STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1042

State of Minnesota,
Respondent,

vs.

Robert Mark Dengler,
Appellant.

Filed June 16, 2014
Affirmed
Hooten, Judge

Washington County District Court
File No. 82-CR-11-4779

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

Peter Orput, Washington County Attorney, Peter S. Johnson, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Sean P. Stokes, Eckberg, Lammers, Briggs, Wolff & Vierling, PLLP, Stillwater, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Worke, Judge; and Toussaint, 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

HOOTEN, Judge

Appellant challenges his conviction of fourth-degree criminal sexual conduct. He argues that the district court abused its discretion by admitting evidence of his prior inappropriate behavior with the victim and by permitting the state to amend the complaint after both sides had presented their cases to the jury. He also argues that the evidence was insufficient to support his conviction. Because evidence of Dengler's other wrongful acts satisfied the requirements set out in *State v. Ness*, 707 N.W.2d 676, 685–86 (Minn. 2006), the amendment to the complaint did not affect appellant's substantial rights, and there was sufficient evidence for the jury to conclude that appellant is guilty, we affirm.

FACTS

In November 2011, A.M.S. reported an incident involving appellant Robert Dengler, her uncle, to the Washington County Sheriff's Office. She stated that in the fall of 2004, Dengler commented on her breasts and then walked up behind her, put his hands down the front of her shirt and underneath her bra, and rubbed her breasts and nipples. Dengler was charged with fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(f) (2010). The complaint alleges that Dengler engaged in sexual contact with A.M.S., who was between 16 and 18 years old at the time and has a significant relationship with him. The complaint also alleges that Dengler frequently made comments to A.M.S. about her buttocks and breasts and, on one occasion, brought her to his bedroom and showed her a pornographic movie.

The state filed a notice one week after the complaint was issued informing Dengler that it would not "seek to prove that [he had] committed additional offenses on other occasions." The district court held an omnibus hearing in July 2012. In October 2012, the state filed a notice indicating its intent to offer evidence of "additional crimes, acts, or wrongs" under *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965), specifically that Dengler "direct[ed] inappropriate sexual comments and conduct towards A.M.S., including making sexual comments and showing A.M.S. pornographic material," between 2002 and 2006. The state offered the evidence, commonly known as *Spreigl* evidence, to establish Dengler's "[m]otive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, common scheme or plan." Dengler's jury trial was scheduled to begin three days later, but the district court continued the trial and scheduled a *Spreigl* hearing for approximately one month later.

After providing Dengler with a summary of A.M.S.'s statements about the prior incidents, the state moved the district court to admit the *Spreigl* evidence. Dengler opposed the motion and moved to exclude the evidence. The district court heard arguments on the matter and denied Dengler's motion to exclude the evidence. The court concluded that A.M.S.'s statements about Dengler's inappropriate comments did not constitute *Spreigl* evidence because they were not "wrongs, acts, or crimes" and were admissible under Minn. R. Evid. 801(d)(2) as statements by a party opponent. The court also ruled that the evidence of Dengler showing A.M.S. the pornographic movie could be submitted as a *Spreigl* act, "pending a final determination of the issue of prejudice versus probity."

Dengler's trial began December 4, 2012. A.M.S. testified that Dengler made comments about her breasts and buttocks whenever she saw him. At the end of its case in chief, the state renewed its motion to admit the evidence of Dengler showing A.M.S. the pornographic movie. The district court heard arguments on the issue again and admitted the evidence, finding that its probative value outweighed its prejudicial effect. Before the state recalled A.M.S., the district court read the jury a cautionary instruction regarding its use of the evidence. A.M.S. took the stand again and testified that when she was a high school student, Dengler showed her a pornographic video in his bedroom during a family birthday party.

After the state and the defense rested, the state moved to amend the complaint under Minn. R. Crim. P. 17.05. The complaint originally alleged that the offense occurred on or around June through December 2004. The state sought to change that range to June 2004 through November 2005. The district court granted the motion, concluding that the change did not affect an essential element of the charged offense. The jury found Dengler guilty. This appeal follows.

D E C I S I O N

I.

Dengler argues that the district court abused its discretion by allowing A.M.S. to testify about him making inappropriate comments to her and showing her a pornographic movie. We agree with Dengler that the district court erred when it admitted the evidence of Dengler's inappropriate comments without conducting a *Spreigl* analysis. The district court correctly concluded that this evidence was not hearsay. *See* Minn. R. Evid.

