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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
David W. OPSAHL, Appellant.

No. A08-0886.
|
Aug. 4, 2009.

West KeySummary

1 **Sentencing and Punishment** ⇐ Drugs and Narcotics

Defendant's sentences for possession with intent to manufacture, tampering, and carrying away anhydrous ammonia constituted multiple offenses that were part of a single behavioral incident, so only one sentence was permissible. After an officer became suspicious of two men in a parked car, he investigated storage tanks of anhydrous ammonia and found the tanks had been tampered with. The record established that all three offenses happened at one location, within a matter of minutes, and for the purpose of obtaining a methamphetamine precursor, so defendant's conduct was considered a single behavior incident. M.S.A. § 609.035.

Kandiyohi County District Court, File Nos. 34-CR-07-1780, 34-CR-07-1781.

Attorneys and Law Firms

Lori Swanson, Attorney General, Thomas C. Vasaly, Assistant Attorney General, St. Paul, MN; and Boyd Beccue, Kandiyohi County Attorney, Willmar, MN, for respondent.

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, MN.

Considered and decided by HALBROOKS, Presiding Judge; LANSING, Judge; and SHUMAKER, Judge.

UNPUBLISHED OPINION

LANSING, Judge.

*1 A jury found David Opsahl guilty of five offenses relating to the theft and possession of anhydrous ammonia, an ingredient that is used in the manufacture of methamphetamine. In this appeal from the district court's entry of conviction and sentencing on three of the offenses, Opsahl challenges the admission of *Spreigl* evidence, the sufficiency of the evidence to establish possession, and the imposition of multiple sentences arising from the same behavioral incident. We affirm the convictions, but because they rest on a single behavioral incident, we vacate the two concurrent sentences.

FACTS

The charges against David Opsahl all link to his October 2007 encounter with a Kandiyohi County deputy sheriff who was patrolling the area around Blomkest Fertilizer Inc. The company has storage tanks for the anhydrous ammonia that is used in the production of fertilizer. Anhydrous ammonia is also used as a precursor ingredient in the manufacture of methamphetamine.

About 2:15 a.m. the deputy saw a man walking past a car that was parked along the road about two-tenths of a mile from the fertilizer plant. The deputy asked the man if he needed assistance, and the man replied that he was out of gas and looking for a gas station. When asked if he had a gas can, the man said that he had one in the trunk of his car, which he indicated was the car parked alongside the road. Within minutes, another man emerged from a hedge row, coming onto the road from the direction of the storage tank area. This second man, later identified as Opsahl, initially walked along the road in the area where the first man and the deputy were standing but did not acknowledge either of them. When the deputy asked Opsahl if the two men were together, Opsahl answered "yes." Opsahl also said that he was looking for gas. The pants of both men were wet from the knees down. Opsahl

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was wearing athletic pants that were ripped in front and were being held together by duct tape.

Because the deputy did not believe their explanation, he called for assistance and went to the tank area to investigate. At the tank area he observed that someone had tampered with a tank; used a duct-tape funnel to remove anhydrous ammonia into a smaller, portable compressor; and placed the compressor by the road. In the long, wet grass between the tank and parked car, the deputy found, at intervals: a hose, work gloves, pieces of duct tape, and a roll of duct tape.

When the deputy returned to the car, he decided to try starting it. Once started, the car's fuel gauge indicated that the gas tank was half full. Later, when Opsahl was sitting in the back of a squad car, the deputy noticed that Opsahl had taken the duct tape off his pants and attempted to conceal it on the car's floor.

The state charged Opsahl with five counts: possession of a substance with intent to manufacture methamphetamine, tampering with equipment used to store anhydrous ammonia, taking or carrying away any amount of anhydrous ammonia, theft of property under $250, and fourth-degree criminal damage to property.

*2 Before trial, the state notified Opsahl that it intended to offer evidence of Opsahl's 2006 conviction for third-degree controlled-substance crime and the investigation that led to the conviction. The district court rejected Opsahl's challenge to the admissibility of the evidence, and a narcotics officer testified about the investigation and conviction at trial. The deputy who had encountered Opsahl and his companion near the fertilizer plant testified about their conversation and the results of his investigation of the area around the anhydrous ammonia tanks. A Blomkest employee described how the evidence at the tank area, including a frost line on the compressor, showed that the anhydrous ammonia had only recently been removed from the tank and transferred to the portable compressor. And a deputy sheriff described a method of manufacturing methamphetamine that uses anhydrous ammonia.

