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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0379**

State of Minnesota,
Respondent,

vs.

Bryant Jockieth Malone,
Appellant.

**Filed April 2, 2018
Affirmed
Peterson, Judge**

Rice County District Court
File No. 66-CR-16-203

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

John L. Fossum, Rice County Attorney, Terence Swihart, Assistant County Attorney,
Faribault, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from his convictions of first-degree criminal sexual conduct, domestic
assault, violation of an order for protection, and terroristic threats, appellant argues that the

district court abused its discretion by permitting the state to introduce relationship evidence and *Spreigl* evidence. We affirm.

FACTS

Appellant Bryant Jockieth Malone began dating N.F. in 2011, and they had a child together. On September 15, 2015, while N.F. was sitting in her truck with their child, appellant accused her of having other romantic relationships, punched her, poured a can of pop over her, and hit her with the pop can, which cut her face. Appellant pulled N.F. into the house, began to beat her in front of the child, and then repeatedly kicked her with steel-toed boots. After he kicked her in the throat, N.F. had trouble breathing, and appellant told her, “Die, b-tch, die.”

Appellant took her to the bedroom, where he threatened to shove a knife in her vagina. N.F. tried to calm him by performing oral sex. Following that, appellant performed nonconsensual vaginal and anal sex on N.F. The two fell asleep, and when they woke up the next day, appellant asked N.F. what she had done to her face and denied striking her. Appellant did not permit N.F. to leave until after dark so that no one would see her face. The following day, N.F. went to a hospital because her head hurt and she was vomiting, but she was afraid to tell the hospital staff that appellant assaulted her. Instead, she told them that two girls assaulted her.

On October 26, 2015, appellant texted N.F. and told her that someone was on his way to kill her. The next day, N.F. was hospitalized with suicidal thoughts brought about by her fear of being beaten again. While in the hospital, N.F. obtained an emergency order for protection (OFP) for herself and her children. The order was served on appellant on

October 30. On December 5, 2015, appellant called N.F. from jail, in violation of the OFP, which prohibited contact by telephone, text, or email.

N.F. reported the September 2015 sexual assault to police on January 21, 2016, when she was living at a center for domestic-abuse victims. Appellant was charged by amended complaint with two counts of first-degree criminal sexual conduct, domestic assault, violation of an OFP, violation of a domestic-abuse no-contact order (DANCO), and two counts of terroristic threats.

Before trial, the state gave notice to appellant that it intended to introduce evidence of appellant's prior bad acts and moved for permission to introduce relationship evidence under Minn. Stat. § 634.20 (2016) and evidence of prior bad acts under Minn. R. Evid. 404(b). The district court granted the state's motion in part, and, at trial, the state presented testimony about two incidents that involved appellant and N.F.

Both N.F. and her friend, J.M., testified about both incidents. In August 2012, appellant beat and choked N.F. in front of J.M. J.M. intervened, and appellant attempted to punch J.M. while she was holding her infant child. The district court found that evidence about this incident was "more probative than unfairly prejudicial" and allowed the testimony under Minn. Stat. § 634.20. In the winter of 2013, when N.F. was pregnant, appellant punched her in the stomach, attempting to harm the fetus, and choked her. Once again, J.M. intervened. The district court found that this evidence was "highly probative and does not involve substantial unfair prejudice" and allowed it under Minn. Stat. § 634.20.

In addition to the testimony about these two incidents, the state sought to admit a video recording of a police interview of N.F. During the interview, N.F. stated that appellant threatened to kill her, but she did not say when the threat occurred. The district court initially determined that the recorded statement would be admitted as relationship evidence, but the court later limited the relationship evidence to evidence of two incidents, and the state chose to use evidence of the two incidents described above. Nevertheless, when the detective who conducted the recorded interview testified at trial, the video recording of the interview was played to the jury, without objection. In the recording, N.F. described an incident in December 2012 when she was in her car with A.E., who was appellant's girlfriend at the time. Appellant approached the car and choked N.F. until she could not breathe and she fell to the ground. He then leaned into the car and choked A.E.

