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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1239**

State of Minnesota,
Respondent,

vs.

Antonio Cornelius Neal,
Appellant.

**Filed August 10, 2020
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-CR-17-30873

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Ross, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

SLIETER, Judge

In this direct appeal from the judgment of conviction for first-degree criminal sexual conduct, appellant Antonio Cornelius Neal argues that the district court committed

reversible error by admitting *Spreigl*¹ evidence of Neal's prior criminal-sexual-conduct crime. Because the prior criminal offense shares a markedly similar *modus operandi* with the conduct underlying the present offense and evidence of the prior criminal offense was not overly-prejudicial, we affirm.

FACTS

In 2019, Neal was charged by amended complaint with three counts of first-degree criminal sexual conduct with a person under the age of 13, in violation of Minn. Stat. § 609.342, subd. 1(a) (2010). The state alleged that Neal sexually assaulted his biological daughter on multiple occasions between 2010 and 2012 when she was between 6- and 8-years-old. The jury found Neal guilty of all three charged counts. The district court allowed, as *Spreigl* evidence during the trial, testimony from Neal's cousin about instances of prior sexual abuse by Neal against her when she was a minor that resulted in Neal being convicted of third-degree criminal sexual conduct in 2004. Neal challenges the district court's admission of his cousin's testimony.

DECISION

Neal argues the admission of his cousin's testimony was improper because the testimony did not demonstrate that he acted according to a common plan, was irrelevant, and the prejudicial value of the testimony outweighed its probative value. Neal also contends that the district court erred in failing to caution the jury as to the proper use of *Spreigl* evidence prior to its receipt.

¹ *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

Minn. R. Evid. 404(b) governs the admissibility of evidence of a defendant's other crimes or prior acts, which is also referred to as *Spreigl* evidence. This evidence is not admissible to prove that a defendant acted in conformity with his or her prior bad acts, but it may be admissible for other purposes such as establishing "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b)(1).

"A district court's decision to admit *Spreigl* evidence is reviewed for an abuse of discretion." *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016). The defendant bears the burden of showing an error occurred and any resulting prejudice. *Id.* If an appellate court determines that the district court erroneously admitted *Spreigl* evidence, the appellate court must then determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *Id.* at 262.

The state argued in district court, and maintains on appeal, that the testimony of Neal's cousin was admissible *Spreigl* evidence to show that Neal acted according to a common plan in assaulting his minor daughter. Neal argues that the facts of the 2004 incident reflect a different *modus operandi* from the current conduct and the *Spreigl* evidence is therefore inadmissible. He also raises a number of alternative arguments against admission of the testimony.

In a written order, the district court considered the five factors required pursuant to Minnesota law in determining the admissibility of *Spreigl* evidence: (1) whether the state

gave notice of its intent to admit the *Spreigl* evidence;² (2) whether the state clarified what the *Spreigl* evidence will prove; (3) whether there was clear and convincing evidence that the defendant participated in the *Spreigl* act; (4) whether the *Spreigl* evidence was relevant and material to the state's case; and (5) whether the probative value of the *Spreigl* evidence was outweighed by its potential prejudice to the defendant. *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). The primary factors for which Neal believes the court erred involve the second and fourth factors, purpose and relevance.

The district court determined that the state satisfied each factor and allowed Neal's cousin to testify at trial. With regard to the second and fourth factors, the district court stated:

[T]he incidents [underlying the 2004 conviction] address the precise disputed fact as to whether Mr. Neal employed a common scheme in committing the present offense. The consistency between [the] incidents establishes a design of sexually abusing younger women that Mr. Neal is related to. Both relevant acts involved familial ties, both took place at the location where Mr. Neal was staying, both involve penetration of genitals by Mr. Neal's penis that lead to ejaculation, and both involve a threat from Mr. Neal to not speak. The close similarity in *modus operandi* is readily apparent based upon those facts.

² Neal argues for the first time on appeal that the state did not provide notice of some of the facts testified to by his cousin during her testimony related to the *Spreigl* incident. Appellate courts generally will not consider matters not argued to and considered by the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) ("This court generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure."). We therefore decline to consider this claim.

The district court determined that the probative value of the evidence outweighed its potential for unfair prejudice. The district court also stated that the prejudice in admitting the evidence would be mitigated by providing a cautionary instruction to the jury before the evidence was introduced.

During trial, Neal's cousin testified that Neal sexually penetrated her twice while at her home—once in 2003 in her brother's room when nobody else was home, and once again in 2004 in her bedroom after everyone else in the home had gone to sleep. Neal told her not to tell her dad about what happened and that her family “won't find out.” Her family eventually did find out and reported the allegations to law enforcement.

Following the testimony of Neal's cousin, the district court instructed the jury that they were to consider the cousin's testimony “for a limited purpose. It's a purpose—the purpose is to assist [the jury] in determining whether Mr. Neal committed the acts that he's charged of here. He's not charged with those offenses and you can't convict him based on those offenses. Is that clear to everyone?” See 10 Minnesota Practice, CRIMJIG 2.01 (2015).