The jury found Opsahl guilty on all five counts. After a hearing, the district court entered judgments of conviction on only the first three counts and imposed concurrent sentences. Opsahl now appeals.

DECISION

In this appeal from conviction and sentencing, Opsahl raises three issues: the admissibility of the *Spreigl* evidence; the sufficiency of the evidence on the element of possession; and the multiple sentences on the three counts, which he contends comprise a single behavioral incident for which only one sentence may be imposed.

I

Evidence of past crimes or prior acts, referred to as *Spreigl* evidence, is not admissible as proof of a person's character or to show that the person acted in conformity with that character. Minn. R. Evid. 404(b); *State v. Kennedy,* 585 N.W.2d 385, 389 (Minn.1998). *Spreigl* evidence is admissible for the limited purposes of proof of plan, intent, motive, knowledge, identity, preparation, opportunity, or absence of mistake or accident. Minn. R. Evid. 404(b); *Kennedy,* 585 N.W.2d at 389. Five requirements must be met to admit *Spreigl* evidence: (1) the state must provide notice, (2) the state must clearly indicate what the evidence will be offered to prove, (3) the state must have clear and convincing proof that the defendant committed the prior act, (4) the offered evidence must be relevant and material to the case, and (5) the prejudicial effect of the evidence must not outweigh its probative value. *State v. Ness,* 707 N.W.2d 676, 685-86 (Minn.2006).

We review admission of *Spreigl* evidence for abuse of discretion. *Id.* at 685. If error is shown, the defendant must also demonstrate that he was prejudiced. *State v. Amos,* 658 N.W.2d 201, 203 (Minn.2003). Consequently, erroneously admitted evidence results in reversal of a jury verdict only if there is a reasonable possibility that it significantly affected the verdict. *State v. Bolte,* 530 N.W.2d 191, 198 (Minn.1995).

The challenged *Spreigl* evidence all relates to Opsahl's 2006 conviction for third-degree possession of methamphetamine. The state's notice and offer of proof included a copy of the complaint and a certified copy of the warrant of commitment. The complaint describes a search of Opsahl's residence in August 2004 during which officers found fuel, foil, scales, coffee, a torch, and pseudoephedrine pills. The state maintained that the contents of the search demonstrated Opsahl's "use and manufacture of drugs" in 2004, and thus it was admissible to show "intent, motive, common plan or

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scheme, lack of mistake or accident and a continuing course of conduct."

*3 The district court's written order allowing the *Spreigl* evidence stated that it was admissible to show intent and absence of mistake. The order described the 2006 conviction as one "in which [Opsahl] was discovered in possession of methamphetamine and also in the presence of several materials that are useful in the manufacture of methamphetamine." The order stated that evidence of the prior conviction was relevant to aid the state in distinguishing Opsahl in the current case from one who might steal anhydrous ammonia for non-methamphetamine-related purposes.

Applying the five requirements for admission of *Spreigl* evidence, we focus on only the last two, because the first three are not at issue. It is undisputed that the state provided notice and indicated the purpose for which the evidence would be offered. And Opsahl has not contested that the state's evidence provided clear and convincing proof of his "use and manufacture" of methamphetamine in 2004. Admissibility therefore turns on the last two requirements-the relevance of the evidence and the balancing of the probative versus prejudicial effect.

Although the district court characterized the basis for admissibility as demonstrating intent and the absence of mistake, its further explanation of the reasons indicates that it concluded that Opsahl's 2006 conviction was relevant to show knowledge. To prove the first count of the complaint, possession of a substance with intent to manufacture methamphetamine, the state was required to show that Opsahl possessed the anhydrous ammonia with the specific intent to manufacture methamphetamine. Minn.Stat. § 152.0262, subd. 1(5) (2006). His knowledge about the manufacture of methamphetamine, while not necessarily dispositive of his intent, tends to make the existence of such an intent more probable. *See* Minn. R. Evid. 401 (defining relevance generally). Opsahl's knowledge is, therefore, relevant to an element of the charged crime, and not merely offered for the impermissible purpose of showing conduct in conformity with a purported character trait. *See* Minn. R. Evid. 404(b) (encompassing the *Spreigl* prohibition).

