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**STATE OF MINNESOTA
IN COURT OF APPEALS
A15-0330**

State of Minnesota,
Respondent,

vs.

Ramone Lamont Newell,
Appellant.

**Filed January 2, 2018
Reversed and remanded
Ross, Judge**

Winona County District Court
File No. 85-CR-13-1912

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

Karin Sonneman, Winona County Attorney, Winona, Minnesota; and

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Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Klaphake,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

ROSS, Judge

A man sneaked into a woman's home late one night, covered the woman's head, fondled her, and forced her to touch herself sexually. The state charged Ramone Newell with first-degree criminal sexual conduct and first-degree burglary. Over Newell's objection at trial, the district court admitted evidence of four of Newell's prior interference-with-privacy convictions on the notion that they established a pattern of reckless voyeurism and would help the jury identify Newell as the offender. Because the conduct in these prior offenses was dissimilar to the conduct of the charged offense, the district court should not have admitted them into evidence as either identity or common-scheme-or-plan exceptions to the rule against admitting evidence of other crimes. Because we conclude that Newell was prejudiced by this evidence, we reverse his convictions and remand for a new trial.

FACTS

A woman lay in bed at 10:30 one evening in April 2013 when she heard her front doorknob rattling. She went to the door and locked it, then returned to bed and fell asleep. She woke up at about 4:00 a.m. and saw a man at the foot of her bed. She repeatedly called out, "Hello." The man demanded, "Shut the f-ck up b-tch. I have a knife."

The woman covered her face with her comforter. The intruder ordered her to turn onto her stomach. Then he crawled into her bed and rolled her onto her back, covering her face with a pillow. The woman saw from the sides of the pillow that the intruder switched the lights on. The woman cried, and the intruder told her to be quiet. He removed the comforter, pulled her pants down, and began touching her vagina, penetrating with his

fingers. He moved off the bed and told the woman to masturbate. He directed verbally as to how she should do it. After about five minutes, the intruder left.

The woman reported the assault, and police contacted Michele Rudnik, a probation officer supervising sex offenders. Rudnik knew that Ramone Newell was a registered predatory sex offender who had committed seven interference-with-privacy offenses. An evidence technician sent Rudnik a picture of a boot print taken from outside the woman's home. Rudnik learned that the print came from a Timberland boot, and she recalled that Newell wore boots of this brand. Rudnik searched Newell's home during a previously scheduled visit and found a pair of Timberland boots.

The state charged Newell with first-degree criminal sexual conduct and first-degree burglary. The prosecutor announced his intent to offer evidence of 17 of Newell's prior bad acts. Seven of these involved Newell's criminal convictions for interfering with privacy by peering through windows to observe undressed women or sexually exposing himself to women. In one of the voyeurism offenses, Newell unscrewed a bulb in a motion-detecting light fixture in the victim's backyard. An investigator in this case believed that a lightbulb outside the woman's front door had likewise been unscrewed. In one of the incidents, Newell engaged in a first-degree burglary during which he reached through a window and touched a woman's leg while she slept. Over Newell's objection, the district court admitted evidence of three of the incidents in which Newell peered through windows and the first-degree burglary incident, theorizing that they established "a long standing pattern of reckless unlawful voyeurism" and "would help the jury make a determination about this defendant's identity as the perpetrator of this felony voyeurism offense."

The prosecutor also offered contested evidence of a DNA sample taken from the fan switch in the woman’s bedroom. Newell’s attorney did not consult with a DNA expert and did not move for a *Frye-Mack* hearing until trial had already begun. The district court refused to grant a continuance for a full *Frye-Mack* hearing but allowed Newell to make an offer of proof. Newell’s expert opined that the DNA sample was not interpretable, and the state’s expert testified that the Bureau of Criminal Apprehension had procedures that enabled a technician to interpret the sample. The district court stated that it would declare a mistrial if it determined that the DNA evidence was foundationally invalid. The district court never made that determination, and the state offered evidence that although 99.95% of the population could be excluded from having contributed to the fan-switch sample, Newell could not be.

