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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0192**

State of Minnesota,
Respondent,

vs.

Donald Deundre Harris, Jr.,
Appellant

**Filed January 16, 2018
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-14-33747

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant argues that he is entitled to a new trial because: (1) the district court abused its discretion by admitting *Spreigl* evidence; (2) the district court abused its discretion by excluding evidence that the victim had previously engaged in prostitution;

and (3) the state failed to disclose evidence, which constituted *Brady* and discovery violations. We affirm.

FACTS

In January 2003, T.S. invited two people to her apartment to celebrate her birthday. Her guests invited another person to join them. That individual introduced himself as “Q.” At some point, Q went into T.S.’s bedroom and asked T.S. to join him, saying that he wanted to talk privately. Q either pushed or pulled T.S. onto the bed and started kissing her. T.S. asked Q to leave, at which point he pinned her down and covered her mouth. Q penetrated T.S.’s vagina with his penis, ejaculated, walked out of her bedroom, and soon thereafter left her apartment. T.S. called 911. Police transported her to the hospital, where a sexual-assault nurse collected vaginal and perineal swabs for DNA. T.S.’s case went dormant after completion of the initial investigation.

In October 2008, K.H. met a man who identified himself as “Don.” K.H. invited Don to her home that evening along with three of her friends. After K.H.’s friends left her home around midnight, Don sat next to K.H. on a couch, put his arm around her, and started kissing her. K.H. told Don that she was not comfortable doing anything other than kissing, at which point Don grabbed her hair and put his hand around her throat. Don put a hand down K.H.’s pants, then attempted to force oral sex on her. K.H. resisted, and Don pushed her down on the couch, removed her pants, and penetrated her vagina with his penis. Don eventually got up, went to the bathroom, and left. K.H. went to the hospital, where a nurse took swabs for DNA that were used to develop a DNA profile for K.H.’s attacker.

In 2010, a forensic analyst tested T.S.'s vaginal swab and found the presence of semen. A predominant DNA profile was obtained from the swab, but without a known suspect, the investigation of T.S.'s assault went cold.

In 2014, appellant Donald Deundre Harris, Jr. emerged as a suspect in T.S.'s case. A DNA sample was collected from Harris, which matched the sample taken from T.S. Police interviewed Harris and he admitted using the nickname "Don Q."

Harris was charged with third-degree criminal sexual conduct. The state moved to admit *Spreigl* evidence of the 2008 sexual assault. The district court granted the motion for the purpose of demonstrating a common scheme or plan. The state called four witnesses to testify about the 2008 incident, including K.H., the nurse who collected DNA samples, and two forensic analysts.

The day after T.S. testified, the prosecutor spoke with the victim-witness advocate about T.S.'s testimony. The advocate informed the prosecutor about a prior conversation with T.S. about "the DNA." The advocate recounted that T.S. did not want to discuss it, but T.S. told the advocate that her boyfriend was "making her do things she didn't want to do while he was in jail." The advocate believed that T.S. was referring to forced prostitution.

Upon learning of the conversation between T.S. and the advocate, the prosecutor notified defense counsel of T.S.'s statement and the advocate's impression. Harris moved for a mistrial or, in the alternative, a continuance to investigate T.S.'s statement. The district court denied these motions. Harris then moved to admit evidence of T.S.'s prior sexual conduct pursuant to Minn. R. Evid. 412. The district court denied Harris's motion.

The jury found Harris guilty and the district court sentenced him to 68 months in prison. This appeal followed.

DECISION

Spreigl evidence

Harris argues that the district court abused its discretion by admitting evidence of the 2008 sexual assault. Evidentiary rulings rest within the discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). On appeal, Harris bears the burden of establishing that the district court abused its discretion and that he was prejudiced. *See id.* Prejudice exists when “there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *State v. Clark*, 738 N.W.2d 316, 347 (Minn. 2007) (quotation omitted).

Generally, evidence of other crimes or misconduct is inadmissible to prove a defendant’s character to show that he acted in conformity with that character. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). But this evidence may be admissible for the “limited purpose of showing motive, intent, absence of mistake or accident, identity, or a common scheme or plan.” *Id.* (citing Minn. R. Evid. 404(b)). The supreme court has developed a five-step process for determining whether to admit this evidence:

- (1) [T]he 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.

State v. Ness, 707 N.W.2d 676, 685-86 (Minn. 2006). If the admission of this evidence is a close call, it should be excluded. *Id.* at 685.

