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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0925**

State of Minnesota,
Respondent,

vs.

Gerald James Risk,
Appellant.

**Filed August 26, 2019
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CR-16-12286

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Jonathan P. Schmidt, Assistant County Attorneys, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Cochran, Presiding Judge; Worke, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct. He argues that he is entitled to a new trial because the prosecutor engaged in misconduct by

eliciting testimony on allegations that appellant possessed child pornography, commenting on those allegations in closing argument, failing to prepare a witness, and introducing evidence that the district court ruled inadmissible. We affirm.

FACTS

In May 2016, the state charged appellant Gerald James Risk with one count of first-degree criminal sexual conduct. The state alleged that, in February 2016, appellant, then 50 years old, engaged in sexual contact with K.T., then 12 years old. K.T. went to appellant's home to have a sleepover with her female friend, H.H., who was also 12 years old. According to the complaint, appellant put K.T.'s hand on his penis, rubbed his penis against K.T.'s vagina, and spanked both girls with a hairbrush, flip-flop, wooden paddle, and belt.

In September 2016, the state sought permission to offer *Spreigl* evidence, including evidence that appellant previously behaved inappropriately with underage girls; possessed pornographic magazines, such as "Barely Legal"; and committed sexual acts with H.H. contemporaneous with the charged crime. *See State v. Spreigl*, 139 N.W.2d 167, 169-72 (Minn. 1965) (discussing the admission of evidence of prior crimes); *see also State v. Campbell*, 861 N.W.2d 95, 102 (Minn. 2015) (stating that *Spreigl* evidence is "evidence of other crimes, wrongs, or acts"). The district court denied the state's request, but permitted evidence of acts perpetrated against H.H. that were "[i]ntertwined" with the charged crime.

Prior to trial, the state again sought permission to offer *Spreigl* evidence, this time a video and images found on appellant's cellphone. The state described the video as appellant "filming a young, though ostensibly adult, female," and saying, "show me the

panties I bought you, or—I swear to God I’ll paddle you.” The images included “innocuous photos” of H.H., as well as sexually suggestive images of women.

At a hearing on the *Spreigl* evidence, the district court determined that the innocuous images of H.H. were admissible, but the other images were not. As for the video, the district court determined that appellant’s reference to paddling was admissible, but the video itself was too prejudicial, and only the audio could be played for the jury.

Additionally, at the hearing, an exchange occurred concerning an allegation that appellant showed K.T. child pornography on his cellphone. Defense counsel indicated that there was “an essential agreement” concerning the allegation, and indicated that he might “ask the investigator” if he located child pornography on appellant’s phone, but wanted a ruling on whether this would “open the door to anything else.” The prosecutor indicated that he would ask the investigator, on redirect, if images or videos were deleted from the phone. The prosecutor stated that it would not be “fair for the defense to paint a picture of, well, you got the phone and there’s nothing on [it] relevant.” The district court asked defense counsel if there was any disagreement with the prosecutor being able to inquire on redirect if there were videos deleted from the phone, and defense counsel indicated that this was “fair game.”

K.T.’s Testimony

At trial, K.T. testified that during the sleepover, in February 2016, she took a bath with H.H. Appellant knocked on the door, came into the bathroom, and poured oil into the tub. K.T. was confused by appellant’s behavior and asked H.H. if he was drunk. According to K.T., H.H. then confided that one time, when appellant was drunk, he made her give

him oral sex. K.T. told H.H. that this was wrong and that she had to tell someone, but H.H. made K.T. promise not to tell.

According to K.T.'s testimony, after the girls got done bathing, appellant suggested that they sleep in his room. He told them "[o]ne of his rules for women that sleep in his bed is that they cannot have clothes on." K.T. was uncomfortable with this, so appellant allowed her to wear her underwear and bra. H.H. "automatically just took off her clothes." Appellant was in his underwear and asked the girls to rub lotion on his arms and chest; K.T. initially refused, but ultimately complied. Appellant then asked H.H. to leave the room, he laid on top of K.T., and asked to see her breasts. K.T. complied.