The state also presented *Spreigl* evidence about two additional incidents. Appellant's mother M.M. testified that in June 2010, appellant cut his sister with a knife during an argument at M.M.'s home. At the time, M.M. had a court order that prohibited appellant from being in her home, but she allowed him to visit. As a result of this incident, appellant was charged with second-degree assault with a weapon and terroristic threats and pleaded guilty to the terroristic-threats charge. The state offered evidence of this incident "to show modus operandi in the use of a knife," "motive in the form of power and control over a victim," and "lack of mistake." The district court found "that the probative value outweighs the possibility of unfair prejudice, and that the use would be limited to arguing motive or method of operation, absence of mistake, or accident."

M.M. also testified that, in August 2012, she intervened when appellant was at her house with D.N., the mother of appellant’s child, and she heard D.N. crying. M.M. ran into the room and saw appellant standing by a wall and D.N., who was upset, sitting on the bed. M.M. testified that there was a court order that said that appellant could not be in her home. M.M. removed appellant from her home and told him that “you do not put [your] hands on anybody in my house.” As a result of this incident, appellant was convicted of violating a DANCO. The state offered evidence of this incident to prove motive and lack of mistake or accident. The district court found that the evidence was “not unfairly prejudicial” and that the evidence was “probative, fairly probative, and relevant to show motive, lack of mistake, or accident.” The court permitted the state to offer evidence about the underlying facts of the incident but not the fact that appellant was convicted.

The jury found appellant guilty of one count of first-degree criminal sexual conduct, domestic assault, violation of an OFP, and one count of terroristic threats, and acquitted him of one count each of first-degree criminal sexual conduct and terroristic threats.¹ The district court sentenced appellant to 360 months for the criminal-sexual-conduct conviction and imposed concurrent sentences for the violation of an OFP and terroristic-threats convictions. This appeal followed.

D E C I S I O N

We review the district court’s decision to admit evidence of a defendant’s other bad acts under either Minn. R. Evid. 404(b) or Minn. Stat. § 634.20 for an abuse of discretion.

¹ The district court dismissed the charge for violation of a DANCO.

State v. Ness, 707 N.W.2d 676, 685 (Minn. 2006) (*Spreigl*² evidence); *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008) (relationship evidence), *review denied* (Minn. Oct. 29, 2008). Appellant has the burden of establishing that the district court abused its discretion and that appellant was prejudiced by admission of the evidence. *Ness*, 707 N.W.2d at 685; *Lindsey*, 755 N.W.2d at 755.

1. *Relationship evidence*

Appellant challenges the admission of the relationship evidence.

Evidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Minn. Stat. § 634.20. Appellant argues only that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

The concept of unfair prejudice involves more than “merely damaging evidence, even severely damaging evidence.” *Lindsey*, 755 N.W.2d at 757. Unfairly prejudicial evidence “is evidence that persuades by illegitimate means, giving one party an unfair advantage.” *Id.* “[T]o become inadmissible, the presumptively admissible relationship evidence must be more than merely potentially prejudicial, and it must be more than merely potentially unfairly prejudicial.” *State v. Andersen*, 900 N.W.2d 438, 442 (Minn. App.

² *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965) (permitting the use of evidence of a defendant’s other bad acts for limited purposes).

2017). The evidence is “inadmissible only if its danger for unfair prejudice *substantially* outweighs its probative value.” *Id.* (emphasis in the original).