Harris concedes that the state provided notice of its intent to admit *Spreigl* evidence, but argues that the state failed to meet the other requirements. First, Harris argues that the state failed to clearly indicate what the *Spreigl* evidence was offered to prove. “Implicit in the requirement that the proponent of *Spreigl* evidence disclose its purpose is that there also be some showing or determination that the evidence reasonably and genuinely fits that purpose.” *State v. Montgomery*, 707 N.W.2d 392, 398 (Minn. App. 2005). It is insufficient to merely recite a purpose listed in rule 404(b) “without also demonstrating at least an arguable legitimacy of that purpose.” *Id.*

The state sought the admission of that evidence “to prove intent, motive, identity, absence of mistake or accident, and/or common scheme or plan.” The state filed a 13-page memorandum detailing how the *Spreigl* evidence was offered for each purpose. The state satisfied the second element of the *Spreigl* analysis.

Second, Harris argues that the state failed to prove his participation in the incident by clear and convincing evidence. “[A] defendant’s participation in a *Spreigl* incident may be considered clear and convincing when it is highly probable that the facts sought to be admitted are truthful.” *Ness*, 707 N.W.2d at 686. The testimony of the victim of a *Spreigl* offense may, by itself, be sufficient to prove the offense by clear and convincing evidence. *Kennedy*, 585 N.W.2d at 389.

Harris argues that the district court abused its discretion by relying on the state's written offer of proof to satisfy this step of the *Spreigl* analysis. However, the supreme court has rejected this argument and permitted district courts to rely on an offer of proof in the form of a memorandum. *See id.* at 390 (stating that there was “no merit” to the argument that the state failed to satisfy the clear-and-convincing standard because the district court permitted the state to submit its offer of proof in a memorandum).

Here, the state asserted that Harris introduced himself to the 2008 victim as “Don Q[,]” waited until she was alone, placed his hands around her neck, pulled off her clothes, attempted to force oral sex, and penetrated her vagina with his penis. At trial, the 2008 victim's testimony was consistent with this version of events. Furthermore, she positively identified Harris in a photographic lineup and Harris's DNA matched the DNA profile of her assailant. The state proved Harris's participation by clear-and-convincing evidence.

Harris also argues that the district court mistakenly ruled that the *Spreigl* offense was material and relevant, first, because the *Spreigl* offense was not markedly similar in time, and second, because the *Spreigl* offense and the charged offense were not sufficiently similar to justify admission to demonstrate a common scheme or plan. “*Spreigl* evidence need not be identical in every way to the charged crime, but must instead be sufficiently or substantially similar to the charged offense—determined by time, place and modus operandi.” *Id.* at 391. The common-scheme-or-plan exception covers only conduct with a marked similarity in modus operandi to the charged offense. *Ness*, 707 N.W.2d at 689. The supreme court has declined to adopt a bright-line rule to determine whether a prior bad

act has lost its relevance on the basis of remoteness. *Id.* at 688 (citing *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005)).

Here, the *Spreigl* offense occurred five years after the charged offense. Harris argues that “five years is too distant to satisfy the substantial similarity standard.” But the supreme court has upheld the admission of *Spreigl* evidence significantly more remote than five years. *See Washington*, 693 N.W.2d at 202-03 (affirming admission of 16-year-old *Spreigl* evidence); *see also State v. Wermerskirchen*, 497 N.W.2d 235, 237, 243 (Minn. 1993) (affirming admission of 19-year-old *Spreigl* evidence).

Furthermore, the district court found that the charged offense and the *Spreigl* offense bore numerous similarities. In particular: (1) Harris met each victim the day of the incident; (2) Harris initiated physical contact with each victim and his advances were rejected; (3) Harris isolated each victim; (4) once alone with each victim, Harris made sexual advances; (5) Harris used force to incapacitate each victim, applying that force to the face or neck; (6) Harris forcibly removed each victim’s pants; (7) Harris vaginally penetrated each victim with his penis; and (8) Harris left each victim’s residence shortly following the sexual assault. These similarities equal or exceed the similarities in other cases in which the supreme court has affirmed the admission of *Spreigl* evidence to demonstrate a common scheme or plan. *See State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015) (concluding that the charged offense and *Spreigl* offense were markedly similar because both involved the defendant punching an individual’s head, a verbal disagreement preceding other acts, a disagreement of minor significance, the defendant claiming self-defense, and the defendant showing no visible signs of injury from the altercations). The

record supports the district court's conclusion that the charged offense and *Spreigl* offense were markedly similar.