801(d)(2)(A) ("A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement[.]"). But non-hearsay evidence is still subject to the other rules of evidence. *See* Minn. R. Evid. 402 (providing that all relevant evidence is admissible, except as otherwise provided); *State v. Ferguson*, 804 N.W.2d 586, 595 (Minn. 2011) (Anderson, Paul, J., concurring) (stating that evidence offered for non-hearsay purposes must be relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice). Because the evidence involved another wrong or act (Dengler making inappropriate comments to A.M.S.), it should have been analyzed as *Spreigl* evidence. The fact that the evidence consisted of Dengler's statements to A.M.S., rather than non-verbal acts, does not change its status as *Spreigl* evidence. *See State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999) (observing that defendant's statements "were 'bad acts' rather than prior crimes").

This error warrants reversal only if the evidence would have been inadmissible after conducting a *Spreigl* analysis. *See State v. Oates*, 611 N.W.2d 580, 585 (Minn. App. 2000), *review denied* (Minn. Aug. 22, 2000) ("Although the trial court erred in failing to conduct a Spreigl analysis on the 'relationship' evidence, [appellant] fails to show that such an analysis would have resulted in a different ruling."). We analyze Dengler's challenges to the inappropriate comments and act of showing the pornographic movie together.

"Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). But this evidence may be admissible "for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Before admitting *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.

Ness, 707 N.W.2d at 685–86.

1. Notice

Dengler argues that the state failed to give him timely notice of its intent to use the *Spreigl* evidence. The state must give the defendant notice of any *Spreigl* evidence that may be used during a felony trial at or before the omnibus hearing. Minn. R. Crim. P. 7.02, subds. 1, 4(a). This requirement is meant to give the defense sufficient time to prepare for trial and to avoid surprising the defendant with unexpected testimony. *State v. Riddley*, 776 N.W.2d 419, 427 (Minn. 2009).

We conclude that Dengler received adequate notice of the state's intent to use *Spreigl* evidence. The evidence was included in the complaint. *See State v. Wiskow*, 501 N.W.2d 657, 659 (Minn. App. 1993) (concluding that proper notice was given when *Spreigl* incidents at issue were described in the complaint). And although the state initially represented that it would not be offering any *Spreigl* evidence, it subsequently indicated it intended to introduce such evidence. Dengler complains that this second notice did not come until late on Friday, three days before his trial was to begin on Monday. But his trial was continued, and his counsel had 60 days before trial to prepare

for the evidence, during which both sides submitted memoranda on the issue and participated in a hearing. Dengler had sufficient notice and was not unfairly surprised when the evidence was introduced.

2. Purpose

Dengler argues that the state failed to clearly indicate the reasons for the evidence. The state indicated in the October 2012 notice that it would offer the evidence to establish "[m]otive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, common scheme or plan." Dengler points out that this is simply a recitation of all the permissible purposes listed in Rule 404(b). But the state specified in the memorandum supporting its motion to admit the evidence that it would be used to show the absence of a mistake and sexual intent. And the prosecutor repeated at the motion hearing that the evidence would be used to show sexual intent. Accordingly, the record belies Dengler's assertion that the state merely made a "boiler plate recitation of all permitted uses."

3. Clear and convincing evidence

Dengler contends that the state failed to show by clear and convincing evidence that he committed the *Spreigl* acts. "The clear and convincing standard is met when the truth of the facts sought to be admitted is 'highly probable.'" *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (quotation omitted). This standard is higher than a preponderance of the evidence but lower than proof beyond a reasonable doubt. *Id.*

The state supported its motion to admit the evidence with an offer of proof that described A.M.S.'s statements to investigators after reporting the underlying offense.

Based on the offer of proof, the district court ruled before trial that the clear and convincing standard was met regarding evidence of Dengler showing A.M.S. the pornographic video. It reiterated this determination at trial when the state renewed its motion to admit this evidence. The district court, having heard A.M.S.'s testimony along with the rest of the state's case in chief, stated:

> And so it is on the offer of proof from the County Attorney's Office that [A.M.S.] contends and has indicated that Mr. Dengler has shown her a porn movie and that that testimony by her is sufficient without corroboration under the case law for a determination of a clear and convincing evidence.