K.T. testified that H.H. came back into the room, and appellant "started talking about, like, female eggs and, like, sperm and how they, like, fertilize the eggs." Appellant then forced K.T. to take off his underwear. H.H. was on the bed pretending to sleep. Appellant put K.T.'s hand on his penis "and [he] was, like, pushing it back and forth." Appellant asked K.T. for oral sex, but she refused. Appellant then pulled K.T.'s underwear off and put his penis on her vagina.

K.T. testified that appellant told both girls "to get on the bed and bend over and put [their] face[s] into a pillow," and he then spanked them with a belt, a flip-flop, a paddle, and a hair brush. The next day, appellant dropped K.T. off at her house, kissed her on the mouth, and told her not to tell. K.T. testified that she told her sister. K.T.'s grandfather drove K.T. and her sister to the police station.

During K.T.'s testimony, the prosecutor asked her if she had told her therapist about appellant showing her some pictures on a phone. K.T. testified: "He didn't show us. We

[we]re in the hotel, and we were, like, looking at the videos that we had just taken because we were, like, dancing around being goofy. And the other [K], [H.H.'s] friend, had scrolled a little bit too far and there were pictures.” The prosecutor then asked what type of pictures, and K.T. responded, “[n]ude pictures.” The prosecutor then asked, “Nude pictures of what?” K.T. responded, “I don’t w[an]t to say kids, but they looked like younger, like maybe 18 or 19.” The prosecutor asked, “So you don’t know if they were kids or not?” K.T. responded, “They weren’t children, but they were, like, younger. They weren’t old.” The prosecutor asked if this was porn, and K.T. responded, “Yes.” The prosecutor also asked K.T. if she remembered telling her therapist “about a razor,” a “vibrating razor,” and K.T. responded, “No.”

H.H.'s Testimony

H.H. testified that she lived with appellant for “[a] year or so,” along with appellant’s dad, brother, and brother’s girlfriend. H.H.’s mom was staying at “a family friend’s house.” H.H. had her own room at appellant’s home. H.H. testified that she occasionally slept in appellant’s bed because she was afraid of the dark. Regarding the sleepover, H.H. generally testified that she did not remember what happened, though she acknowledged taking a bath with K.T. She denied that appellant came into the bathroom while the girls were bathing. She denied being sexually abused by appellant, and denied that appellant spanked her or behaved inappropriately with K.T.

Testimony of K.T.'s Therapist

K.T.’s therapist testified that she met with K.T. in February 2016. According to the therapist, K.T. discussed the sexual abuse and disclosed that appellant “used the backside

of an electric shaver, which would vibrate, and put it on her.” The prosecutor asked the therapist, “Did she tell you about whether she had ever seen some pictures on [appellant’s] phone?” The therapist replied, “She said he had shown her pictures of naked children” on his cellphone on a day prior to the incident. On cross-examination, defense counsel asked the therapist about her statements to law enforcement regarding K.T.’s disclosure. He asked, “And . . . what you told Sergeant Markstrom is that [appellant] had shown her child pornography on the phone, correct?” The therapist responded, “Yes.”

Testimony of Sergeant Markstrom; Exhibit 14

Sergeant Rolf Markstrom testified about executing a search warrant at appellant’s residence. During his testimony, 21 photos were offered and admitted into evidence without objection. One of those photos, exhibit 14, depicts appellant’s bed, and on the bed is a handheld camcorder and a photo. On the edge of exhibit 14, portions of a number of magazines are visible. One magazine clearly displays the word “Legal” and a woman’s face. No nudity is visible.

During Sergeant Markstrom’s testimony, the prosecutor asked about the forensic analysis of appellant’s cellphone. He asked, “Did you find what you would qualify as . . . child pornography on the phone?” The sergeant responded, “I did not.” The prosecutor then asked, “Were there a number of videos and photographs that had been deleted?” The sergeant responded, “There were deleted files on the phone.”

Appellant’s Testimony

Appellant testified in his own defense. He acknowledged that K.T. and H.H. spent the night at his house in February 2016. He denied sexually abusing the girls, and

insinuated that K.T. had fabricated the story because he was going to restrict contact between the girls due to K.T.'s mental-health issues.

