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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0640**

State of Minnesota,
Respondent,

vs.

Clarence Alvin Cooper,
Appellant.

**Filed March 11, 2019
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-17-23281

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Patrick Lofton, 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 Bjorkman, Presiding Judge; Connolly, Judge; and Florey, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that the district court abused its discretion by admitting evidence that he committed another

sexual assault. He advances additional arguments in a pro se supplemental brief. We affirm.

FACTS

Fifty-four-year-old C.D. was walking from her car to an evening church service on June 24, 2017, when an unknown young man approached her. The two spoke briefly, and when C.D. indicated she needed to go inside to help set up chairs, the man offered to help. As they worked, the man told C.D. she was beautiful and that he wanted to marry her. He stayed for the service. Afterward, he told C.D. his name was “Cooper” and asked to exchange phone numbers; C.D. refused, but he gave her his number. He then joined C.D. and two other women to go out for food nearby. When they discovered that the restaurant was closed, the other women left.

C.D. told the man she was going home because she needed to use the bathroom. He invited her to use the bathroom at his house, assuring her that his family was there and “it would be a safe place to go.” C.D. followed him in her car and noticed that his house was farther away than she had expected. C.D. left her purse and phone in the car when she went in because she “didn’t plan on staying.”

After C.D. used the bathroom, she walked out to find the man standing across the hall from her. He grabbed her by the shoulders and maneuvered her into another room. She felt her heels hit something and fell backward onto a mattress on the floor, landing heavily on her right hip. The man grabbed her left foot and quickly removed her leggings and underwear. C.D. objected, but the man, still holding her left leg up, penetrated her vagina with his penis. It was painful, and the man’s movements caused C.D.’s head to

pound against the wall. The man ejaculated, then performed oral sex on her, and then rolled her onto her stomach. Thinking that he intended anal sex, C.D. told him “that if he did anything anally [she] would kill him.” He vaginally penetrated her again. Afterward, he offered her water and food; she accepted some water, then left with her shoes, leggings, and underwear in her hand. As she walked to her car, the man asked if he could call her the next day and requested money to repair his vehicle. She refused and drove away.

At home, C.D. removed and washed her clothes but did not bathe before going to bed. In the morning, she left for an early church commitment, not planning to tell anyone about the incident. But a church friend noticed that C.D. was upset, elicited the story from her, and convinced her to report the incident to police. C.D. retraced her path from the previous night to locate the man’s house, then went to the police station.

C.D. gave a statement describing the incident. She also relayed the name “Cooper” and the phone number that he had given to her, and provided a photograph of him taken during the church service. A sexual-assault examination revealed multiple bruises on C.D.’s limbs and buttocks, abrasions on her abdomen and left thigh, redness and tenderness in her vaginal area, multiple tears and bleeding in and around the vagina, and bruising on her cervix, as well as the presence of saliva and semen in her vaginal area.

The police used the phone number to identify “Cooper” as appellant Calvin Cooper, a 22-year-old Liberian who had immigrated to the United States the previous year. Cooper gave a statement to police, initially denying any memory of C.D., then acknowledging that he had sex with her and claiming the encounter was consensual.

The state charged Cooper with first-degree criminal sexual conduct. Over Cooper's objection, the district court permitted the state to counter Cooper's consent defense with evidence that on July 16, 2017, Cooper entered the apartment of 63-year-old M.G., overpowered her, and penetrated her vagina with his penis. Cooper testified that he had consensual sex with both C.D. and M.G. The jury found Cooper guilty. Cooper appeals.

DECISION

I. The district court did not abuse its discretion by admitting evidence that Cooper sexually assaulted M.G.

Evidence of a defendant's prior crimes or bad acts is not admissible to prove the defendant's character to show he acted in conformity with it on a particular occasion. Minn. R. Evid. 404(b)(1); *State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965). But this *Spreigl* evidence may be admissible for other limited purposes. Minn. R. Evid. 404(b)(2); *State v. Clark*, 738 N.W.2d 316, 345 (Minn. 2007). We review the admission of *Spreigl* evidence for an abuse of discretion. *State v. Welle*, 870 N.W.2d 360, 365 (Minn. 2015). To garner reversal, the appellant must show both an abuse of discretion and resulting prejudice. *State v. Rossberg*, 851 N.W.2d 609, 615 (Minn. 2014).

A five-part test governs the admissibility of other-acts evidence:

- (1) the 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); *see* Minn. R. Evid. 404(b)(2). Cooper argues that the district court abused its discretion by admitting evidence that he sexually assaulted M.G. because the state failed to satisfy the last four *Ness* factors. We address each in turn.