When limited to its proper purpose, the evidence was not more prejudicial than probative. *Spreigl* evidence, by its nature, is prejudicial, but the balancing analysis focuses on whether it "persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn.2005). The necessity of the *Spreigl* evidence is an important factor in weighing the probative value against the prejudicial effect. *Ness*, 707 N.W.2d at 690. Opsahl's intent to manufacture methamphetamine could not be inferred from possession alone because, as the district court noted, anhydrous ammonia has other uses. The state therefore needed independent evidence of Opsahl's intent to manufacture, and it was not illegitimately or unfairly persuasive to offer proof of his prior knowledge about the manufacture of methamphetamine.

*4 The trial transcript raises the further question of whether the jury was instructed on the limited use. The district court's instruction that the evidence was to assist jurors "in determining whether [Opsahl] committed those acts with which he is charged" suggests that consideration of the *Spreigl* evidence extended beyond the first count. The second and third counts did not require knowledge or intent to use the anhydrous ammonia for the unlawful manufacture of a controlled substance. Minn.Stat. § 152.136, subd. 2(a) (1), (6) (2006). Thus, knowledge of the components of methamphetamine manufacture is not relevant to an element of either the second or third count. The *Spreigl* evidence was not sufficiently similar to the second or third count to show a common scheme or plan. *See Ness*, 707 N.W.2d at 689 (stating that *Spreigl* evidence can only be used under common-scheme-or-plan exception when prior acts are "markedly similar in modus operandi" to current charge). And the *Spreigl* evidence was not admissible to show "absence of mistake," because Opsahl was not arguing that a mistake had been made; he instead denied that he had any involvement in the charged conduct. *See id.* at 687 (dismissing mistake or accident as purpose for admissibility when defendant denies that he engaged in the charged conduct).

The record shows, however, that failure to limit more strictly the use of the evidence was harmless. The state presented a very strong case to prove that Opsahl was involved in the underlying acts. Opsahl's defense of coincidence was implausible on its face and in light of the officer's testimony about Opsahl's statements and actions. Although the *Spreigl* evidence might have some potential to influence a jury to believe that Opsahl engaged in this conduct, it is not reasonably likely that it contributed to the outcome. Given the strength of the other evidence, the jury would still have found that Opsahl committed the underlying conduct on the theft of property and criminal damage to property, and the evidence was permissible to show knowledge, which was

relevant to the intent element on the first count. Admission of the evidence was not reversible error.

II

We next address the sufficiency of the evidence to show Opsahl's possession of the anhydrous ammonia. If an item is found "in a place to which others had access," possession may still be established if "there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it." *State v. Florine,* 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). A fact-finder may also determine that the defendant possessed the item "where the inference is strong that [he] at one time physically possessed [it] and did not abandon his possessory interest." *Id.* at 105, 226 N.W.2d at 610.

Opsahl contends that the evidence of his possession is only circumstantial. He argues that, because it is possible that someone other than himself or his friend possessed it or that they had possessed but abandoned it, the proof is insufficient to establish the element of possession necessary to the first count.

***5** When sufficiency of the evidence is challenged, we review the record in a light favorable to the verdict and assume that the jury believed testimony that supported the verdict and disbelieved testimony that did not. *State v. Webb,* 440 N.W.2d 426, 430 (Minn.1989). Circumstantial evidence is entitled to the same weight as direct evidence. *State v. Bauer,* 598 N.W.2d 352, 370 (Minn.1999). A conviction based entirely on circumstantial evidence is subject to stricter review on appeal, and will be upheld only if the reasonable inferences drawn from the evidence are "inconsistent with any rational hypothesis" except guilt. *State v. Threinen,* 328 N.W.2d 154, 156 (Minn.1983). An asserted theory other than guilt does not require reversal if the evidence taken as a whole makes the theory seem unreasonable. *See State v. Thomas,* 590 N.W.2d 755, 758 (Minn.1999) (considering evidence as whole).

Assuming, for purposes of our analysis, that the conviction for the first count was based only on circumstantial evidence, we turn to an evaluation of whether Opsahl's hypotheses of innocence are reasonable.

