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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1364**

State of Minnesota,
Respondent,

vs.

Scott Marlin Morey,
Appellant.

**Filed July 31, 2017
Affirmed in part and remanded in part
Smith, John, Judge***

Clearwater County District Court
File No. 15-CR-14-522

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

David L. Hanson, Clearwater County Attorney, Bagley, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and
Smith, John, Judge.

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

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm appellant Scott Marlin Morey's multiple convictions for criminal sexual conduct because we reject appellant's arguments that (1) the district court improperly admitted evidence of other wrongful conduct, (2) the prosecutor committed misconduct, (3) the evidence was insufficient to support one of the convictions, and (4) some of the convictions represented a single behavioral incident or were lesser included offenses. We remand to the district court to correct the warrant of commitment.

FACTS

Appellant was charged by amended complaint with 14 counts of criminal sexual conduct involving two of his sons.¹ Appellant, an ordained Lutheran minister, and his wife, M.M., adopted six children between 2004 and 2010. In October 2014, one of the children, F.M., ran away from home. Deputy Larry Olson of the Clearwater County Sheriff's Department located F.M. and told him that he would be returned to his parents' home. F.M., who appeared "nervous and kind of fearful," asked to speak to someone. F.M. told Deputy Neil Dolan, a school resource officer, that his father had multiple sexual contacts with him. Dolan arranged to have F.M. and his brother, J.M., who were both minors, removed from the home.

Because F.M. told Dolan that appellant showed him pornographic images on his cell phone, Dolan applied for a search warrant. Appellant was helpful when Dolan executed

¹ A third child committed suicide before trial; the complaint was amended to remove allegations involving this child.

the search warrant, but Dolan observed him attempt to hide something in his sock drawer. Dolan retrieved a cell phone from the drawer. The cell phone contained sexual images and text messages with sexual content. Based on these messages and images, Dolan interviewed appellant's adult son, F.M.K.J.M., appellant's acquaintance, R.B., and R.B.'s son, B.B.

At trial, J.M. and F.M. testified to multiple instances of oral sex, sexual contact, and anal penetration by appellant over a five-year period of time. F.M.K.J.M., whose testimony was offered as *Spreigl* evidence, stated that appellant took nude photographs of him and offered him money or presents in exchange for sexual favors. R.B. testified that he was appellant's occasional sexual partner. He and appellant discussed grooming behaviors with regard to appellant's sons and R.B.'s son, B.B.

The jury found appellant guilty of 13 of the 14 charges, and acquitted him of one count of first-degree criminal sexual conduct involving F.M. The district court sentenced appellant on 12 convictions for first- and second-degree offenses, imposing consecutive sentences of 90 months (count 8), 172 months (count 9), and 144 months (count 13), for a total of 406 months. The remaining convictions were sentenced concurrently with these sentences, except for count 14, in which a conviction was entered but no sentence imposed on grounds that it was a lesser included offense to count 13. But the warrant of commitment and the Minnesota Department of Corrections website incorrectly recorded the district court's sentence.

DECISION

I.

The district court permitted the state to introduce evidence of text messages between appellant and R.B.; Facebook messages between appellant and R.B.'s son, B.B.; and evidence of appellant's receipt of nude photos from his adult son, F.M.K.J.M., and sexual contact with him. The district court reasoned that this evidence was admissible as *Spreigl* evidence² under Minn. R. Evid. 404(b), and it was more probative than prejudicial.

Evidence of a defendant's prior bad acts is not admissible to prove a defendant's character or that the defendant acted in conformity therewith. Minn. R. Evid. 404(b). It may be admissible for purposes of showing "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* The district court may not admit such evidence unless the state complies with the notice procedures set forth in the rule, the evidence offered is clear and convincing, and the court determines that its probative value outweighs its potential for unfair prejudice. *Id.*

We review the district court's evidentiary decisions for an abuse of discretion. *State v. Bartylla*, 755 N.W.2d 8, 20 (Minn. 2008). Appellant has the burden of demonstrating that the district court abused its discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Appellant argues that the state's proffered evidence was (1) not clear and convincing; (2) not relevant; and (3) overly prejudicial.

² *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965) (permitting the use of evidence of other bad acts under limited circumstances), now set forth in Minn. R. Evid. 404(b).

The state's evidence was recovered from appellant's phone through a backup file labelled "Scott Morey's iPhone" on appellant's computer. R.B., the recipient of some of the text messages, acknowledged that they were accurate. B.B. testified that the Facebook conversations he had with appellant were accurate. F.M.K.J.M. gave a statement to Dolan about sending nude pictures to appellant and engaging in sexual contact; appellant confirmed that he had received the pictures and that he had sexual contact with F.M.K.J.M. after he was an adult. This evidence is clear and convincing.

