contact with C.N., which rendered the incidents involving R.G. more relevant than they might have been otherwise. *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. Sept. 23, 2008). The supreme court has repeatedly upheld the use of

*Spreigl* evidence on the issue of whether the alleged abuse occurred when the defense's theory is fabrication. *See, e.g.*, *State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993) (holding that in cases where corpus delicti is disputed, *Spreigl* evidence may be admitted to disprove the defense that the complainant is fabricating or imagining the occurrence of sexual contact); *State v. Shuffler*, 254 N.W.2d 75, 76 (Minn. 1977) (stating that the *Spreigl* evidence "was directly relevant to the jury's resolution of the key factual issue, which was whether defendant had taken indecent liberties with the victim, as she testified, or whether [the testimony was a fabrication] as defendant testified"). The *Spreigl* evidence was relevant and material to the victim's credibility.

b. Probative verses prejudicial value.

"When balancing the probative value against the potential prejudice of *Spreigl* evidence, unfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, 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 denied C.N.'s claim that the sexual abuse occurred, and his defense was that the testimony that the assaults occurred lacked credibility. The *Spreigl* evidence that appellant had assaulted young boys in the past was relevant to C.N.'s credibility and therefore had significant probative value. Moreover, the district court gave the jury a cautionary instruction before the jury heard the *Spreigl* evidence and before the jury deliberated, which mitigated any potential for unfair prejudice. *See State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008) (stating that "any potential unfair prejudice [resulting from

admission of *Spreigl* evidence] was mitigated by the cautionary instructions"). Accordingly, the district court did not abuse its discretion by admitting the *Spreigl* evidence.

c. Effect on the verdict.

Appellant also claims that the wrongfully admitted *Spreigl* evidence affected the verdict, thus entitling him to a new trial. But as addressed above, the district court did not erroneously admit the *Spreigl* evidence. And even if the court did improperly admit the evidence, appellant fails to articulate how the error affected the verdict. The district court provided the proper instruction before the jury heard the *Spreigl* evidence, and the instruction was reiterated at the end of the trial. 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* evidence, the jury was unlikely to let that evidence significantly affect its verdict.

2. Ineffective assistance of counsel.

A postconviction court must hold an evidentiary hearing on a postconviction petition "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2008). To obtain a hearing, a petitioner must allege facts that, if proved by a fair preponderance of the evidence, would entitle him or her to relief. *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002). An evidentiary hearing is required when disputed material facts must be resolved to determine the postconviction issues on the merits. *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004). If the postconviction court has any doubts regarding

whether to conduct an evidentiary hearing, it should resolve those doubts in favor of granting a hearing. *Dobbins v. State*, 788 N.W.2d 719, 736 (Minn. 2010). A summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005).

To receive an evidentiary hearing on a postconviction claim of ineffective assistance of counsel, a petitioner must allege facts that, if proved by a fair preponderance of the evidence, would satisfy the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984). *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). Under that test, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that the petitioner was prejudiced by counsel's deficient performance. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). A defendant must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007); *accord Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (observing that judicial review should be "highly deferential" to counsel's performance).

Appellant argues that his trial counsel was ineffective due to trial counsel's failure to (1) "call a private investigator to the stand as a defense witness even though [appellant] had paid for and fully expected [the] investigator to testify at trial"; (2) provide notice to the state prior to the start of trial of an alibi defense and exhibits related to the alibi defense, which resulted in alibi exhibits being excluded; and (3) "put on expert testimony which [appellant] had paid for and fully expected to be presented at trial." His other assertions of ineffectiveness fail for lack of specificity.

