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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0522**

State of Minnesota,
Respondent,

vs.

Michael Darron Ware,
Appellant.

**Filed April 12, 2021
Affirmed in part, reversed in part, and remanded
Cleary, Judge***

Dakota County District Court
File No. 19HA-CR-19-1792

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

Kathryn M. Keena, Acting Dakota County Attorney, Anna Light, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Mark D. Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and
Cleary, Judge.

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

CLEARY, Judge

A jury convicted appellant of first- and second-degree criminal sexual conduct (CSC). In this appeal from final judgments of conviction, appellant argues the district court prejudicially erred by admitting into evidence sexually-oriented text messages because the texts constituted prior bad acts under Minn. R. Evid. 404(b) and the state did not follow the procedural requirements to admit them. Additionally, appellant argues that the conviction for second-degree CSC must be vacated as part of the same behavioral incident as the first-degree CSC conviction. Because we determine the text messages did not contain evidence of prior bad acts, but agree that appellant's warrant of commitment incorrectly lists two convictions, we affirm the first-degree CSC conviction but reverse and remand to correct the error in the warrant of commitment to reflect one adjudication.

FACTS

Appellant Michael Darron Ware appeals from final judgments of conviction for first- and second-degree CSC under Minn. Stat. § 609.342, subd. 1(a) (2016) and Minn. Stat. § 609.343, subd. 1(a) (2016), respectively.

On the first day of trial, Ware filed motions in limine requesting the exclusion of “any evidence that the defendant has been guilty of additional misconduct and crimes on other occasions . . . pursuant to Minn. R. Evid. 404(b).” The district court addressed Ware's motions the same day. The state explained it intended to offer text messages between Ware and J.P., the alleged victim. The state also explained that there was a police investigation of Ware relating to a different matter: “a family member of the defendant

alleged that he had gone through the defendant's phone and found text messages between the defendant and his 17-year-old daughter that he found inappropriate." The state said it was not going "to move forward with *Spreigl* evidence as it relates to *that* issue." See generally *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965) (emphasis added). There was no discussion of prior-bad-act evidence or *Spreigl* evidence pertaining to the texts Ware sent to J.P.

Thirteen-year-old J.P.¹ testified that Ware was in an "off-and-on" relationship with J.P.'s mom, and J.P. has known Ware for "eight or nine years." While J.P. is not biologically related to Ware, J.P. described Ware as "more like a parent." At times, Ware lived with J.P., J.P.'s mom, and J.P.'s two siblings.

During the summer of 2018, Ware was living at his mom's house and J.P. would visit Ware's mom's house every weekend, occasionally accompanied by J.P.'s mom, cousin, and two siblings. J.P. spent the night at Ware's mom's house "every other weekend" that summer. Ware's mom's house has two stories; Ware's mom has a bedroom on the second floor, and Ware's bedroom was on the first floor next to his office. When J.P. would spend the night, J.P. slept in Ware's office on a couch and Ware slept on an air mattress, also in his office.

J.P. testified that the last night J.P. slept at Ware's mom's house was in late August, before school started. That night, J.P. recalled that Ware lay down on the air mattress and told J.P. "to come over here on the air mattress with him." J.P. complied and fell asleep

¹ Although J.P.'s legal name is not J.P., we refer to those initials as they are the initials of J.P.'s preferred name.

next to Ware on the air mattress. J.P. woke up to Ware touching J.P. “in my vagina” with his fingers. J.P. testified that Ware “was inside of me” for “one to two minutes” and that J.P. “was scared.” Ware stopped when J.P. “squirmed” away, then Ware “pretended like he was asleep.” J.P. fell back asleep and then woke up again because Ware was touching J.P. “the same way he was touching me before,” which lasted “two to three minutes.” J.P. then “squirmed” away again, waited for Ware to fall asleep, and then moved onto the couch.