Opsahl's first theory is that he and his friend did not possess the anhydrous ammonia at any time. The strength of the evidence against this claim makes it unreasonable. The evidence at the tank area showed that the theft had occurred not long before Opsahl was apprehended. It was early in the morning in a relatively untraveled area, and the officer, who had been patrolling the area, testified that he had seen no one else in the vicinity of the fertilizer company. Opsahl's theory also requires hypothesizing about why he and his friend were in this particular area if it was not to illegally obtain the anhydrous ammonia. The claim that they had run out of gas is not corroborated by any independent evidence. Their explanation that they were searching for fuel is refuted by their failure to remove the gas can from their trunk. When Opsahl came out of the hedge row to the car, he attempted to pass by the officer unnoticed, which a person would not likely do if he was in need of help to obtain gas. The car started up when the deputy tried it, and the gas gauge moved from empty to half-full once it was running.

Opsahl's second theory of innocence is that he and his friend had ceased consciously exercising dominion and control over the anhydrous ammonia when they left it by the road. This theory assumes they were involved in every other step of the crime and suggests that they decided to abandon it at the last moment. But the steps taken were considerable and entailed serious risks. They placed the portable compressor close to the road and were interrupted by the deputy on their way to their car, which had been left facing in the direction of the tank area. The record shows no signs they had abandoned the crime, and it strains rationality to conclude that they took all of the steps except picking up the compressor and then suddenly changed their minds.

***6** In short, the jury apparently inferred from the evidence that Opsahl had left the compressor of anhydrous ammonia by the road intending to return with the car to pick it up. The circumstantial evidence is inconsistent with any other reasonable hypothesis, and is sufficient to support the jury's verdict.

III

Finally, Opsahl challenges the district court's imposition of concurrent sentences on all three counts. If a defendant's conduct constitutes multiple offenses but is part of a "single behavioral incident," the court may impose only one sentence. Minn.Stat. § 609.035, subd. 1 (Supp.2007); *State v. Schmidt,* 612 N.W.2d 871, 876 (Minn.2000). The bar on multiple sentences includes concurrent sentences. *State v. O'Hagan,*

474 N.W.2d 613, 622 (Minn.App.1991), *review denied* (Minn. Sept. 25, 1991).

Multiple offenses comprise a single behavioral incident if they "arise from a continuous and uninterrupted course of conduct, occur at substantially the same time and place, manifest an indivisible state of mind, and ... [are] motivated by a desire to obtain a single criminal objective." *State v. Baxter,* 686 N.W.2d 846, 850 (Minn.App.2004). It is the state's burden to show that conduct does not constitute a single behavioral incident. *State v. Hager,* 727 N.W.2d 668, 678 (Minn.App.2007). If the facts are undisputed, the determination of whether multiple offenses form part of a single behavioral incident is a question of law subject to de novo review. *State v. Marchbanks,* 632 N.W.2d 725, 731 (Minn.App.2001).

The facts underlying the three convictions-possession with intent to manufacture, tampering, and carrying away anhydrous ammonia-were not in dispute for the purpose of sentencing. The record establishes that all three events happened at one location, within a matter of minutes, and for the purpose of obtaining a methamphetamine precursor. The court's sentencing order confirmed the singular purpose when it stated its conclusion of law that "the ultimate goal of the defendant was the same [in the three offenses], to acquire anhydrous ammonia to be converted into methamphetamine."

We conclude that the conduct is a single behavioral incident. The state's argument that the first and third counts are divisible rests on asserting that possession is a continuing offense that necessarily continued after the physical "carrying away" had ceased. On these facts, the distinction is not legally significant-the offenses still occurred within a matter of minutes, for a singular purpose.

The state also argues that the second count-tampering-is distinct from the other two counts for two reasons. First, the state contends that the tampering caused property *damage* to the owners of the tank farm, while the possession and carrying away caused property *loss.* The state provides no authority indicating that this distinction should override the controlling considerations of whether the acts occurred at the same time and for the same purpose. *Baxter,* 686 N.W.2d at 850. Second, the state argues that tampering is distinct from possession with intent to manufacture because the victim of the first offense is only the fertilizer company and the victim of the second offense is the community at large. Although Minnesota courts often apply a multiple-victim exception in cases "involving multiple violent crimes or sex crimes," "society as a whole" is not considered a separate victim for these purposes. *State v. Skipintheday,* 717 N.W.2d 423, 426-27 (Minn.2006) (stating that "to define all those who suffer even the most indirect harm as 'victims' for the purpose of the multiple-victim exception ... would be to sweep nearly all crimes within the multiple-victim exception, and in so doing swallow the rule"). Thus, the multiple-victim exception does not apply to either offense.