Finally, Harris argues that the probative value of the *Spreigl* evidence was outweighed by its risk of unfair prejudice. Even if *Spreigl* evidence is relevant, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Minn. R. Evid. 403. The closer the relationship in time, place, and modus operandi between the *Spreigl* offense and the current charge, the less likely the jury will use the evidence improperly. *State v. Blom*, 682 N.W.2d 578, 612 (Minn. 2004). When balancing the probative value of *Spreigl* evidence against its potential for unfair prejudice, a district court considers the state's need for the evidence. *Ness*, 707 N.W.2d at 690. The supreme court has explained necessity as follows:

“Need” for other-crime evidence is not necessarily the absence of sufficient other evidence to convict, nor does exclusion necessarily follow from the conclusion that the case is sufficient to go to the jury. A case may be sufficient to go to the jury and yet the evidence of other offenses may be needed because, as a practical matter, it is not clear that the jury will believe the state's other evidence bearing on the disputed issue.

State v. Bolte, 530 N.W.2d 191, 197 n.2 (Minn. 1995).

Here, the *Spreigl* evidence had high probative value because it corroborated T.S.'s account of the sexual assault. Furthermore, as the district court noted, Harris indicated an intent to raise a consent defense, and the *Spreigl* evidence supported the state's position that Harris had a common scheme or plan to commit a sexual assault.

Harris asserts that the *Spreigl* evidence was unfairly prejudicial because presentation of that evidence consumed an undue amount of time, and confused and misled

the jury. Unfair prejudice in the *Spreigl* context refers to “the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means.” *Montgomery*, 707 N.W.2d at 399 (quotation omitted). The reading of cautionary instructions lessens the probability of undue weight being given by the jury to the *Spreigl* evidence. See *State v. Slowinski*, 450 N.W.2d 107, 114-15 (Minn. 1990).

Here, the state presented four witnesses to testify about the *Spreigl* incident, but this testimony was not redundant, and “the state had the right to present evidence of the details of the [*Spreigl* incident].” *Ture v. State*, 681 N.W.2d 9, 16 (Minn. 2004). The district court also gave the jury cautionary instructions before the state introduced the *Spreigl* evidence and during its final instructions, and then referred the jury to its cautionary instruction in response to a jury question concerning the relevance of the *Spreigl* evidence. The probative value of the *Spreigl* evidence was not outweighed by its risk of unfair prejudice and the district court correctly admitted evidence of the 2008 incident.

Rule 412 evidence

Harris argues that the district court abused its discretion by denying his motions to admit evidence of T.S.’s involvement in prostitution and to grant a hearing to assess the evidence before ruling on its admissibility.

Generally, in a prosecution for criminal sexual conduct, “evidence of the victim’s previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury.” Minn. R. Evid. 412(1). When the victim’s consent is a defense, evidence of the victim’s prior sexual conduct “tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue”

may be admissible. *Id.* (1)(A)(i). Rule 412 lays out the procedure to introduce evidence of prior sexual conduct. *Id.* (2). The accused must make a motion setting out with particularity an offer of proof of the evidence the accused seeks to admit. *Id.* (2)(A). If the district court deems that offer of proof sufficient, the court shall conduct a hearing outside the presence of the jury allowing the accused to make a full presentation of the offer of proof. *Id.* (2)(B).

“To qualify as a pattern of clearly similar sexual behavior, the sexual conduct must occur regularly and be similar in all material respects.” *State v. Davis*, 546 N.W.2d 30, 34 (Minn. App. 1996), *review denied* (Minn. May 21, 1996). Conduct involving an agreement to trade sex for money bears no clear similarity to conduct involving the exchange of sex for drugs. *Id.* at 35.

The district court’s conclusion that evidence of T.S.’s involvement in prostitution was “remote and uninstructional” is supported by the record. In his offer of proof, Harris stated that T.S. told a victim-witness advocate that, at the time of the offense, her boyfriend required her to do things that she would not have otherwise done. Harris also offered that the state spoke to T.S. again and disclosed to the defense that her boyfriend “did prostitute her but 8 months after he got out of jail. Not before and not during [the] sexual assault. For money not drugs and not for her—he got [the] money. Only happened a few times and she stopped it.” Harris offered no specific evidence indicating that the prostitution actually occurred prior to or contemporaneously with the charged offense. Furthermore, even assuming that T.S.’s statements about the timing of the prostitution were not truthful, Harris’s offer of proof contained no evidence suggesting that the sexual conduct involved

trading sex for drugs. Instead, Harris's offer of proof suggested that T.S. traded sex for money, not drugs. Minnesota caselaw holds that trading sex for drugs is not sufficiently similar to trading sex for money such that this evidence would demonstrate a pattern of clearly similar behavior. *See id.*, 546 N.W.2d at 35 (stating that an agreement to trade sex for money bears no clear similarity to exchanging sex for drugs). We hold that the district court correctly excluded evidence of T.S.'s involvement in prostitution.