J.P. testified that the assaults occurred multiple times, “mostly every week—every weekend I would go over there.” J.P. stated that Ware touched J.P. in “the same way” “about nine or ten” times in total. The second time the assault occurred,² J.P. testified that Ware “told me if I told anybody we’d both get in trouble,” so J.P. did not tell anyone about Ware’s conduct. Sometimes Ware “would be fully naked,” sometimes Ware would touch J.P.’s “behind” and “chest,” sometimes Ware would “put lotion on [J.P.] and rub [J.P.],” and sometimes it would “happen in his living room and in his bedroom.” Similar incidents also occurred at the apartment where J.P. lived with J.P.’s mom. J.P. testified that the first time J.P. told anyone about Ware’s conduct was in May of 2019, when J.P. was in inpatient treatment at the hospital for “suicidal thoughts.”

J.P. testified that Ware bought J.P. a cell phone on the first day of school, September 4, 2018. Throughout September, Ware and J.P. exchanged text messages. Ware’s attorney objected to the text messages on relevance, foundation, and hearsay grounds. After an off-

² J.P. first testified about the August incident—the last time Ware assaulted J.P.—and then explained that Ware assaulted J.P. earlier as well.

the-record discussion, the district court overruled the objection and admitted the texts into evidence as exhibits 1-27. At a bench discussion outside the presence of the jury, Ware’s attorney argued she already objected to the admission of the text messages as prior bad acts, but the district court stated, “I don’t recall hearing an objection on that basis . . . the prior bad acts.” Ware’s attorney responded, “Well, I don’t think I—I don’t know that I mentioned that but I know—I believe that I did object to their—to them being admitted.”

In the initial text messages, Ware told J.P. that “from here on out, if I ever say something to you that is CRAZY, INAPPROPRIATE, NASTY, FREAKY, SLUTTY or ANYTHING ABOUT MOM . . . ALWAYS DELETE THEM RIGHT AWAY!!!! YOU UNDERSTAND ME??” Ware sent J.P. text messages calling J.P. “sweet cheeks,” “honey,” and “baby.” Ware also sent J.P. a text message with a link to TikTok that showed, as J.P. described, a video of “[a] girl dancing in a tank top and shorts,” which Ware followed up with texts saying “[s]h-t like that! Reminds me of your little shorts” and “I want you to practice your Ti[k]Tok.”

In other text messages referencing J.P.’s girlfriend, who was twelve at the time, Ware stated, “OH MY GOD [J.P.]!!!! SHE IS BADDDDD!!!! Dam baby. You got yourself a Bad B-tch. Good job baby Dam!” Also in reference to J.P.’s girlfriend, Ware texted, “Can she hang out with you after school? Where she live baby? . . . I can come get you and we can go get her if you want to??” The district court gave a curative instruction as to the text messages involving J.P.’s girlfriend:

Members of the Jury, earlier in the trial, you heard evidence regarding a September 6, 2018, text exchange in which Mr. Ware made references to [J.P.’s] girlfriend. Because

of the nature of the charges in this case, one might reasonably conclude that Mr. Ware had a desire to set up a situation in which he would have access to [J.P.]’s girlfriend. The parties both agree that you should not draw such a conclusion.

Ware testified that he has five children and actively participated as a parent in their day-to-day lives. One of Ware’s children is J.P.’s younger brother. Ware testified that he had a “really great” relationship with J.P. Ware could not remember a time that he ever had to discipline J.P. Ware explained that J.P. would spend the nights at Ware’s mom’s house with him, but that Ware would always sleep in his bedroom. Ware testified that he could not remember a time that he ever slept in the office, and that he never laid on the air mattress with J.P., touched J.P., or penetrated J.P.

Ware testified that he asked J.P. to delete the text messages because of “the contentious nature of the house at the time. The family dynamics was falling apart . . . I was just letting her know that if I ever said anything, you know, about your mom, my bad. . . . I would hate for two adults’ argument to spill over. . . .” Ware explained that he was angry when he first learned J.P. had a girlfriend, so he sent the texts about J.P.’s girlfriend because he “was trying to not be so insensitive and let [J.P.] know that I still had [J.P.’s] back.” Ware testified, “I did a dumb dad joke instead of me being mad about [J.P.] being gay or coming out, I said, go—go ahead.”