Marked Similarity

Our supreme court stated that rule 404(b) “plan” evidence includes “evidence of offenses which, because of their marked similarity in *modus operandi* to the charged offense, tend to corroborate evidence of the latter.” *Ness*, 707 N.W.2d at 687-88 (quotation omitted). Such evidence may be admissible “to refute the defendant's contention that the victim's testimony was a fabrication or a mistake in perception.” *Id.* at 688. “[T]he closer

the relationship between the other acts and the charged offense, in terms of time, place, or *modus operandi*, the greater the relevance and probative value” of the evidence. *Id.*

Neal argues that the *Spreigl* incident is not markedly similar to the charged offense because the prior offense: (1) included a single form of penetration; (2) involved his minor cousin who was five to seven years older than his daughter at the time of the abuse; (3) did not involve a threat; and (4) occurred at a different location. Each argument is addressed below.

Different forms of assault

Neal cites no caselaw in support of his argument that a *Spreigl* incident that involved a single form of penetration is markedly different from the charged offense which includes multiple forms of penetration for *Spreigl* admission. That Neal sexually assaulted both his minor cousin and minor daughter through vaginal penetration establishes that the forms of assault were sufficiently similar.

Different familial relationships and ages

Our supreme court has allowed common plan *Spreigl* evidence of past abuse of relatives in cases where the defendant was charged with assaulting a daughter. *See State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993) (past allegation of sexual assault of niece admissible to show a pattern of abusing young girls within the “family context”). Neal assaulted two familial minors. The fact that one victim was a cousin and the other was a daughter does not establish a different *modus operandi* between the two incidents. Further, both victims were minor relatives, and the 2004 incident shows an “ongoing pattern of opportunistic [assault] of young girls within the family context.” *Id.*

Different threats

The record shows that Neal threatened his daughter by telling her “not to tell or he would hurt her.” Neal’s cousin testified that Neal told her that “[her family] won’t find out” and that she should not “tell [her] dad.” While the language used in the incidents was different, it would have been reasonable for both Neal’s cousin and the district court to interpret Neal’s language in each case as a threat.

Different locations

The district court concluded that the *Spreigl* and charged incident “both took place at the location Mr. Neal was staying.” It is reasonable to conclude that the incidents occurred in the bedrooms of homes where Neal was staying even though the offenses occurred at different physical locations.

In sum, the *modus operandi* of the prior offense was markedly similar to the convicted offense for the district court to conclude that the prior offense was admissible as *Spreigl* evidence.

Relevancy

Neal asserts that the abuse of his cousin occurred at least six years before the conduct underlying the current charges, and is therefore too remote to be relevant. The district court stated in its pretrial order that “[a]lthough large periods of time have passed between the past allowed bad act, the relevance of the similarities is striking and the matter is not stale.”

“The degree of proximity between the prior and charged acts, while bearing somewhat on the probative value analysis, is largely a factor in determining whether the

Spreigl evidence is relevant to the prosecution.” *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005). “In general, the prior acts become less relevant as time passes. Thus, the greater the time gap, the more similar the acts must be” to be considered as relevant. *Id.* There is no bright-line rule for determining how old is too old.

Relevancy concerns of prior bad acts are lessened if “the defendant was actually convicted of a crime based on the prior bad act, thus reducing the prejudice of having to defend against claims of other acts that occurred years before.” *Ness*, 707 N.W.2d at 689. Neal’s conviction resulting from the 2004 incident bolsters its relevance to the current charges.

The record establishes that the prior conviction is relevant and the district court did not abuse its discretion in admitting the evidence on this ground.

Probative Value

Neal also argues that the probative value of his cousin’s testimony is outweighed by its prejudicial impact. “The use of *Spreigl* evidence to show a common scheme or plan has been endorsed repeatedly, despite the particular risk it poses for unfair prejudice.” *Ness*, 707 N.W.2d at 687. Plan evidence may be admissible “to refute the defendant’s contention that the victim’s testimony was a fabrication or a mistake in perception.” *Id.* at 688. The need for plan evidence is perhaps the largest factor in determining whether the probative value of the evidence is outweighed by its prejudicial effect. *Id.* at 690. In assessing the probative value, appellate courts look to whether the evidence was relevant and whether the evidence was needed to strengthen the proof of an element. *Id.* at 689.

At trial, Neal's primary defense was that his daughter was lying about the abuse. "In criminal sexual conduct cases, particularly in child sex abuse prosecutions, prior acts of sexual conduct are often relevant . . . where the defendant asserts the victim is fabricating the allegations." *State v. Boehl*, 697 N.W.2d 215, 219 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005). Neal's cousin's testimony has clear probative value in refuting the allegation that his daughter was lying.

In sum, Neal's argument that his daughter fabricated the abuse allegations compels us to conclude that the district court did not abuse its discretion in concluding that the probative value of his cousin's testimony outweighed its prejudicial effect.

Lastly, the district court attempted to mitigate the prejudicial impact of the cousin's testimony by giving a cautionary instruction on how the jury should evaluate the testimony. Neal argues that the district court erred by giving this instruction after his cousin testified. Because the alleged error was not objected to, our court reviews for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

The record shows that the district court acknowledged that the instruction is typically given before the evidence is presented, but that it forgot to do so before the cousin's testimony. The record also shows that, after noting this, Neal's attorney expressly agreed with the district court's suggestion to give the instruction after the testimony.

In cases involving *Spreigl* evidence, Minnesota caselaw suggests that "[b]oth at the time the evidence is received and in the final charge, the court should admonish the jury that the testimony is received for [a] limited purpose." *State v. Billstrom*, 149 N.W.2d 281,

285 (Minn. 1967). The record shows that the district court did both, and there is no support that giving the instruction after the cousin's testimony was an error.

In sum, the district court did not abuse its discretion or otherwise err in admitting the *Spreigl* evidence.

Affirmed.