Counsel's decisions not to present an alibi defense and not to call the private investigator as a witness are matters of trial strategy which are not reviewable. *See State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (stating that matters involving trial strategy, including what evidence to present, which witnesses to call, and what defenses to raise at trial, are not reviewable for competency). And even if trial counsel's errors rose to the level of ineffective assistance of counsel, appellant is unable to establish the second prong of the *Strickland* analysis—that he was prejudiced by counsel's deficient performance. Although the district court did not allow appellant to introduce copies of the documents and receipts supporting his alibi defense due to trial counsel's lack of notice to the state, the court allowed appellant to testify about his whereabouts on the dates that coincided with the receipts and documents. This minimized the prejudice to appellant. Also, the alleged abuse occurred multiple times between July 2009 and January 2010, but the dates on the receipts and documents only related to 18 days late in this time-period. The exclusion of the receipts likely had little or no effect on the outcome of the proceeding.

Moreover, although appellant claims that his expert would have testified as to the victim's suggestibility, he fails to elaborate and provide sufficient detail concerning the proposed expert testimony. As a result, appellant fails to establish how the expert's testimony may have affected the jury. Also, defense counsel had sufficient opportunity to cross-examine the victim regarding his memory of the sexual abuse and his inconsistencies regarding the dates of the abuse. Appellant was not denied the effective

assistance of counsel, and the district court did not err by denying appellant's petition for postconviction relief.

3. Exclusion of videotaped statement of the victim.

Evidentiary issues lie within the sound discretion of the district court, and the district court's rulings on such issues will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The burden is on the appellant to demonstrate (1) that the district court abused its discretion by admitting the evidence and (2) that the appellant was prejudiced by the admission of the evidence. *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009).

Appellant challenges the district court's decision not to allow into evidence a videotaped statement that C.N. gave to a social worker that purportedly impugned the victim's credibility. But a review of the transcript of the videotaped statement indicates that C.N. twice referred to appellant spending time in prison and describes multiple instances of sexual abuse that were either covered in more detail than in C.N.'s trial testimony, or not testified to at all. This information would have been prejudicial to appellant. And appellant fails to articulate how the admission of the videotaped statement would have impugned the victim's credibility. Therefore, appellant cannot establish that he was prejudiced by the district court's decision not to allow the statement into evidence.

4. Sufficiency of the evidence.

When considering a claim of insufficient evidence, this court "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a

light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). An appellate court assumes that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The appellate court "will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

The jury found appellant guilty of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a). This statute provides that a person commits criminal sexual conduct in the first degree when the person "engages in sexual penetration with another person" and "the complainant is under 13 years of age and the actor is more than 36 months older than the complainant." Minn. Stat. § 609.342, subd. 1(a).

Appellant argues that there is insufficient evidence to support his conviction because the only evidence offered by the state in support of the conviction was the "[u]ncorroborated testimony" of the victim who had "dubious credibility." But it is well settled that "a conviction can rest on the uncorroborated testimony of a single witness." *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (quoting *State v. Hill*, 285 Minn. 518, 518, 172 N.W.2d 406, 407 (1969)). For example, in *State v. Reichenberger*, the supreme court affirmed a conviction of having sexual intercourse with a minor, even though the victim made conflicting statements at various times prior to trial, because at

trial, the victim testified positively that intercourse had occurred. 285 Minn. 75, 78, 182 N.W.2d 692, 694 (1970). The court held that the jury was apprised of the previous inconsistent statements and "the task of weighing credibility was for the jury, not this court." *Id.* at 79, 182 N.W.2d at 695.

Here, the victim consistently testified that appellant sexually penetrated him in various ways at both his old house and his new house. If believed, this testimony is sufficient to sustain appellant's conviction of first-degree criminal sexual conduct. *See Foreman*, 680 N.W.2d at 539. Although appellant testified in his defense and claimed that the sexual contact did not occur, the jury believed the victim's testimony and did not believe appellant's testimony. *See State v. Profit*, 591 N.W.2d 451, 467 (Minn. 1999) (stating that the jury is in the best position to evaluate the credibility of witnesses and the reviewing court assumes that after due consideration, the jurors believed the state's witnesses). Also, the victim testified that despite being almost 35 years older than the victim, appellant spent a great deal of time with the victim, and bought him soda, energy drinks, and a computer. This testimony was corroborated by the victim's sister. The state also presented *Spreigl* evidence in the form of testimony from another person who was sexually abused by appellant. This witness testified that appellant was a friend of his mother's, that appellant bought him things when he was a kid, and that appellant sexually abused him. Therefore, in light of all of the evidence and testimony presented at trial, and the deference afforded to the jury in making credibility determinations, there was sufficient evidence to sustain appellant's conviction of first-degree criminal sexual conduct.