The district court must identify the "precise disputed fact to which the [*Spreigl*] evidence would be relevant." *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006) (quotation omitted). Appellant argues that the district court "failed to identify a specific purpose for admission [of the evidence] that was relevant to a specific disputed fact at trial." But the district court reasoned that the prior similar actions were significant because they demonstrated "a design to commit sexual misconduct" or a "pattern or plan," which is often necessary in child sexual abuse cases because of "problems of secrecy, the absence of physical proof of the crime, the unwillingness of some victims to testify, and a general lack of confidence in the ability of the jury to assess the credibility of child witnesses." The supreme court approved the use of *Spreigl* evidence in child sexual abuse cases. *State v. McLeod*, 705 N.W.2d 776, 785 (Minn. 2005) (stating that the evidence suggested "a pattern of conduct or design that continued with [the victim] and is arguably sexual in nature"). Appellant denied having sexual relations or sexual contact with J.M. and F.M., but the *Spreigl* evidence described "grooming" behavior, which supported the existence of a pattern or plan. See *State v. Muccio*, 890 N.W.2d 914, 924 (Minn. 2017) (describing

“grooming” as “a process sexual predators use to shape a child’s perspective and lower the child’s inhibitions with respect to later criminal sexual acts. . . . Through the grooming process, the offender increases the likelihood that the child will cooperate with the adult and reduces the likelihood that the child will disclose the adult’s wrongful acts.”). We are satisfied that the district court identified the disputed fact to which the *Spreigl* evidence was relevant.

In evaluating whether the probative value outweighs the prejudicial effect of the evidence, the district court reasoned that the text messages and the Facebook conversations did “not carry significant potential for unfair prejudice” because they were appellant’s own admissions. Appellant’s receipt of nude pictures from F.M.K.J.M. and sexual contact with him “is directly related to the charged offense of [appellant] having sexual contact with the three victims in this case (his other sons).” In *Ness*, the supreme court concluded that the *Spreigl* evidence was too prejudicial because, when its probative value was weighed against the possibility of unfair prejudice, the state had no need for the disputed evidence because there was an independent witness to corroborate the victim’s testimony. 707 N.W.2d at 690. Here, there were no witnesses to appellant’s actions against the victims.

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. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). The disputed evidence was created by appellant and relevant to the charges against him. The district court instructed the jury on the limited use of the evidence, which reduced the chance that the jury would improperly use it to convict appellant on his character rather

than on the evidence. See *State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015) (affirming district court’s admission of *Spreigl* evidence because district court carefully weighed potential for prejudice against probative value and instructed jury on how to treat the evidence). The district court did not abuse its discretion by admitting the *Spreigl* evidence.

II.

Appellant asserts that the prosecutor committed misconduct by “impermissibly attacking his character” during closing arguments. Appellant raises two claims: first, that in closing the prosecutor argued that appellant was not credible because he had lied about having a sexual relationship with R.B., and second, that the prosecutor referred to F.M.K.J.M.’s testimony as consistent with the child victims’ testimony.

Appellant did not object to the prosecutor’s remarks and, therefore, we review for plain error. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). Under the plain-error standard, a defendant must show error that is plain and that affected the defendant’s substantial rights. *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011). If a defendant establishes these elements, an appellate court will correct the error “only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* “A plain error affects the substantial rights of the defendant when there is a reasonable likelihood that the error substantially affected the verdict.” *Id.* (quotation omitted). Because appellant is alleging that the prosecutor committed misconduct, the standard of review for plain error is modified. *State v. Smith*, 825 N.W.2d 131, 139 (Minn. App. 2012), review denied (Minn. Mar. 19, 2013). Under this modified standard, the state bears the burden of persuasion that the alleged misconduct did not affect the defendant’s substantial

rights. *Id.* “This court will reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant’s right to a fair trial.” *Id.* (quotation omitted).

Appellant’s first claim arises out of his statement to Officer Dolan, in which he said that he had not been sexually active with others during his 15-year marriage to M.M. R.B. testified at trial that he and appellant had been sexual partners sporadically over a 20-year period of time. In closing, the prosecutor argued that appellant lied about his sexual relationship with R.B., commenting, “He has held himself out to be truthful” and “[h]e concealed his romantic relationship, of a sexual nature with [R.B.], so it is with his children. He’s guilty of these offenses and we respectfully ask that you find him so.” In his rebuttal argument, the prosecutor mentioned again that appellant lied about having sexual relations, and said, “Being a liar does matter. When we’re dealing with a case like this, that doesn’t have physical evidence, being a liar does matter. [Appellant] lied about his continuing relationship with [R.B.], he’s lying about abusing his sons, so we ask that you find him guilty.