Purpose

When considering the admission of other-acts evidence, a “district court should not simply take the prosecution’s stated purposes . . . at face value.” *Ness*, 707 N.W.2d at 686. Rather, the court should “look to the real purpose for which the evidence is offered, and ensure that that purpose is one of the permitted exceptions to the rule’s general exclusion of other-acts evidence.” *Id.* (quotation omitted).

Cooper contends the district court erred by failing to make findings regarding the purpose of the evidence. The record, while slim, indicates otherwise. The prosecutor indicated that the evidence would show a common scheme or plan and “lack of mistake or accident,” and would refute allegations of “fabrication.” While the district court did not address these stated purposes at length, it expressly found that the evidence could be admitted to show “lack of consent” and a “common scheme or plan”—two recognized, proper purposes for *Spreigl* evidence. *See Clark*, 738 N.W.2d at 316 (stating that, in sexual-assault prosecutions, *Spreigl* evidence may be introduced to establish, “by showing a common scheme or plan,” that the sexual act occurred); *State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984) (recognizing that *Spreigl* evidence may be “relevant to the issue of consent”). Accordingly, this factor is satisfied.

Clear and Convincing Evidence

The clear and convincing standard “requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt” that the prior act occurred. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (quotation omitted). The truth of the facts sought to be admitted must be “highly probable.” *State v. Stewart*, 643 N.W.2d 281, 297 (Minn. 2002) (quotation omitted). The uncorroborated testimony of the *Spreigl* victim is sufficient. *Kennedy*, 585 N.W.2d at 389-90. We defer to a district court’s determination that a *Spreigl* incident is proved by clear and convincing evidence. *State v. McLeod*, 705 N.W.2d 776, 788 (Minn. 2005).

Cooper assigns error because “M.G.’s testimony was internally inconsistent and demonstrably false.” This argument is unavailing. The district court conducted an evidentiary hearing to determine whether the state could prove the *Spreigl* incident by clear and convincing evidence. M.G. testified that a man entered her apartment, overpowered her as she physically resisted, removed her underwear, held her leg up, “tried to penetrate [her]” and then did “part of the way” and ran out, after which she called the police. When confronted on cross-examination with inconsistencies between her police statement and her testimony regarding what led up to the assault, M.G. insisted that “he raped me. And that’s all that matters to me. That he raped me.” Other evidence confirmed that Cooper had parked near M.G.’s apartment building shortly before the assault, followed her into the building, and fled down 11 flights of stairs immediately afterward. And Cooper, after initially denying any connection to M.G., acknowledged a sexual encounter and claimed it was consensual. This record amply supports the district court’s determination that, despite

inconsistencies and other flaws in M.G.’s testimony, the state met its burden to prove the incident by clear and convincing evidence.

Relevance and Materiality

The probative value of *Spreigl* evidence depends on its similarity to the charged offense “in terms of time, place, and modus operandi.” *Ness*, 707 N.W.2d at 688-89 (quotation omitted). The closer the *Spreigl* incident is to the charged offense in these three respects, the greater its relevance and probative value. *Id.* at 688.

Cooper argues the *Spreigl* evidence is not relevant to a disputed fact issue and insufficiently similar to the charged offense to be admissible. We disagree. First, the disputed fact issue here is whether C.D. consented to sex with Cooper—the same issue M.G. disputed. Second, the two incidents are substantially similar in time, place, and modus operandi; they occurred only 22 days apart, within a few miles of each other in Brooklyn Center and Brooklyn Park, and both involved Cooper targeting a widowed woman decades older than himself, physically overpowering her and removing her undergarments, manipulating her legs to penetrate her, subsequently denying any memory of her, and later claiming the encounter was consensual. The *Spreigl* evidence is highly probative on the disputed issue of consent.

Probative Value versus Potential Unfair Prejudice

The probative value of *Spreigl* evidence must outweigh “its potential to unfairly prejudice.” *Clark*, 738 N.W.2d at 347. There is always a risk that evidence of another bad act will be viewed as indicative of a propensity, particularly when the other act is of a sexual nature. *State v. Fardan*, 773 N.W.2d 303, 319 (Minn. 2009). But when the evidence

is highly relevant and necessary “to strengthen weak or inadequate proof in the case,” the risk that the evidence will be “used as propensity evidence” is diminished. *Id.*

As noted above, C.D.’s credibility was central to the state’s case.¹ While some evidence tended to corroborate her account of nonconsensual sex, some of C.D.’s conduct may have undermined her credibility—e.g., accompanying a strange man to his home, not consistently resisting, and not immediately reporting the assault. Defense counsel argued that these and other factors are inconsistent with a nonconsensual encounter. *See State v. Rucker*, 752 N.W.2d 538, 550 (Minn. App. 2008) (stating that evidence of prior criminal-sexual-conduct conviction was probative to the criminal-sexual-conduct victims’ credibility when their conduct “may have called into question their credibility, weakening the state’s case”), *review denied* (Minn. Sept. 23, 2008). The *Spreigl* evidence was critical to the state’s ability to demonstrate C.D.’s credibility and rebut Cooper’s consent defense.