5. Cruel and unusual punishment.

Appellant argues that his sentence of 360 months for first-degree criminal sexual conduct violates the Eighth Amendment's prohibition against cruel and unusual punishment. A conviction of and sentence for first-degree criminal sexual conduct is governed by Minn. Stat. § 609.342, subds. 1(a), 2(a). An appellate court reviews de novo the question of whether a statute is constitutional. *State v. McDaniel*, 777 N.W.2d 739, 753 (Minn. 2010). When a defendant argues that a sentence is cruel or unusual, this court similarly exercises de novo review. *State v. Gutierrez*, 667 N.W.2d 426, 438 (Minn. 2003). Because statutes are presumed constitutional, a person who challenges a sentence as cruel or unusual "bears the heavy burden . . . of showing that our culture and laws emphatically and well nigh universally reject the sentence." *State v. Chambers*, 589 N.W.2d 466, 479-80 (Minn. 1999) (citation omitted) (internal quotation marks omitted).

When determining whether a punishment is cruel or unusual, we are to examine the proportionality of the crime to the punishment assigned. *State v. Mitchell*, 577 N.W.2d 481, 489 (Minn. 1998). In deciding whether a particular punishment is cruel and unusual, the U.S. Supreme Court determines whether the punishment comports with "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598 (1958) (plurality opinion). Courts are directed to "look to standards as expressed by the legislature, since it is the legislature that is constituted to respond to the will and consequently the moral values of the people." *Chambers*, 589 N.W.2d at 480 (quotations omitted).

Appellant had a criminal-history score of four, which placed the presumptive sentence for his conviction of first-degree criminal sexual conduct in the range of 199 to 281 months. Minn. Sent. Guidelines IV (2008) (sex-offender grid). The jury also determined that three aggravating factors were present. Although a double departure from the sentencing guidelines would mean a maximum sentence of 562 months, the statutory maximum sentence for first-degree criminal sexual conduct is 360 months. *See* Minn. Stat. § 609.342, subd. 2(a). Thus, after the jury found the presence of aggravating factors, the district court sentenced appellant to 360 months.

Appellant argues that his sentence constitutes cruel and unusual punishment because his conduct was not so heinous as to warrant such a substantial upward departure. To support his claim, appellant cites *Mitchell*, in which a 15-year-old boy was tried as an adult and convicted of first-degree murder. 577 N.W.2d at 483. The supreme court held that a sentence of life imprisonment for a minimum of 30 years upon a 15-year-old child convicted of first-degree murder did not constitute cruel or unusual punishment. *Id.*

Appellant argues that by comparison to *Mitchell*, he received the same sentence as the defendant in *Mitchell* and, therefore, his sentence is cruel and unusual because he "did not kill anyone." But the defendant in *Mitchell* did not receive a comparable sentence to appellant. Rather, the defendant in *Mitchell* received a sentence of life in prison, with the defendant not eligible for parole until 30 years. This is distinct from the 30-year sentence that appellant received. Moreover, appellant fails to compare himself with someone similarly situated. He makes no claim that it is uncommon for an individual convicted of

first-degree criminal sexual conduct to be sentenced to 360 months in prison when aggravating factors are present. Finally, appellant's sentence is statutory, and the aggravating factors are established in the Minnesota Sentencing Guidelines. Appellant fails to demonstrate cruelty or unusual punishment in his sentence or in the governing statute or guidelines.

**Affirmed.**