During appellant's testimony, the prosecutor asked appellant, "You knew [K.T.] at one point had said that you showed them child pornography on your phone?" Appellant responded, "I never showed either one of them anything off of my phone. . . . [u]nless it was like a YouTube video of something . . . nothing pornographic ever on my phone did I show them." The prosecutor then asked, "And then she qualified that in her testimony that it was kind of younger-looking adults." Appellant responded, "Yes, she said that. . . . [but] I never showed them anything pornographic in my phone."

The State's Closing Argument

During closing argument, in discussing K.T.'s testimony, the prosecutor stated that defense counsel "is going to point out to you . . . that [K.T.] told [her therapist] about the electric razor. Remember, she didn't remember that during the testimony. And that she told [the therapist] about the child porn. New detail."

Later, in discussing K.T.'s credibility, the prosecutor stated that defense counsel would argue that K.T. "has been so inconsistent in her multiple statements that you don't know what the truth is. She only brought up the razor with [the therapist]. She only brought up the child porn with [the therapist]. She changed it from child porn to young adult porn while she was testifying." The prosecutor later stated, "While we're at it, there was no child porn found on the defendant's phone. But, remember, he was apprised of this investigation very early on." The prosecutor later stated that appellant "knew about this investigation from the beginning. You heard testimony from Sergeant Markstrom that

there were videos and photos on that phone that had been deleted. He had plenty of time to delete any child porn that was on that phone.”

The Defense’s Closing Argument

During closing argument, defense counsel discussed the child pornography allegation:

[The therapist] is another individual who is trying to help. . . . She’s spent 90 minutes with [K.T.] that day, February 17th of 2016, an hour and a half, and she got a pretty good story. This is the first time that [K.T.] references child pornography. And she tells [the therapist], “I showed—he showed me child pornography on the phone.” She says, the whole way this thing stopped, the way she got it to stop, was when [appellant] took this razor, this vibrating razor, and put it on her vagina. And it was too intense for her to handle, so she had to stop it. Right?

. . . .

And when [K.T. is] ultimately confronted with some of these issues when she was testifying—think about the child porn. Right? She told [the therapist], “He showed us child porn on his phone.” Right? But what she said here is, “No, no, no, he didn’t show it to us.” We were scrolling through and we just happened upon it accidentally, like an oops moment.” And, No, it’s not really child porn. It’s, you know, young women. Right?

The jury found appellant guilty of the charged offense. The district court sentenced appellant to 144 months’ imprisonment. This appeal followed.

DECISION

Appellant asserts that he is entitled to a new trial because of four instances of prosecutorial misconduct. First, he asserts that the prosecutor inappropriately asked multiple witnesses about appellant possessing child pornography without first “providing notice of the state’s intent to introduce the prior bad-act evidence and without allowing the

court to rule on the admissibility of the evidence.” Second, he argues that the prosecutor inappropriately mentioned the child-pornography allegation during closing argument. Third, he asserts that the prosecutor engaged in misconduct by not preparing his witness, K.T., regarding the district court’s order prohibiting testimony on appellant possessing adult pornography. Fourth, he argues that the prosecutor inappropriately introduced exhibit 14, a photograph that displayed a “Barely Legal” pornographic magazine that the court had specifically ruled inadmissible. Each of these arguments is addressed in turn.

I. The prosecutor did not engage in plain-error misconduct by asking multiple witnesses about appellant possessing child pornography.

Appellant argues that the prosecutor committed misconduct by questioning multiple witnesses about his alleged possession of child pornography. He asserts that the prosecutor was seeking to admit *Spreigl* evidence and failed to give proper notice. He points to four instances where the prosecutor sought to elicit the alleged *Spreigl* evidence.

First, during the questioning of K.T., the prosecutor asked if she recalled telling her therapist about appellant showing her pictures, and then asked about the nature of those pictures. Second, during the questioning of K.T.’s therapist, the prosecutor asked the therapist if K.T. had ever disclosed seeing pictures on appellant’s phone. Third, during the questioning of Sergeant Markstrom, the prosecutor inquired whether child pornography was discovered on appellant’s phone. Fourth, during appellant’s own cross-examination, the prosecutor stated, “You knew [K.T.] at one point had said that you showed them child pornography on your phone?”