*7 The state has not met its burden of showing that the conduct comprised more than one behavioral incident. Because only one sentence is permissible when crimes are part of a single behavioral incident, we vacate Opsahl's sentences on counts two and three. *See State v. Kebaso,* 713 N.W.2d 317, 324 (Minn.2006) (confirming that in vacating concurrent sentences because of single behavioral incident, sentence on most serious offense remains and sentences on less serious offenses are vacated).

Affirmed in part, vacated in part.

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Grant Leighton JOHNSON, Appellant.

No. A15–0913.
|
March 14, 2016.

Wabasha County District Court, File No. 79–CR–14–670.

Attorneys and Law Firms

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, MN; and Karen Kelly, Wabasha County Attorney, Wabasha, MN, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by CONNOLLY, Presiding Judge; STAUBER, Judge; and REILLY, Judge.

UNPUBLISHED OPINION

REILLY, Judge.

***1** Appellant challenges his conviction of fifth-degree controlled substance crime, arguing that the district court abused its discretion by allowing the state to introduce evidence about past drug-related offenses to demonstrate intent. We affirm.

FACTS

In July 2014, a Wabasha County Sheriff's Deputy on routine patrol saw a vehicle swerve onto the shoulder and then cross the centerline of the roadway into oncoming traffic. The deputy initiated a traffic stop and identified appellant as the driver. The deputy smelled an odor of marijuana coming from inside the vehicle and appellant acknowledged that he had marijuana in the center console. The deputy searched the vehicle and found a clear plastic "sandwich-style Baggie with [a] green, leafy substance" that was later determined to be 16.295 grams of marijuana. The deputy found other baggies in the storage pocket on the back of the passenger seat containing "residue" of "[s]mall green, leafy substances" and smelling of marijuana. The deputy also found $740 cash in appellant's wallet. Based on his observations, the deputy took appellant into custody and the state charged appellant with one count of controlled substance crime in the fifth degree in violation of Minn.Stat. § 152.025, subd. 1(b)(1) (2014).

A jury trial was held and the state called the arresting-deputy as its sole witness during its case-in-chief. Following the deputy's testimony, the state sought to prove the element of intent or common scheme or plan by offering testimony from two Rochester police officers in relation to two previous drug offenses. The district court allowed the testimony over appellant's objection and provided cautionary instructions to the jury. The first witness testified that in August 2008, he found 95.8 grams of marijuana in the center console of appellant's vehicle, prepackaged in sandwich baggies. The police officer also found $492 in cash on appellant's person, a scale, and clean and empty baggies. The second witness testified that in October 2011, he found 381.7 grams of marijuana in a crate on the front passenger seat of appellant's vehicle. The police officer also found a brown glass pipe, a scale, plastic baggies, $2,664 in cash, and three cell phones. Following this testimony, appellant stipulated to the two prior controlled substance crime convictions and waived his right to testify in his own defense.

The district court instructed the jury on fifth-degree controlled substance crime (possession with intent to sell) and the lesser-included charge of possession of a small amount of marijuana. The jury found appellant guilty of controlled substance crime in the fifth degree with intent to sell and guilty on the charge of possession of a small amount of marijuana and the district court imposed a stayed sentence. This appeal followed.

DECISION

The issue presented on appeal is whether the district court abused its discretion by allowing the state to introduce evidence through two *Spreigl* witnesses concerning

appellant's past drug-crimes and refer to that evidence during closing argument, in order to demonstrate appellant's intent to commit the charged offense.

***2** As a general rule, 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) (2014); *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). However, *Spreigl* evidence may be admitted for limited, specific purposes, to demonstrate factors such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). Admission of *Spreigl* evidence rests within the sound discretion of the district court and is reviewed under an abuse of discretion standard. *State v. Ness*, 707 N.W.2d 676, 685 (Minn.2006). An appellant challenging the admission of *Spreigl* evidence bears the burden of showing error and any resulting prejudice. *State v. Clark*, 738 N.W.2d 316, 345 (Minn.2007).

Prior to admitting *Spreigl* evidence, the district court performs a five-step analysis and considers whether: (1) the state gave notice of its intent to admit the evidence; (2) the state clearly indicated what the evidence would be offered to prove; (3) there is clear and convincing evidence that the defendant participated in the prior act; (4) the evidence is relevant and material to the state's case; and (5) the probative value of the evidence is not outweighed by its potential prejudice to the defendant. *Ness*, 707 N.W.2d at 685–86; Minn. R. Evid. 404(b). Here, the district court determined that each of the five elements was satisfied.