In *Andersen*, the defendant argued that evidence of prior assaultive behavior against the victim was not probative because “a key issue was whether [the victim] fabricated her assault allegations” and the relationship evidence did not pertain to that issue. *Id.* at 441. This court rejected defendant’s argument, stating, “[The victim’s] testimony informed the jury of the nature of their relationship, the times that she felt afraid of [defendant], and the times that [defendant] attempted to manipulate, control, and restrain her. This testimony has obvious probative value.” *Id.*

The relationship evidence about the previous incidents when appellant was violent toward N.F. was highly probative because N.F. told hospital staff that she was assaulted by two girls and then failed to report the September 15 assault for four months, and appellant argued that N.F. had concocted the story that he assaulted her. The relationship evidence “illuminated” their relationship by revealing that it included significant violence and responded to appellant’s fabrication claim by explaining why N.F. did not report the assault until after she was living at a center for domestic-abuse victims. *See State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004) (relationship evidence is used “to illuminate the history of the relationship” between a victim and the accused and provide context for crime).

The evidence was not unfairly prejudicial because it was needed to respond to appellant’s fabrication claim. There were no witnesses to the September 15 assault, and the relationship evidence was relevant to the jury’s credibility determinations. Also, the district court instructed the jury about the permissible use of the relationship evidence

before the evidence about each incident was presented, which tended to lessen the probability that the jury would misuse or give “undue weight” to the evidence. *Lindsey*, 755 N.W.2d at 757 (quotation omitted). The district court did not abuse its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

2. *Spreigl* evidence

Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible 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). Before *Spreigl* evidence may be admitted in a criminal prosecution, the state must (1) give notice of its intent to offer the evidence; (2) indicate what the evidence will be offered to prove; (3) provide clear and convincing evidence of the defendant’s participation in the prior bad act; (4) demonstrate that the evidence is relevant to the state’s case; and (5) show that the probative value outweighs the potential for unfair prejudice to the defendant. *State v. Bartylla*, 755 N.W.2d 8, 20-21 (Minn. 2008). Appellant argues only that the probative value of the *Spreigl* evidence was substantially outweighed by the danger of unfair prejudice.

The state indicated that the *Spreigl* evidence was offered to prove modus operandi in the use of a knife, motive in the form of power and control over a victim, and lack of mistake or accident. Evidence of another crime is admissible to show a common plan or scheme if the other crime “has a marked similarity in modus operandi to the charged

offense that tends to corroborate evidence of the charged offense.” *Bartylla*, 755 N.W.2d at 20 (quotation omitted). In both the offense against his sister and the charged offenses against N.F., appellant gratuitously held a knife against the victim in a threatening manner. This was a marked similarity in modus operandi that tended to corroborate N.F.’s testimony about the September 15 assault and made the evidence about the June 2010 offense probative.

“[M]otive explains the reason for an act.” *Ness*, 707 N.W.2d at 687 (quotation omitted). “[M]otive concerns external facts that create a desire in someone to do something.” *Id.* Although appellant’s prior and current offenses may all have been motivated by a desire to exercise power and control over his victims, the evidence about his prior offenses did not show that the prior offenses provided a reason for committing the current offenses. Having the same motive for two offenses does not show that an earlier offense was the motive for a later offense. Evidence of appellant’s prior offenses was not probative with respect to his motive for the offenses against N.F. *Compare id.* at 682, 687 (*Spreigl* evidence of defendant’s prior sexual misconduct was not admissible to show motive in prosecution for criminal sexual misconduct), *with State v. Black*, 291 N.W.2d 208, 215 (Minn. 1980) (upholding admission of *Spreigl* evidence to show that motive for murder was to silence witness on outstanding robbery charges against defendant), *abrogated on other grounds by State v. Jones*, 556 N.W.2d 903, 909 n.4 (Minn. 1996).

The state’s final purpose for offering the *Spreigl* evidence was to prove a “lack of mistake or accident,” which is a permissible purpose under the rule. We understand the state’s argument to the district court to be that because appellant pleaded guilty to violating

a DANCO following the August 2012 offense against D.N., he knew that violating a court order is an offense, and his violation of N.F.'s OFP against him was not the result of a mistake or accident.