This strong probative value outweighed the risk of unfair prejudice. The *Spreigl* evidence was presented by two witnesses. And while their testimony, including vigorous cross-examination, spanned approximately 100 transcribed pages, it was not excessive relative to evidence of the charged offense. Six witnesses testified about the assault of C.D., and numerous visual and audio exhibits were presented over three days. *Cf. State v. DeWald*, 464 N.W.2d 500, 504 (Minn. 1991) (recognizing concern for unfair prejudice

¹ Cooper contends that the district court should have reserved its *Spreigl* ruling until after the close of the state’s case. *See Kennedy*, 585 N.W.2d at 392 (“The final determination of the strength of the state’s case should be made by the trial court after the state has presented all of its non-*Spreigl* evidence.”). Because it was apparent even before trial that consent was the central issue, a delayed ruling was unnecessary.

when the jury “heard far more testimony” about the *Spreigl* evidence than about the charged offense). The district court repeatedly instructed the jury about the limited use of the *Spreigl* evidence, and the prosecutor underscored this instruction during closing argument. Such instructions lessen the probability of the jury giving undue weight to the evidence. *Kennedy*, 585 N.W.2d at 392. On balance, the risk of unfair prejudice did not outweigh the strong probative value of the *Spreigl* evidence.

In sum, we discern no abuse of discretion by the district court in admitting the *Spreigl* evidence.

II. Cooper’s pro se arguments lack merit.

In a pro se supplemental brief, Cooper reiterates concerns about the admission of the *Spreigl* evidence and advances several additional arguments. Because he does not cite legal authority or record evidence to support his arguments, they could be deemed waived. *See State v. Munt*, 831 N.W.2d 569, 588 (Minn. 2013) (declining to address claims asserted without citation to the record or legal authority). But we choose to address two of his arguments in the interests of justice. Minn. R. Civ. App. P. 103.04.

Cooper argues that racial bias infected his trial, from the jury-selection process to the conduct of the judge, the prosecutor, and even his own counsel. We do not treat such concerns lightly. And we are satisfied, upon close review of the record, that none of the participants in Cooper’s trial did so. Cooper’s jury was selected from a random list and each juror was vetted for racial bias by both the prosecutor and defense counsel. *See State v. Williams*, 525 N.W.2d 538, 542 (Minn. 1994) (stating that a criminal defendant is not guaranteed “a jury of a particular composition”). The trial judge carefully considered and

ruled on evidentiary issues, including admitting the *Spreigl* evidence and excluding inadmissible vouching testimony that Cooper sought to present. *See State v. Reese*, 692 N.W.2d 736, 741 (Minn. 2005) (stating that testimony about another’s credibility is inadmissible). And the judge conscientiously addressed Cooper’s concern that a black man accused of sexually assaulting a white woman would not receive a fair trial, confronting the issue in jury instructions and urging the jurors to set aside any “personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases.” Likewise, the prosecutor fairly summarized the evidence of the charged offense and appropriately limited her discussion of the *Spreigl* evidence, urging the jury to do the same. Overall, we discern no taint of racial bias in Cooper’s trial.

Cooper also asserts that his counsel was ineffective because he (1) failed to obtain possible surveillance video from near the restaurant where he and C.D. went, (2) exhibited racial prejudice by acknowledging that C.D. “is a sympathetic character,” (3) failed to object to the *Spreigl* evidence, and (4) failed to object to the only black person in the jury pool being “taken out.” These arguments are unavailing. The first two relate to counsel’s strategic decisions, such as which evidence or arguments to present, which we do not review for competence. *State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001). And the last two misrepresent the record, which reveals that counsel consistently opposed admission of the *Spreigl* evidence, and that the only black person in the jury pool was never even questioned as a prospective juror because of her placement on the randomized list.

Based on our careful review of the record, we conclude that Cooper's pro se supplemental brief does not establish a basis for relief.

Affirmed.