A prosecutor’s closing argument must be based on evidence or reasonable inferences from the evidence. *State v. Jones*, 753 N.W.2d 677, 690-92 (Minn. 2008). A witness, including the defendant, can be impeached with evidence of false statements or inconsistent testimony, and the state may argue that a witness is not credible because of it. *State v. Smith*, 619 N.W.2d 766, 771 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001); *see also State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984) (“an advocate may . . . point to circumstances that cast doubt on a witness’ veracity” but may not give a personal

opinion about a witness' credibility). Here we do not find reversible misconduct in light of the entire record.

Appellant's second claim relates to references made to *Spreigl* evidence that had been admitted. The proper scope of *Spreigl* evidence is limited to the purpose, or purposes, for which it was admitted. *State v. Babcock*, 685 N.W.2d 35, 40 (Minn. App. 2004), *review denied* (Minn. Oct. 20, 2004).

The particular *Spreigl* evidence admitted through R.B. concerned appellant's advice on grooming techniques for the purpose of showing a pattern or plan. R.B. also testified about sexual encounters with appellant in the course of identifying how he knew appellant. The prosecutor's use of the *Spreigl* evidence in final argument skirts the line between proper and improper argument and may have been plain error. But, immediately after this, the district court reminded the jury that the evidence could not be used a proof of appellant's character, and the *Spreigl* evidence was "admitted for the limited purpose of assisting you in determining whether [appellant] committed those acts with which [appellant] is charged in the complaint."

The district court's prompt corrective instruction suggests that the court recognized this. The district court properly gave a limiting instruction to the jury on the use of *Spreigl* evidence. Furthermore, the testimony provided by J.M. and F.M. was strong and the limited misuse of the *Spreigl* evidence did not prejudice appellant.

The prosecutor used F.M.K.J.M.'s testimony to argue that appellant followed a common pattern of conduct in grooming his sons for sexual contact. F.M.K.J.M.'s *Spreigl* evidence was introduced for the purpose of showing this pattern, and this is a legitimate

use of *Spreigl* evidence. Minn. R. Evid. 404(b). Viewing the oral argument as a whole, the references to F.J.K.J.M. are not improper.

These two rather limited statements did not affect appellant's substantial rights, when read in the entire context of the state's argument and rebuttal. Therefore, there is no basis for relief on this ground.

III.

Appellant argues that the evidence was not sufficient to sustain his conviction of first-degree criminal sexual conduct against J.M. set forth in Count 13. We review the question of whether a defendant's alleged conduct meets the definition of an offense as a question of statutory interpretation subject to de novo review. *State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013). We examine the record to determine whether the evidence and reasonable inferences drawn from the evidence, when viewed in a light most favorable to the verdict, were sufficient to permit the jury to arrive at its verdict. *Id.* We assume that the jury believed the state's witnesses and rejected any evidence to the contrary. *Id.* This is particularly true when the jury must reconcile conflicting evidence. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

Count 13 of the amended complaint alleged that appellant committed first-degree criminal sexual conduct (penetration) against J.M. between September 1, 2014 and October 27, 2014. Appellant challenges the sufficiency of evidence of sexual penetration. "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, or anal intercourse" or "any intrusion however slight into the genital or anal openings . . . of the

complainant's body by any part of the actor's body." Minn. Stat. 609.341, subd. 12 (1), (2)(i) (2014).

According to J.M.'s testimony, he was lying on his back in bed. Appellant removed the child's boxer shorts, held his legs up in the air, and attempted to penetrate the child's anal opening with appellant's erect penis. J.M. said that appellant was not able to fully penetrate, stating "the incident did not go." The attempt lasted about 10 minutes.

"Sexual penetration" includes "any intrusion *however slight* into the . . . anal openings." *Id.* (emphasis added). The jury rejected a similar charge involving F.M., demonstrating that the jury listened carefully to the evidence and the jury instructions. Full penetration was apparently not achieved, but viewing the evidence in the light most favorable to the verdict, it is reasonable to infer that during the ten-minute assault described by J.M., appellant's fully erect penis achieved the slight penetration prohibited by law. *Hayes*, 826 N.W.2d at 803. The evidence was sufficient to sustain this conviction.

IV.