Appellant did not object to the prosecutor's questions or the testimony elicited.¹ "[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious. *State v. Vue*, 797 N.W.2d 5, 13 (Minn. 2011). "Typically, a plain error contravenes case law, a rule, or a standard of conduct." *Id.*

For unobjected-to prosecutorial misconduct, our review is under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). If an appellant establishes that the prosecutorial misconduct is plain error, then the burden shifts to the state to show that the misconduct did not affect the appellant's substantial rights. *Id.* at 302. This requires a showing "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotations omitted). If all prongs of the modified plain-error test are met, an appellate court "then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.*

Appellant asserts that the testimony at issue constitutes *Spreigl* evidence, which includes evidence of a defendant's prior bad acts. *State v. Thao*, 875 N.W.2d 834, 839 (Minn. 2016). There is a danger in admitting such evidence because "the jury may convict because of those other crimes or misconduct, not because the defendant's guilt of the

¹ Because appellant's counsel "affirmatively developed and expanded" the evidence on the child-pornography allegation, the invited-error doctrine is likely applicable. See *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007). However, the doctrine does not apply to plain errors. *Id.*

charged crime is proved.” *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). A prosecutor must give notice of intent to offer such evidence. Minn. R. Evid. 404(b). It is improper for a prosecutor to elicit inadmissible testimony. *See State v. Harris*, 521 N.W.2d 348, 353 (Minn. 1994). The state contends that the testimony at issue was not *Spreigl* evidence, but rather “evidence of grooming that both parties knew would come into evidence.”

For two reasons, we conclude that appellant has failed to demonstrate plain-error misconduct. First, it is not clear or obvious from the record that the prosecutor was attempting to elicit *Spreigl* testimony. Not all references to prior bad acts constitute *Spreigl* evidence, and immediate-episode evidence is admissible “when there is a close causal and temporal connection between the prior bad act and the charged crime.” *State v. Riddley*, 776 N.W.2d 419, 425 (Minn. 2009); *see State v. Wofford*, 114 N.W.2d 267, 271 (Minn. 1962) (“It is well recognized that the rule excluding evidence of the commission of other offenses does not necessarily deprive the state of the right to make out its whole case against the accused on any evidence which is otherwise relevant upon the issue of the defendant’s guilt of the crime with which he was charged.”).

Second, the record indicates that both parties and the district court were aware of the child-pornography allegation and the potential for the issue to be raised during trial. Prior to any witness testimony, defense counsel indicated to the district court that he might ask “the investigator” whether “he located child pornography on the phone.” Defense counsel also indicated that the parties had “an essential agreement” on that issue. Even though the state first raised the issue, there was no objection, and no objection during the subsequent references to the child-pornography allegation.

We are not prepared to say that the prosecutor's questions constituted a clear or obvious error given the familiarity of the parties with the allegation, the apparent "agreement" on the issue, and the lack of any objection. It is important for defendants to object at trial because "the district court is in [the] unique position to determine what actions constitute prosecutorial misconduct." *Ramey*, 721 N.W.2d at 298. Defendants should not be allowed to deliberately sit on their objections "with the hope of securing reversible error for appeal and, as a result, getting two chances at a jury trial." *Id.* at 299 (quotation omitted).

By arguing that the admission of *Spreigl* testimony constituted plain error, appellant argues, in effect, that the district court should have sua sponte struck the testimony or provided a cautionary instruction. See *State v. Vick*, 632 N.W.2d 676, 687 (Minn. 2001) ("[T]he real question before us is *not* whether the [district] court erred in *admitting* the evidence, but instead is whether the [district] court's failure to sua sponte strike the testimony or provide a cautionary instruction was plain error."). But under the circumstances, it would have been inappropriate to do so, as the record indicates that the defense was contemplating raising the issue of the child-pornography allegation as a matter of trial strategy, and there was no objection when the state ultimately raised the issue first. The supreme court has indicated that district courts, generally, should not interfere with the defendant's trial strategy. *State v. Washington*, 693 N.W.2d 195, 205 (Minn. 2005). Given the circumstances of this case, we cannot say that the prosecutor committed plain-error misconduct by asking questions about the child-pornography allegation.