The jury found Newell guilty of first-degree criminal sexual conduct and first-degree burglary. The district court sentenced him to 360 months in prison. We granted Newell’s motion to stay his appeal and remanded for postconviction proceedings. The district court denied Newell’s petition for postconviction relief after an evidentiary hearing.

Newell appeals.

D E C I S I O N

Newell challenges his convictions, arguing that the district court erroneously admitted the prior-bad-acts evidence. We review a district court’s decision admitting prior-bad-acts evidence—commonly called “*Spreigl* evidence”—for an abuse of the district court’s discretion. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006); *see also State v. Spreigl*, 272 Minn. 488, 491, 139 N.W.2d 167, 169 (1965). If we conclude that the district

court erroneously admitted *Spreigl* evidence, we then determine if it is reasonably possible that wrongfully admitted evidence significantly affected the verdict. *State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016). Under that standard of review, for the following reasons we reverse Newell’s conviction.

Newell argues that the district court erroneously admitted evidence of his prior convictions because they involved conduct insufficiently similar to the charged offenses. Evidence of another crime, wrong, or act is not admissible to prove the character of a person to show that the person acted in conformity with that character on a particular occasion. Minn. R. Evid. 404(b) (2016). “The overarching concern behind excluding [prior-acts] evidence is that it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime” *State v. Fardan*, 773 N.W.2d 303, 315 (Minn. 2009) (quotations omitted). But the evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Minn. R. Evid. 404(b). The analysis therefore begins with the prosecutor’s purpose for the evidence.

The district court must “identify the precise disputed fact to which the *Spreigl* evidence [is] relevant.” *See Ness*, 707 N.W.2d at 686 (quotation omitted). The district court held that the evidence could be admitted to establish Newell’s “long standing pattern of reckless unlawful voyeurism” and “help the jury make a determination about [Newell’s] identity as the perpetrator of this offense.” Newell contends that the prior acts were inadmissible for both purposes.

Newell argues that the prior offenses were too dissimilar to the present allegations to serve the purpose for which the evidence was admitted. While in theory identity, common plan or scheme, and modus operandi evidence serve different purposes, in practice the supreme court has somewhat merged these exceptions so that each requires the district court to find sufficient similarity between the *Spreigl* evidence and the charged offense for the prior-acts evidence to be admissible. For example, quoting *Ness* in *State v. Wright*, the supreme court concluded that *Spreigl* evidence is admissible to prove identity only if there is a “repeating or ongoing pattern of very similar conduct.” 719 N.W.2d 910, 918 (Minn. 2006) (holding that the weapon used and injuries inflicted in the previous and charged offenses were “markedly similar”). In *Ness*, the supreme court reexamined the common scheme or plan exception and clarified that a bad act is admissible under the common-scheme-or-plan exception only if it has a “marked similarity” in modus operandi to the charged offense. 707 N.W.2d at 688. Justice Stras recently explained the unintentional intersection of these exceptions in a concurring opinion. See *Griffin*, 887 N.W.2d at 266–69 (Stras, J., concurring) (citing *State v. Bowser*, 305 Minn. 431, 435–36, 234 N.W.2d 890, 892–93 (1975) and noting that the identity exception has historically required a unique “pattern of conduct,” commonly referred to as a modus operandi, which allows a jury to infer that the same person committed two separate crimes by virtue of the unique manner in which the crimes were committed). We will determine here whether Newell’s prior acts were sufficiently similar to the charged offense to allow the evidence of the prior acts to be admissible as *Spreigl* evidence.