The district court has "broad discretion" to make a pretrial ruling based on an offer of proof and decide, after the state presents its case, whether a hearing is required. *State v. DeWald*, 464 N.W.2d 500, 504–05 (Minn. 1991); *see also State v. Lindahl*, 309 N.W.2d 763, 766 (Minn. 1981) (stating that the district court has "broad discretion" to determine whether the state needs to call a witness to testify at a hearing to determine the admissibility of *Spreigl* evidence). There is no requirement that A.M.S.'s statements be corroborated to meet the clear-and-convincing standard. *See Kennedy*, 585 N.W.2d at 389.

Here, the district court heard arguments from both the state and the defense about the sufficiency of the *Spreigl* evidence. It recognized the clear-and-convincing evidence standard, and it consistently determined—after the motion hearing and after the state presented its case in chief, including A.M.S.'s testimony about the charged offense—that the state's offer of proof met that standard This was not an abuse of discretion.

4. Relevant and material

Dengler concedes, as he did in the district court, that the evidence at issue is relevant and material. But his argument about the evidence's probative value primarily concerns the evidence's relevance. We therefore analyze this argument under the fourth *Ness* prong.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. When conducting a *Spreigl* analysis, "the district court must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *Ness*, 707 N.W.2d at 686 (quotation omitted). "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." *Id.*

Because Dengler stipulated to this prong, the district court did not identify the disputed fact to which the *Spreigl* evidence was relevant. But it previously stated that the evidence was "clearly being offered to show the requisite sexual intent" and that "the court is satisfied that the evidence to be offered will be used for the legitimate purpose of establishing a pattern of conduct towards A.M.S. in regard to the sexual intent of [Dengler]." We agree that the *Spreigl* evidence was relevant to the issue of sexual intent.

For the jury to convict Dengler of fourth-degree criminal sexual conduct, the state was required to prove beyond a reasonable doubt (1) that Dengler engaged in sexual contact with A.M.S.; (2) that Dengler has a significant relationship to A.M.S.; and (3)

that A.M.S. was at least 16 but under 18 years of age at the time of the sexual contact. *See* Minn. Stat. § 609.345, subd. 1(f). "Sexual contact" includes "the intentional touching by the actor of the complainant's intimate parts." Minn. Stat. § 609.341, subd. 11(a)(i) (2010). The touching must be "committed with sexual or aggressive intent." *Id.*, subd. 11(a) (2010).

Dengler insists that sexual intent was not in dispute because he denied touching A.M.S. altogether. The record convinces us otherwise. Dengler told an investigator that he grabbed A.M.S.'s shoulders and breasts but that he was "just joking around." And Dengler's attorney, in his opening statement, told the jury that whether Dengler acted with sexual intent was "a critically important issue." The attorney explained that even if the jury determined that Dengler touched A.M.S., the jury had to further "determine whether the evidence in this case proves beyond a reasonable doubt that the contact occurred with sexual intent or was sexually motivated."

Based on the elements of the charged offense and the facts in the record, sexual intent was a legitimate issue in this case. And A.M.S.'s testimony that Dengler had previously made inappropriate comments to her about her breasts and buttocks and had shown her a sexually explicit video had a tendency to make it more likely that Dengler acted with sexual intent during the charged incident. The evidence was therefore relevant and material to the state's case.

5. Probative value vs. potential prejudice

Dengler insists that the probative value of the *Spreigl* evidence is "clearly extremely limited" because the "true disputed fact" in his case was whether he touched

A.M.S. under her shirt. The final *Ness* prong is whether the probative value of the evidence is outweighed by its potential prejudice. 707 N.W.2d at 686. The district court determined that the *Spreigl* evidence was "highly probative" of the issue of sexual intent and that "the probative value is higher than the prejudicial nature of the evidence." We agree. Dengler does not argue that the evidence posed any danger of prejudice, and we see no risk of unfair prejudice from admitting the evidence beyond the inherent prejudicial nature of all *Spreigl* evidence. The district court read two limiting instructions (one before A.M.S. testified about Dengler showing her the pornographic video and the other before closing arguments), the testimony was brief and subject to cross-examination, and the incidents were not unfairly inflammatory.

We conclude that the district court did not abuse its discretion by admitting evidence that Dengler showed a pornographic movie to A.M.S. And we conclude that the district court would have properly admitted the evidence of Dengler's inappropriate comments had it performed a *Spreigl* analysis. Because evidence of Dengler's comments would have been admissible as *Spreigl* evidence, Dengler was not prejudiced by the district court's error in failing to conduct a *Spreigl* hearing before admitting such evidence.

II.