With respect to the first two elements, the state filed a *Spreigl* notice that it intended to call two witnesses to give *Spreigl* evidence. Following its case-in-chief, the state informed the district court that it intended to offer *Spreigl* evidence to prove the element of intent or common scheme or plan. *See State v. Billstrom*, 276 Minn. 174, 178, 149 N.W.2d 281, 284 (1967) ("At the time the evidence is offered, the prosecutor shall specify the exception to the general exclusionary rule under which it is admissible."). The district court did not err in determining the first and second elements were satisfied.

With respect to the third element, appellant does not dispute that he participated in the prior acts. The state demonstrated by clear and convincing evidence that appellant participated in the prior crimes by introducing evidence of his prior convictions. *See State v. Blom*, 682 N.W.2d 578, 601 (Minn.2004) (noting that defendant's conviction was clear and convincing evidence of prior incident). The third element is satisfied.

Appellant challenges the fourth element and argues that the *Spreigl* evidence was inadmissible because it was not relevant and did not bear strong enough similarities to the charged offense. The district court determined that the 2008 and 2011 incidents were relevant and material because "the whole case turns on the question of intent." Minnesota caselaw supports the district court's determination that *Spreigl* evidence may be used to demonstrate intent. *See, e.g., State v. Fardan*, 773 N.W.2d 303, 317 (Minn.2009) (affirming use of *Spreigl* evidence as relevant of intent); *State v. Berry*, 484 N.W.2d 14, 17 (Minn.1992) (holding district court properly admitted evidence of *Spreigl* incidents to show intent); *State v. Hannuksela*, 452 N.W.2d 668, 678–79 (Minn.1990) (holding no abuse of discretion where district court admitted *Spreigl* evidence as "particularly probative of the 'knowledge of intent' ").

***3** Under the common scheme or plan exception, a prior bad act "must have a marked similarity in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688. The district court plainly articulated why the *Spreigl* conduct was markedly similar to the charged offense, namely, that in each of the three cases police officers discovered marijuana, plastic baggies, and large amounts of cash in appellant's vehicle. We agree with the district court that the 2008 and 2011 offenses share a marked similarity with the current offense and the district court did not abuse its discretion in finding that the *Spreigl* evidence was relevant and material to the charged offense.

Appellant concedes that the 2008 and 2011 offenses share "broad similarities" with the present case but argues that they were not similar enough because the amount of marijuana found in the prior offenses was greater than the amount found in 2014, and the deputy did not find multiple cell phones, scales, or a pipe in the present case. We acknowledge that crimes that are "simply" of the "same generic type" are not markedly similar. *Clark*, 738 N.W.2d at 346–47 (finding prior crime was not markedly similar to charged offense where the crimes were "relatively remote in time" and the two incidents did not show a "distinctive modus operandi"). However, "[a]bsolute similarity" between the charged offense and the *Spreigl* crime is not required. *Berry*, 484 N.W.2d at 17; *see also State v. Kennedy*, 585 N.W.2d 385, 391 (Minn.1998) (holding that *Spreigl* evidence "need not be identical"); *Ness*, 707 N.W.2d at 688 (citing *Kennedy*, 585 N.W.2d at 391). The

district court acknowledged the distinctions but concluded that there were "enough similarities" to support a relevancy-finding, and we agree. We are satisfied that the district court did not abuse its broad discretion in concluding that the *Spreigl* evidence was relevant and markedly similar to the charged offense.

Finally, appellant argues that the potential for unfair prejudice outweighed the probative value of the *Spreigl* evidence. *Spreigl* evidence is more probative than prejudicial if the testimony is admitted not to "arouse the jury's passion," but rather for the purpose of "placing the incident ... in [the] proper context." *Kennedy*, 585 N.W.2d at 392. Appellant claims that the evidence was unfairly prejudicial because there were two *Spreigl* witnesses and only one witness during the state's case-in-chief, and the *Spreigl* evidence was unnecessary in light of the strength of the state's case. "[C]ourts should not allow the state, when presenting *Spreigl* evidence, to present evidence that is unduly cumulative with the potential to fixate the jury on the defendant's guilt of the other crime." *Ture v. State*, 681 N.W.2d 9, 16 (Minn.2004). Here, the district court determined that the probative value outweighed the potential for prejudice and permitted the two police officers to testify. Each police officer testified regarding a separate incident. The district court did not abuse its discretion because the evidence was not "unduly cumulative" nor did it risk "fixat[ing] the jury on the defendant's guilt." *Id.*