Newell convincingly argues that the conduct in the present case differs substantively from the conduct in the admitted *Spreigl* offenses. Three of the prior offenses did not involve intruding into a victim's home, while this offense involved a home invasion. The only one of the other offenses that involved a burglary included Newell reaching through an open window and touching the sleeping victim's leg, but it occurred seven years before this offense and it too otherwise involved no home invasion. In one of the *Spreigl* offenses Newell unscrewed a lightbulb, and so did the offender in this case. But unscrewing a lightbulb to darken an area during a nighttime offense is not especially unique, and the details of the offense were otherwise not factually close to this one. We do see that in some ways the offenses are similar to this one, but only on a very loose comparison. In none of the old cases did Newell enter through the victim's door, claim to be armed with a knife (or any weapon), attempt to cover the victim's face or otherwise prevent the victim from seeing, remove covering from the victim, pull clothes off of the victim, fondle the victim sexually, or order the victim to touch herself sexually.

Caselaw informs us as to the level of similarity required for *Spreigl* evidence to be admissible, and the catchword is "markedly." This implies an obviousness between the prior acts and the current offense; they must resemble each other significantly. For example, the *Wright* court saw sufficient similarity when both the charged and prior incidents involved intrusions into the homes of vulnerable victims whom the defendant had known, took place in the early morning hours, were preceded by the defendant's extensive drug use, were committed with similar weapons, and involved "markedly similar" injuries to the victims. 719 N.W. at 918. In *State v. Kennedy*, the supreme court deemed the *Spreigl*

offense sufficiently similar to the charged criminal sexual conduct offense when both involved the same victim, included “nearly identical” advances, and occurred in the victim’s bedroom. 585 N.W.2d 385, 391 (Minn. 1998). In *State v. Blom*, the supreme court deemed a *Spreigl* offense sufficiently similar to the charged kidnapping and murder offense when both incidents involved kidnapping and taking young, petite women to remote, wooded areas and involved the defendant subduing the victims by applying force to their throats. 682 N.W.2d 578, 612 (Minn. 2004). In *State v. Bartylla*, the supreme court upheld the admission of *Spreigl* evidence in Bartylla’s rape trial when the charged offense and Bartylla’s former incident each involved entering a woman’s home without consent, accessing the home through a door that had been inadvertently left open, and beating the woman so severely that she suffered fractured facial bones. 755 N.W.2d 8, 21–22 (Minn. 2008). In *State v. Clark*, the supreme court deemed the *Spreigl* offense and the charged offense too dissimilar even when both involved the use of a gun to threaten victims, both occurred in the victims’ bedrooms, and both involved vaginal penetration or attempted vaginal penetration. 738 N.W.2d 316, 346–47 (Minn. 2007). Guided by this caselaw, we conclude that Newell’s former offenses lack the obvious similarity required for admission.

The state offers a theory of similarity by suggesting that Newell’s offenses are gradually escalating in intensity from window peeping to touching from outside the home to this offense of entering and groping. We have approved the use of *Spreigl* evidence in a case where a defendant demonstrates a progressive pattern of increasingly serious misconduct, but only when the prior offenses are very similar to the charged offense. See *State v. Dupay*, 405 N.W.2d 444, 449 (Minn. App. 1987). We are aware of no case in which

a Minnesota court has affirmed the admission of *Spreigl* evidence on this theory of escalation from voyeurism to sexual assault. And even on that theory, the state has failed to demonstrate gradual escalation here because the details of Newell's prior offenses, and their timing, do not convey gradual escalation in any way that is obvious or clear.

We conclude that the *Spreigl* offenses here establish Newell's tendency to engage in voyeuristic conduct targeted at women in their homes. But they are not in the nature of a pattern of conduct, a common scheme, or a modus operandi so as to render them admissible under either the identity or plan exceptions. We conclude that the district court abused its discretion by admitting the evidence.

We must therefore determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *Griffin*, 887 N.W.2d at 262. There is. No witness could identify Newell. The most compelling evidence was the DNA evidence, but its reliability was vigorously contested by Newell's attorney and expert. The Timberland boot print, standing alone, is the only remaining piece of identification evidence. The prosecutor emphasized Newell's prior convictions when arguing to the jury, urging that they all demonstrated a similar pattern of behavior and established Newell's identity as the perpetrator. On these facts, we hold that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. We therefore reverse Newell's conviction and remand for a new trial.

Reversed and remanded.