Dengler contends that the district court abused its discretion by allowing the state to amend the complaint to extend the alleged date of the offense after both sides had rested. Allowing amendment of a complaint is within the sound discretion of the district court. *State v. Bakdash*, 830 N.W.2d 906, 916 (Minn. App. 2013), *review denied* (Minn.

Aug. 6, 2013). The district court may permit amendment of the complaint any time before the jury enters a verdict unless doing so charges an additional or different offense or prejudices the defendant's substantial rights. Minn. R. Crim. P. 17.05. This "rule is intended to protect against confusing the jury, violating due process notions of timely notice, and adversely affecting the trial tactics of the defense." *State v. Guerra*, 562 N.W.2d 10, 13 (Minn. App. 1997) (quotations omitted).

"[I]n order to prejudice the substantial rights of the defendant, it must be shown that the amendment either added or charged a different offense." *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982). "A different offense is charged if an amendment affects an essential element of the charged offense." *Guerra*, 562 N.W.2d at 13 (quotation omitted). Fourth-degree criminal sexual conduct has three essential elements: (1) the defendant engaged in sexual contact with the complainant; (2) the defendant has a significant relationship with the complainant; and (3) the complainant was at least 16 but under 18 years old at the time of the sexual contact. Minn. Stat. § 609.345, subd. 1(f). The date of the offense is not essential. *See id.*; *State v. Becker*, 351 N.W.2d 923, 927 (Minn. 1984) (stating that "the precise date is an essential element of the crime only where the act done is unlawful during certain seasons, on certain days or at certain hours of the day").

The amendment did not affect any essential elements of the charge. It simply made the complaint consistent with the facts presented at trial. *See Ruberg v. State*, 428 N.W.2d 488, 490 (Minn. App. 1988) ("Where the date is not the essential element of the crime the trial court may properly allow an amendment of the complaint so it comports

with evidence presented at trial."), *review denied* (Minn. Oct. 26, 1988). We have approved of similar amendments in previous cases. *See State v. Shamp*, 422 N.W.2d 520, 522, 527 (Minn. App. 1988) (holding that changing time period of alleged second-degree criminal sexual conduct, which required the complainant to be under 16, did not affect an essential element), *review denied* (Minn. June 10, 1988); *Ruberg*, 428 N.W.2d at 490 (holding that amending dates of alleged incidents first-degree criminal sexual conduct, which required complainant to be under 16, did not add or charge a different offense).

Dengler also argues that the timing of the amendment prevented him from presenting a complete defense. We first note that appellate courts have approved of amendments after the defense has begun or finished its case. *See Gerdes*, 319 N.W.2d at 712 (holding that district court did not abuse its discretion by allowing amendment of complaint after defendant had testified); *Ruberg*, 428 N.W.2d at 490–91 (holding that the district court did not abuse its discretion by allowing amendment of complaint "[a]fter all the evidence was presented"). Second, we are not persuaded by Dengler's contention that the amendment prejudiced his defense. Dengler complains that he was unable to present evidence regarding the extended time period from January 1 to November 30, 2005. We do not see how this hypothetical evidence would have impacted his defense. Dengler denied touching A.M.S., but acknowledged the incident, his presence, and when it occurred. Amending the date alleged in the complaint did not affect Dengler's substantial right to present a complete defense. For all of these reasons, we conclude that the district court did not abuse its discretion by allowing the state to amend the complaint.

III.

Dengler's final argument is that the evidence presented at trial was insufficient to sustain his conviction. When considering an insufficient-evidence claim, we analyze the record and determine "whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the fact-finder to reach the resulting verdict." *State v. Eller*, 780 N.W.2d 375, 379 (Minn. App. 2010), *review denied* (Minn. June 15, 2010). We will not disturb the verdict "if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense." *Id.* at 380.

The evidence presented at trial is sufficient for a jury to reasonably conclude that Dengler committed fourth-degree criminal sexual conduct. A.M.S. was born in December 1987. She turned 16 in 2003 and 18 in 2005. She testified that she could not remember the exact date of the incident but that she believed it happened in fall 2004. She stated that the leaves were falling and that she was driving a specific car, which she got rid of in the fall of 2005.

Dengler highlights testimony about other timeframes, his own testimony that he did not touch A.M.S.'s breasts, and his wife's testimony that she does not recall him touching A.M.S.'s breasts. But the state's witnesses testified otherwise. And when considering the sufficiency of the evidence we assume 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). "This is especially true where resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive

function of the jury." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). Accordingly, Dengler's highlighting of contrary evidence is not enough to overturn his conviction.

Affirmed.