***4** Moreover, the district court gave the jurors cautionary instructions regarding the proper use of the evidence prior to admitting *Spreigl* evidence. The use of cautionary instructions mitigates the danger that evidence may be misused. *State v. Diggins*, 836 N.W.2d 349, 358 (Minn.2013). The district court advised the jurors that the evidence was offered for a "limited purpose," and could not be used to convict appellant of any offense other than the charged offense. The district court also offered a cautionary instruction before the case was submitted to the jury for deliberation. The cautionary instructions "lessened the probability of undue weight being given by the jury to the evidence." *Kennedy*, 585 N.W.2d at 392. The district court did not err in determining that the probative value of the evidence outweighed its prejudicial effect.

Appellant also contends that the prosecutor referred to the prior offenses during closing argument, placing "undue importance on that evidence." During closing, the prosecutor argued that: "The two Rochester police officers told you about two prior incidents. The State would suggest to you that you use those to decide what the Defendant intended.... What does that tell you about his intent?" The prosecutor noted that police officers found plastic baggies, marijuana, and large amounts of cash in all three instances. During appellant's closing argument, the defense attorney also addressed the previous incidents and attempted to distinguish the earlier offenses from the charged offense. "There is nothing inappropriate ... about referring to properly admitted *Spreigl* evidence in a closing argument," provided the evidence is not used to attack the defendant's character or establish a criminal propensity. *State v. Duncan*, 608 N.W.2d 551, 555 (Minn.App.2000), *review denied* (Minn. May 16, 2000). A review of the prosecutor's closing argument as a whole does not support appellant's argument that the state used *Spreigl* evidence to attack appellant's character or establish criminal propensity. *See id.*; *State v. Powers*, 654 N.W.2d 667, 678 (Minn.2003) (directing that closing arguments should be considered as a whole).

Appellant argues that the admission of *Spreigl* evidence deprived him of a fair trial and that he is entitled to a new trial on that basis. Because we do not discern any error, we need not address appellant's new-trial demand.

Affirmed.

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Kevin M. KRUEGER, Appellant.

No. A07–1235.
|
June 9, 2009.

West KeySummary

1 **Criminal Law** ⟹ Sex offenses, incest, and prostitution

Criminal Law ⟹ Sex offenses

Criminal Law ⟹ Evidence of other offenses and misconduct

Trial court erred in admitting prior-crime evidence at defendant's trial for criminal sexual conduct. The only material similarities between defendant's prior crime and the current charge were that both acts involved vaginal penetration of a minor. Further, although the evidence regarding the prior crime established that defendant cooperated with police, took responsibility for his actions, and was a loving and devoted father, it more pointedly revealed that defendant had previously engaged in an illegal sexual relationship with a minor. 50 M.S.A., Rules of Evid., Rule 404(b).

Ramsey County District Court, File No. K0–06–1002.

Attorneys and Law Firms

Lori Swanson, Attorney General, Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, MN, for respondent.

Renée Bergeron, Special Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by SHUMAKER, Presiding Judge; BJORKMAN, Judge; and COLLINS, Judge.

UNPUBLISHED OPINION

COLLINS, Judge.*

*1 Appellant seeks reversal of his conviction of third-degree criminal sexual conduct, challenging the sufficiency of the evidence and arguing that the district court abused its discretion by admitting evidence of a prior conviction without analyzing the factors set forth in *State v. Spreigl,* 272 Minn. 488, 139 N.W.2d 167 (1965). Because the district court erroneously admitted evidence of appellant's prior conviction and there is a reasonable possibility that the verdict was thereby significantly affected, we reverse and remand.

FACTS

In late December 2005, after being grounded for breaking curfew, N.Y. and two of her foster sisters ran away from their foster home. The girls remained on the run for approximately one week. When they returned to the foster home, police investigators questioned them about what transpired while they were away. N.Y., who was 15, revealed that she and appellant Kevin Krueger had engaged in a sexual relationship. Krueger, who was 24 and denied any sexual involvement with N.Y., was charged with one count of third-degree criminal sexual conduct in violation of Minn.Stat. § 609.344, subd. 1(b) (2004). A jury found Krueger guilty as charged, and he was sentenced to 36 months' imprisonment. This appeal followed.

DECISION

I.

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