

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0787**

State of Minnesota,
Respondent,

vs.

Amit Kumar Mishra,
Appellant.

**Filed March 25, 2019
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-CR-17-9253

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

Michael O. Freeman, Hennepin County Attorney, Patrick Lofton, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Max A. Keller, Keller Law Offices, Minneapolis, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Hooten, Judge; and Cochran, Judge.

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

HOOTEN, Judge

Appellant challenges his convictions of agreeing to hire a prostitute and soliciting a child through electronic communication. He argues that there was insufficient evidence to prove he reasonably believed he was communicating with a 15 year old, and he argues that

he should have been allowed to present evidence that he and his wife were victimized by a phone scam. We affirm.

FACTS

In April 2017, appellant Amit Kumar Mishra responded to an advertisement posted on Backpage.com for a woman named “Princess Kylie.” The advertisement had been posted in the dating section of the website under “women seeking men” by police officers conducting a prostitution sting. The advertisement indicated that Kylie was 18 years old, and it included a phone number. Mishra called the number, but no one picked up. A police officer posing as Kylie then texted Mishra from the number. The two texted back and forth multiple times, and Mishra agreed to pay \$100 to have sex with Kylie at her apartment. At one point in the text conversation, Mishra asked Kylie her age. She indicated that she would soon be 16 years old. After Kylie texted him her age, Mishra did not text anything back for 90 minutes. When he did finally text her back, Mishra indicated that he was “ready to start.” Mishra then spoke on the phone with a female officer posing as Kylie and confirmed the details of their scheduled meeting. Mishra arrived at Kylie’s apartment with condoms, the agreed-upon \$100 in cash, and a cellphone. Police officers arrested him and confirmed that Mishra’s phone was the same one used to communicate with Kylie.

Mishra was charged with one count of agreeing to hire a prostitute he reasonably believed to be between 13 and 16 years old under Minn. Stat. § 609.324, subd. 1(b)(3) (2016), and one count of soliciting someone he reasonably believed to be a child through electronic communication under Minn. Stat. § 609.352, subd. 2a(1) (2016). He pleaded not guilty and elected to have a jury trial. Mishra testified at trial that he believed Kylie

was at least 18 years old and that, based on his phone conversation with the officer posing as Kylie, he believed she was in her late 20s or early 30s. At one point, he also began to testify about an incident in 2015 in which he and his wife were the victims of a phone scam. The prosecutor objected to the testimony, and the district court sustained the objection on the basis that the phone scam was not relevant. The district court also noted that the evidence had not been disclosed to the state before trial. The jury found Mishra guilty of both charges, and the district court imposed sentences on both.¹ This appeal follows.

D E C I S I O N

I. Sufficiency of the Evidence

Mishra first argues that there was insufficient evidence to convict him of agreeing to hire a child prostitute and solicitation of a child. Specifically, he argues that there was insufficient evidence to prove that: (1) he reasonably believed that the prostitute was 13 to 15 years old for the charge of agreeing to hire a prostitute; and (2) he reasonably believed that the person he solicited was 15 or younger for the solicitation charge. Both of these elements refer to Mishra’s state of mind, and, lacking any direct evidence of his belief about Kylie’s age, would be proven by circumstantial evidence. See *State v. Essex*, 838 N.W.2d 805, 809 (Minn. App. 2013) (“Because intent is a state of mind, it is generally

¹ Mishra does not raise this argument on appeal, but we note that the district court may have erred by imposing two sentences for offenses arising from a single behavioral incident. See Minn. Stat. § 609.035, subd. 1 (2016) (“[I]f a person’s conduct constitutes more than one offense . . . the person may be punished for only one of the offenses . . .”). Mishra may bring a motion to correct the sentence pursuant to Minn. R. Crim. P. 27.03, subd. 9, or file a petition for postconviction relief if he wishes to address this issue. See *Washington v. State*, 845 N.W.2d 205, 210 (Minn. App. 2014).

proved circumstantially” (quotation omitted)). Therefore, the circumstantial-evidence test applies.

We undertake a two-step analysis when an appellant challenges the sufficiency of circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). At the first step, we identify the circumstances proved at trial. *Id.* In doing so, “we defer to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.” *Id.* at 598–99 (quotation omitted). We assume that the jury believed the state’s witnesses and disbelieved the defense’s witnesses, and conflicting evidence is construed in the light most favorable to the verdict. *Id.* In other words, only the circumstances that are consistent with the verdict are considered when determining the circumstances proved. *Id.*

At the second step, we “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotation omitted). This requires that we review the circumstantial evidence as a whole rather than as isolated facts. *Id.* We independently examine the reasonableness of all inferences. *Id.* And we give no deference to the fact-finder’s choice between reasonable inferences. *Id.*

We begin by looking at the circumstances proved that are relevant to what Mishra reasonably believed about Kylie’s age. The state proved at trial that: Mishra texted Kylie; he asked about her age; Kylie indicated, by text message, that she was 15 years old; after a 90-minute pause, Mishra continued to send Kylie several more text messages.