But it is not clear from the record that the jury knew that appellant pleaded guilty to violating a DANCO. The district court permitted the state to offer evidence about the underlying facts of the August 2012 incident, but it did not allow evidence of the fact that appellant was convicted, and the state has not cited any evidence presented to the jury that shows that appellant pleaded guilty to violating a DANCO. At trial, however, M.M. testified that, in August 2012, there was a court order that said that appellant could not be in her home. The jury could reasonably infer that, if M.M. knew about the court order, appellant also knew about it. Thus, M.M.'s testimony was somewhat probative with respect to the absence of mistake.

We conclude that although the *Spreigl* evidence was not admissible to prove motive, it was admissible to prove a common plan and the lack of mistake. And although the probative value of the *Spreigl* evidence was not great, the district court did not abuse its discretion in determining that the danger for unfair prejudice did not substantially outweigh its probative value.

Furthermore, appellant has the burden of showing prejudice. *State v. Thao*, 875 N.W.2d 834, 839 (Minn. 2016). Wrongfully admitted evidence is prejudicial when “there is a reasonable possibility that [it] significantly affected the verdict.” *Id.* (quotation omitted). In determining whether wrongfully admitted evidence is prejudicial, this court

considers whether (1) the district court gave a limiting instruction; (2) the state emphasized the evidence in its closing argument; and (3) the evidence of guilt was overwhelming. *Id.*

The district court carefully instructed the jury before evidence about each *Spreigl* incident was presented; the state spent a relatively short amount of time addressing the incidents in its argument, and the evidence, which appellant's mother reluctantly provided, was brief. The jury acquitted appellant of two charges, which suggests that the jurors carefully weighed the evidence, and did not improperly use the *Spreigl* evidence. And the evidence of appellant's guilt, through N.F.'s testimony and the medical records of her injuries, was overwhelming. Appellant has not shown that he was prejudiced by the introduction of the *Spreigl* evidence.

Pro se issues

In his pro se brief, appellant argues that the investigating officer improperly commented on appellant's decision to remain silent. During trial, the state may not directly or indirectly comment on a defendant's exercise of his constitutional right to remain silent. *State v. DeRosier*, 695 N.W.2d 97, 106-07 (Minn. 2005).

Appellant was in jail when police were investigating the September 2015 assault. During his trial testimony, the investigating officer was asked what steps he took during his investigation, and he responded, "I collected the evidence. I logged it into evidence. I did attempt to speak with [appellant]." The investigator did not refer to the fact that appellant was in jail or state that appellant refused to speak with him, and the state asked no further questions about whether the investigator contacted appellant. The district court found that the comment did not "suggest necessarily that [appellant] exercised his right to

remain silent,” concluded that it was not prejudicial, and denied appellant’s mistrial motion. We agree. The officer’s testimony did not suggest that appellant refused to speak with him; it merely suggested that, for whatever reason, the officer was not able to speak with appellant.

Appellant also argues that the prosecutor committed misconduct during her closing argument when she said, (1) “He knows what happened to her face. He’s proud of what happened to her face”; and (2) “I submit to you that I’ve met my burden and ask you to return a verdict of guilty on all six counts.”

When reviewing claims of prosecutorial misconduct during closing arguments, we view the argument as a whole, rather than focusing on selected remarks. *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009). Prosecutors have the right to “legitimately argue, analyze, [and] explain evidence and present proper inferences.” *DeRosier*, 695 N.W.2d at 106-07. The state is not required to make a “colorless argument.” *Graham*, 764 N.W.2d at 356.

The prosecutor’s first statement was made in the context of describing the violent assault, N.F.’s powerlessness, and her humiliation by appellant. Viewing the entire closing argument, this argument did not affect appellant’s substantial rights. *See State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (stating that standard of review for unobjected-to prosecutorial misconduct is whether it affected defendant’s substantial rights).

As to the second statement, a prosecutor may not shift the burden of proof to a defendant. *Id.* at 148. The prosecutor did not shift the burden of proof; rather, she acknowledged that she had the burden of proof.

Affirmed.