Appellant argues that the district court erred by imposing sentences on eight convictions involving F.M. because they were part of a single behavioral incident. "[T]he district court's determination of whether multiple offenses constitute a single behavioral incident is a factual determination that [an appellate court] will not disturb unless clearly erroneous." *State v. O'Meara*, 755 N.W.2d 29, 37 (Minn. App. 2008). A factual determination is clearly erroneous when there is no support in the record for it. *Id.*

"[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035,

subd. 1 (2014). Generally, this means that a person cannot be sentenced for two or more crimes that were committed in the course of a single behavioral incident. *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). To determine whether two intentional crimes are part of a single behavioral incident, we consider factors of time and place and whether the segment of conduct was motivated by an effort to obtain a single “criminal objective.” *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (quotation omitted). “The mere fact that [a defendant] committed multiple crimes over time for the *same* criminal objective does not mean that he committed those crimes to attain a *single* criminal objective.” (Emphasis in the original). The state has the burden of proving by a preponderance of the evidence that a defendant’s offenses were not part of a single behavioral incident. *Id.* A court’s decision on whether crimes are part of a single behavioral incident “depends heavily on the facts and circumstances of the particular case.” *Id.*

Counts 1-3 and 5-7 allege sexual acts on different dates and do not meet the unity of time requirement for a single behavioral incident. Appellant argues that Count 8, alleging second-degree criminal sexual conduct between January 1, 2007, and October 27, 2014, encompassed all of the other charges, including Count 9, alleging first-degree criminal sexual conduct between January 1, 2010 and October 27, 2014, and, therefore, appellant should be sentenced only on Count 8. In the alternative, appellant argues that Count 8 encompassed all of the second-degree allegations, and Count 9 encompassed all of the first-degree allegations.

“Multiple acts against the same victim do not constitute a single behavioral incident when the individual acts are separated by time and place.” *State v. Suhon*, 742 N.W.2d 16,

24 (Minn. App. 2007) (affirming multiple sentences for sexual assault by defendant against his minor child over a period of 11 years), *review denied* (Minn. Feb. 19, 2008). Here, six of the counts allege specific acts occurring within a range of specific dates, each distinct from the others.

In addition, F.M. testified about multiple other sexual acts occurring over a longer range of time, including acts of sexual contact that constituted second-degree criminal sexual conduct in addition to those more specifically set out in Counts 1 and 7. These other acts were charged in Count 8. Count 9 alleges additional first-degree criminal sexual conduct that occurred over a range of time in addition to those set out more specifically in Counts 2, 3, 5, and 6. The district court's imposition of sentences on each of these eight convictions was not erroneous.

Appellant also argues that six of the convictions involving F.M. are lesser included charges of those set forth in Counts 8 and 9. Minn. Stat. § 609.04, subd. 1 (2014) states that a person “may be convicted of either the crime charged or an included offense, but not both.” But to be a lesser included charge, the defendant must be convicted of two different charges based on the same act or “unitary course of conduct.” *State v. Folley*, 438 N.W.2d 372, 373 (Minn. 1989).

An offense is not a lesser included offense of another if they are separate criminal acts. *State v. McCauley*, 820 N.W.2d 577, 590 (Minn. App. 2012), *review denied* (Minn. Oct. 24, 2012). “The inquiry into whether two offenses are separate criminal acts is analogous to an inquiry into whether multiple offenses constituted a single behavioral incident under Minn. Stat. § 609.035.” *Id.* (quotation omitted). This includes a unity of

time and place, and whether there was a single criminal objective. *Id.* at 591. As set forth above, most of the offenses were specific to a certain date range; counts 8 and 9 were cumulative, but were based on actions in addition to those set forth in the other charges. The district court did not err by imposing sentences on all eight convictions involving conduct against F.M.

V.

Appellant argues that the sentence listed on the Minnesota Department of Corrections (DOC) website is incorrect. On the record at the sentencing hearing, the district court sentenced appellant to consecutive sentences on counts 8, 9, and 13. During the sentencing hearing, the district court misspoke and stated that sentences on counts 2, 9, and 13 were consecutive, but then corrected its statement. On the warrant of commitment, however, count 2 is concurrent with count 9, but nothing is stated about whether count 8 is consecutive or concurrent. Count 13 is sentenced as consecutive to counts 2 and 9. The DOC website lists the expiration of appellant's sentence as approximately three years later than it would be if based on consecutive sentences on counts 8, 9, and 13. The state concedes that there is an error. *See State v. Staloch*, 643 N.W.2d 329, 331 (Minn. App. 2002) (“[A]n orally pronounced sentence controls over a judgment and commitment order when the two conflict.”). We therefore remand to the district court for correction of the warrant of commitment to reflect the sentence as imposed at the sentencing hearing.

VI.

Appellant has raised several issues in his pro se brief, including (1) a challenge to F.M.K.J.M.'s *Spreigl* testimony; (2) insufficiency of the evidence; (3) the district court's

evidentiary rulings refusing to permit background information about the child victims and a confession of the child victim who committed suicide before trial; and (4) ineffective assistance of counsel.

An appellate court need not consider “pro se claims on appeal that are unsupported by either arguments or citations to legal authority.” *Bartylla*, 755 N.W.2d at 22. Appellant cites no legal authority whatsoever. We therefore decline to consider his claims.

Affirmed in part and remanded in part.