From these circumstances it is easy to infer that Mishra saw Kylie’s message indicating her age and thus reasonably believed that she was 15 years old. Mishra argues,

however, that these circumstances are also consistent with a rational hypothesis that he did not reasonably believe Kylie was 15 years old. He asserts that it would be reasonable to infer that he never actually saw Kylie's response and remained under the impression that she was 18 years old, as indicated by her advertisement on Backpage.com. This inference relies on his testimony that he receives numerous text messages and emails throughout the day because of his job and that Kylie's age-indicating text message was simply lost in the shuffle. But, on appeal, we assume that the jury disbelieved Mishra. So we cannot consider his testimony in determining what reasonable inferences can be drawn from the evidence. *See id.* We are left with the evidence that Mishra asked Kylie her age, she told him, and he continued the conversation. Considering the evidence as a whole, the only rational inference from this evidence is that Mishra saw Kylie's text message and disregarded it. Accordingly, there was sufficient circumstantial evidence on the elements of his belief about her age to convict Mishra.

II. Exclusion of Evidence

Mishra also argues that the district court erred by excluding evidence he wished to present at trial and that this prevented him from presenting a complete defense. The United States Constitution and the Minnesota Constitution guarantee criminal defendants the right to present a meaningful defense. U.S. Const. amends. VI, XIV; Minn. Const. art. 1, § 7; *State v. Greer*, 635 N.W.2d 82, 91 (Minn. 2001). But when evidence is repetitive, marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues, it may be excluded. *Greer*, 635 N.W.2d at 91. The exclusion of a defendant's

evidence is thus reviewed for an abuse of discretion and, if an error is found, that error is subject to a harmless-error analysis. *Id.*

Mishra argues that the district court should have allowed him to introduce evidence that, prior to this incident with Kylie, he and his wife were the victims of a phone scam. He frames the district court's decision to exclude this evidence as being based on an erroneous interpretation of what constitutes reverse-*Spreigl* evidence. "[E]vidence of an alternative perpetrator's other crimes, wrongs, or bad acts—sometimes called reverse-*Spreigl* evidence—is admissible to cast reasonable doubt upon the identification of the defendant as the person who committed the charged crime." *State v. Swaney*, 787 N.W.2d 541, 557 (Minn. 2010) (quotation and emphasis omitted). In this case, Mishra was trying to bring in evidence of another crime, not to suggest that there was an alternate perpetrator, but to show that he is skeptical of what he reads on the internet because he was previously scammed. Mishra is therefore correct that the evidence he sought to present was not reverse-*Spreigl* evidence.

But the district court did not base its decision to exclude this evidence on a misunderstanding of the law. At trial, the prosecutor objected to Mishra attempting to introduce the phone-scam evidence, and the district court held a discussion off the record before sustaining the objection. A short while later, the district court excused the jury for a lunch break, at which point the attorneys and the judge went on the record to explain the off-the-record discussion. The judge explained that the "objection was . . . for relevance and I believe it was regarding an issue about nondisclosure of some information that [trial counsel] was trying to elicit from Mr. Mishra." When the district court asked the

prosecutor if that was a proper characterization of the objection, the prosecutor said, “Yes, it’s [irrelevant] and lack of discovery on that issue. I would note general discovery rules, but also 404(b), I believe that’s reverse *Spreigl* type evidence that must be noticed ahead of time.” As the discussion continued, the prosecutor again insisted that the evidence “is a reverse *Spreigl*.” The district court took the matter under advisement over the lunch break.

After the lunch break, the district court ruled as follows:

I find that the initial conversation regarding the phone scam, if it involved Mr. Mishra’s wife and not – he was not a participant in that, I do not find that it would be relevant for these proceedings.

And I also will note that this matter – this information was not disclosed to the state before today’s date. We are in day two of trial. . . . The state did not have any notice of this issue. They did not have any opportunity to do any research regarding this issue or to verify that this occurred. So I am going to grant the state’s motion and that information will not be permitted.

While the district court did talk about notice, as would be required with reverse-*Spreigl* evidence, it excluded the evidence because it was irrelevant. Thus, the district court did not err by excluding the evidence on the mistaken belief that it was reverse-*Spreigl* evidence.

That still leaves the question of whether the district court erred by excluding Mishra’s evidence on the basis of relevance. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401.

Mishra argues that the phone-scam evidence was relevant. He explains that his “assertion that he did not trust representations on the internet was central to his theory of the case and to his defense to the charges.” And that, when combined with his testimony that he believed Kylie to be older than 18, “[a]llowing evidence of the phone scam may have reasonably strengthened the jury’s ability to draw the inference that [Mishra] did not reasonably believe [Kylie] was under 16.” But Mishra is unable to convincingly explain why a phone scam relating to his and his wife’s immigration status would make him think it more likely that the prostitute he solicited on Backpage.com is older than her advertisement indicates. Nor is it clear why, when he was presented with evidence that she is *younger* than the advertisement indicated, the phone scam would lead him to believe that she is nonetheless older. If anything, a wary person might avoid Backpage.com altogether or, when informed that the woman he is soliciting is underage, reasonably suspect that he is the subject of a police operation and back out of the proposed sexual encounter. But Mishra did neither of those things, and we cannot see how evidence of a phone scam would possibly be relevant.

Even if the evidence were relevant, its exclusion would constitute harmless error. Harmless-error review requires us to be “satisfied beyond a reasonable doubt that an average jury (i.e., a reasonable jury) would have reached the same verdict if the evidence had been admitted and the damaging potential of the evidence fully realized.” *Greer*, 635 N.W.2d at 90 (quotation omitted). The evidence against Mishra was damning. He called and texted police officers who were posing as an underage prostitute, he received a text message from Kylie indicating that she was 15 and nonetheless continued to text her, and

he showed up at her apartment with the agreed-upon \$100 and condoms. It is hard to see how the tale of a telephone scam would have affected this verdict. We are satisfied that any error would have been harmless.

Affirmed.