Harris also argues that he was entitled to a hearing pursuant to rule 412(2)(D). If new information is discovered after the date of the rule 412(2)(B) hearing or during trial that makes evidence of prior sexual conduct admissible, the accused may make an offer of proof and the district court shall hold an in camera hearing to determine whether the proposed evidence is admissible. Minn. R. Evid. 412(2)(D).

The district court concluded that Harris was not entitled to an in camera hearing because it had just held a hearing pursuant to rule 412(2)(B) and there was no additional information the district court could gain from holding another hearing. This conclusion is consistent with rule 412. Harris offered no evidence after the rule 412(2)(B) hearing that would make T.S.'s involvement in prostitution admissible. We hold that the district court correctly determined that Harris was not entitled to an additional hearing.

Brady/Discovery violations

Harris argues that he is entitled to a new trial because the state's late disclosure of T.S.'s statement and the victim-witness advocate's impression that she was referring to forced prostitution constituted both a *Brady* violation and a discovery violation.

Brady violations present mixed questions of law and fact, which this court reviews de novo. *Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005). Determining whether a discovery violation took place is an issue of law, which this court reviews de novo. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). However, this court reviews the district court's decision whether to impose sanctions for discovery violations for an abuse of discretion. *Id.* This court also reviews the denial of a motion for a mistrial for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003).

Brady violation

In *Brady v. Maryland*, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). “Thus, in criminal cases, the state has an affirmative duty to disclose evidence that is favorable and material to the defense.” *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999). Whether the individual prosecutor knows of evidence favorable to the defense is not dispositive for *Brady* purposes. *Id.* at 235. Rather, the prosecutor must disclose exculpatory information in the possession or control of the prosecution staff and anyone else who has participated in the investigation and who regularly reports to the prosecutor's office. *Id.*

A *Brady* violation is composed of three elements. *Pederson*, 692 N.W.2d at 459. First, the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching. *Id.* Second, the evidence must have been willfully or

inadvertently suppressed by the state. *Id.* Finally, the accused must have been prejudiced as a result. *Id.* All three elements must be met to constitute a *Brady* violation. *Id.* A defendant is not entitled to a new trial unless the evidence is “material,” meaning that “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 460 (quotation omitted). A “reasonable probability” is one “sufficient to undermine confidence in the outcome.” *Id.* (quotation omitted).

As stated previously, evidence relating to T.S.’s engagement in prostitution was not admissible. Because Harris could not have introduced this evidence even if it had been disclosed earlier, this evidence was not material. Consequently, Harris was not prejudiced by the late disclosure of this evidence, and this late disclosure does not constitute a *Brady* violation. The district court did not err when it denied Harris’s motion for a mistrial on that basis.

Discovery violation

At the defense’s request and before the rule 11 omnibus hearing, the prosecutor must allow access to “all matters within the prosecutor’s possession or control that relate to the case, except as provided in Rule 9.01, subd. 3.” Minn. R. Crim. P. 9.01, subd. 1. The prosecutor must also make certain disclosures, including “the substance of oral statements” that are known to the prosecutor and relate to the case. *Id.*, subd. 1(2)(c). Prosecutors also have a continuing duty to disclose information learned in interviews with potential witnesses. *State v. Moore*, 493 N.W.2d 606, 608 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993).

In determining whether to impose sanctions for a discovery violation, the district court considers “(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors.” *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). Failure to consider these factors constitutes an abuse of discretion. *State v. Sailee*, 792 N.W.2d 90, 95 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). Nonetheless, a conviction will stand if the error was harmless beyond a reasonable doubt. *Id.* “An error is harmless if the jury’s verdict is surely unattributable to the error.” *Id.* (quotation omitted).

Because the prosecutor has a duty to disclose “the substance of oral statements” that relate to the case, the prosecutor should have disclosed, at an earlier time, T.S.’s statement to the victim-witness advocate. *See* Minn. R. Crim. P. 9.01, subd. 1(2)(c). The district court denied Harris’s request for a continuance after the state’s disclosure but failed to make specific findings concerning the *Lindsey* factors, which constitutes an abuse of discretion. *See Sailee*, 792 N.W.2d at 95.

Nonetheless, this error was harmless and does not warrant a new trial. First, as the district court stated, the discovery violation was likely inadvertent. Second, and most importantly, Harris was not prejudiced because any discussion of T.S.’s engagement in prostitution was inadmissible. Therefore, the state’s failure to timely disclose these statements did not affect the jury’s verdict. Because the district court’s failure to discuss the *Lindsey* factors was harmless, Harris is not entitled to a new trial.

Affirmed.