Ware testified that he called all of his children “honey,” “baby,” and “sweet cheeks.” Ware explained that J.P. would use his phone to practice recording singing and dancing because “kids are becoming huge stars” through apps like TikTok. Ware further explained that he sent the links to the TikTok videos because Ware and J.P. were trying to get J.P. “a

contract” with “YouTube or whatever,” and that “[J.P.] and the other kids, the neighbors, and my nieces and nephews, they were all trying to become stars.” Lastly, Ware agreed that there were no sexual undertones in the messages that he and J.P. exchanged.

The state offered testimony from J.P., the investigating detective, J.P.’s mother, and a social worker who interviewed J.P. after J.P.’s hospitalization.³ Ware testified on his own behalf. The jury found Ware guilty of first- and second-degree CSC. The district court sentenced Ware to 360 months in prison for first-degree CSC.

Ware appeals.

DECISION

I. The district court did not plainly error by admitting the text messages into evidence because they are not *Spreigl* evidence.

Ware argues the text messages constituted evidence of prior bad acts, the state did not follow the procedural requirements to admit prior-bad-acts evidence, and that the district court committed plain error by admitting the text messages into evidence. The state contends that the text messages are not prior-bad-acts evidence and, even if they are, any error in admission was not plain. The district court overruled Ware’s objections on foundation, hearsay, and relevance grounds but did not rule on whether the evidence was admissible under Minn. R. Evid. 404(b), evidence of prior bad acts, because Ware did not object on those grounds.

“Evidentiary rulings rest within the sound discretion of the district court, and we will not reverse an evidentiary ruling absent a clear abuse of discretion.” *State v. Ali*, 855

³ The forensic interview was recorded and the video was admitted into evidence.

N.W.2d 235, 249 (Minn. 2014). The admissibility of evidence of other crimes or acts is governed by Minn. R. Evid. 404(b). Such evidence is commonly referred to as *Spreigl* evidence. *See Spreigl*, 139 N.W.2d at 167; *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

Appellate review of an evidentiary issue is forfeited when a defendant fails to object to the admission of the evidence. *State v. Vasquez*, 912 N.W.2d 642, 649 (Minn. 2018). “A defendant’s objection to the admission of evidence preserves review only for the stated basis for the objection or a basis apparent from the context of the objection.” *Id.* This court has also concluded that “evidentiary objections should be renewed at trial when an in limine or other evidentiary ruling is not definitive but rather provisional or unclear, or when the context at trial differs materially from that at the time of the former ruling.” *State v. Word*, 755 N.W.2d 776, 783 (Minn. App. 2008).

Here, Ware objected to the admission of the text message evidence at trial on different grounds than those he raises in this appeal. At trial, Ware objected to the text messages on relevance, foundation, and hearsay grounds. On appeal, Ware argues that the evidence should not have been admitted based on Minn. R. Evid. 404(b) and *Spreigl* violations. Ware concedes in his brief that his trial attorney “did not object to the State’s non-compliance with the Rule of Criminal [Procedure] 7.02 *Spreigl* notice and Evidence Rule 404(b) admissibility requirements for such evidence.” Because Ware’s objection to the admission of evidence preserves review only for the stated basis for the objection, Ware forfeited this issue. *See Vasquez*, 912 N.W.2d at 649-50.

“We review forfeited issues for plain error.” *Id.* at 650. Under the plain-error

doctrine, the appellant must show that there was (1) an error; (2) that is plain; and (3) that the error affected his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three prongs are met, the appellate court then assesses whether it should “address the error to ensure fairness and the integrity of the judicial proceedings.” *Id.* “An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). “With respect to the substantial-rights requirement, [the appellant] bears the burden of establishing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict.” *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted).