II. The prosecutor did not commit plain-error misconduct by mentioning the child-pornography allegation during closing argument.

Appellant next argues that the prosecutor committed plain-error misconduct by mentioning the child-pornography allegation multiple times during his closing argument, including arguing that appellant could have deleted child pornography from his cellphone before law enforcement searched it. During closing argument, prosecutors may “argue all reasonable inferences from evidence in the record.” *State v. Smith*, 876 N.W.2d 310, 335 (Minn. 2016) (quotation omitted). However, it is misconduct for a prosecutor to intentionally “misstate the evidence or mislead the jury as to the inferences it may draw.” *Id.* (quotation omitted).

The state’s closing argument was not plain-error misconduct. The therapist testified regarding K.T.’s disclosure that appellant showed her child pornography, and Sergeant Markstrom testified that photos and videos were deleted from appellant’s cellphone. The prosecutor’s arguments were therefore reasonable inferences drawn from the evidence.

III. We need not determine whether the prosecutor committed plain-error misconduct by not preparing K.T. as a witness because appellant was not prejudiced by her testimony.

Appellant next argues that the prosecutor engaged in misconduct by not preparing K.T. prior to her testimony, which resulted in K.T. discussing appellant’s possession of adult pornography. Prior to trial, the district court ruled that evidence of appellant’s possession of legal pornographic magazines was inadmissible. The state asserts that, even if appellant establishes a plain error, his substantial rights were not affected. We agree.

“The state has a duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements.” *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). “A reviewing court is much more likely to find prejudicial misconduct when the state intentionally elicits impermissible testimony.” *Id.* “But an intentional elicitation of impermissible testimony, although erroneous, will warrant reversal only when it is likely that the impermissible testimony substantially weighed on the jury’s decision.” *Id.*

Accepting that the state’s failure to prepare K.T. constituted plain error, the burden shifts to the state to show that appellant’s substantial rights were not affected. *Ramey*, 721 N.W.2d at 302. We consider various factors, including: “(1) the strength of the evidence against [the defendant]; (2) the pervasiveness of the erroneous conduct; and (3) whether [the defendant] had an opportunity to rebut any improper remarks.” *State v. Peltier*, 874 N.W.2d 792, 805-06 (Minn. 2016).

Regarding the strength of the evidence, as the state notes, other evidence was admitted indicating that appellant had an interest in pornography, namely, the video/audio in which appellant discussed “paddling” a woman. The prejudicial effect of the jury learning that appellant possessed adult pornography on his phone was therefore negligible. *See also State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999) (“Where evidence sought to be introduced under *Spreigl* does not tend to show that the defendant is guilty of a crime other than the crime with which he is charged, the chance of it creating unfair prejudice is less than is ordinarily the case when evidence is admitted under Rule 404(b).” (quotation omitted)). K.T.’s unobjected-to testimony was limited in both duration and scope. Appellant was afforded an opportunity to rebut K.T.’s testimony during cross-examination,

and during closing argument, appellant's counsel pointed to the testimony as an inconsistency, arguing that K.T.'s story had changed from appellant showing her child pornography to inadvertently discovering adult pornography on appellant's phone. Presuming, without deciding, that plain-error prosecutorial misconduct occurred, the state has met its burden of establishing that appellant's substantial rights were not affected by K.T.'s testimony that appellant possessed adult pornography.

IV. The prosecutor did not engage in plain-error misconduct by introducing exhibit 14 into evidence.

Finally, appellant asserts that the prosecutor inappropriately offered into evidence exhibit 14, a photograph containing visible portions of a "Barely Legal" pornographic magazine, which the district court ruled was inadmissible. We discern no plain-error misconduct.

In exhibit 14, the word "Legal" and a woman's face are visible. However, no nudity is visible, and the nature of the magazines is not readily discernable. The focal points of exhibit 14 are a camcorder and photo strip, and the testimony surrounding exhibit 14 concerned those items, not pornographic magazines. Appellant failed to object to the admission of exhibit 14. While the exhibit could have been better redacted, offering it was not clear or obvious error. *See Ramey*, 721 N.W.2d at 302.

Affirmed.