Ware argues that the text messages are *Spreigl* evidence and that the state did not provide notice to offer the texts as evidence in violation of Minn. R. Crim. P. 7.02, subds. 1 and 2, which amounted to plain error. Evidence of other crimes, wrongs, or acts, also known as *Spreigl* evidence, is inadmissible to prove the character of a person or to show that the person acted in conformity with that character. Minn. R. Evid. 404(b)(1). *Spreigl* evidence is, however, admissible “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.* When determining whether to admit *Spreigl* evidence, courts consider a five-step process:

- (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, 686 (Minn. 2006); *see* Minn. R. Evid. 404(b)(2).

For rule 404(b) to apply, the prior act must have been a “bad” act. *State v. McLeod*, 705 N.W.2d 776, 787-88 (Minn. 2005). “But the prior bad act need not constitute a crime.” *Id.* at 788. The Minnesota Supreme Court has determined that for evidence to be deemed *Spreigl* evidence, there must be something “per se wrong” with the act. *Ture v. State*, 681 N.W.2d 9, 17 (Minn. 2004).

In *Ture*, the supreme court considered whether notebooks and address books seized from the defendant constituted *Spreigl* evidence. *Id.* at 16. These items contained women’s names, license plate numbers, addresses, and phone numbers, including a reference to the place of employment where one of the victim’s worked. *Id.* The defendant argued that notice was required before admitting the evidence because his behavior could be “characterized as stalking.” *Id.* at 17. The supreme court determined however, that “the evidence was not evidence of bad acts because *there is nothing per se wrong* with collecting information on women.” *Id.* (emphasis added).

Similar to *Ture*, while the text messages here appear inappropriate, there was nothing expressly or per se wrong about the text messages. Ware argues in his reply brief that “the [s]tate cannot plausibly argue that inappropriate conduct between an adult and a child, and which involves sexual references, and where, as here, the adult has a parenting or care-giver role, is not *per se* wrong.” But Ware himself testified that these messages were appropriate in context.

Ware testified that he called all of his children “honey,” “baby,” and “sweet cheeks.”

Ware testified that J.P. used his phone to practice singing and dancing to make TikTok videos because “kids are becoming huge stars” through apps like TikTok. Ware explained he sent the links to TikTok videos because Ware and J.P. were trying to get J.P. “a contract” with “YouTube or whatever,” and that “[J.P.] and the other kids, the neighbors, and my nieces and nephews, they were all trying to become stars.” Ware further explained that he sent the messages about J.P.’s girlfriend to compensate for his initial reaction and to try to show J.P. that he “still had [J.P.’s] back.”

Ware now argues that the texts constitute a bad act under Minn. R. Evid. 404(b), but does not cite any legal authority to support his argument. We are not persuaded. While the text messages demonstrated unusual behavior, similar to *Ture*, there was nothing “per se wrong” with the conduct to rise to the level of a crime, wrong, or act to qualify as *Spreigl* evidence under Minn. R. Evid. 404(b).

Therefore, under *Ture*, the text messages did not constitute *Spreigl* evidence so the district court did not err by admitting them.⁴

II. Ware’s warrant of commitment incorrectly lists two convictions and the conviction for second-degree CSC must be vacated to reflect only one adjudication.

Ware argues that his convictions for first- and second-degree CSC “represent one behavioral incident and therefore the conviction entered on the unadjudicated Count 1 second-degree guilty verdict must be vacated.” The state concedes that Ware’s “conviction

⁴ We note that even if the text messages were considered *Spreigl* evidence and the district court did err by admitting them, the error was not “clear or obvious” so it did not amount to *plain* error. See *Webster*, 894 N.W.2d at 787.

on count one [second-degree CSC] should be vacated.” Under Minn. Stat. § 609.04, subd. 1 (2020), the judgment of conviction entered for Ware’s second-degree CSC should be vacated as a lesser-included offense. The district court recognized this at the sentencing hearing, explaining that “[a]s to Count Two [sic], that is officially dismissed, as it is consumed by Count One [sic].”⁵

The warrant of commitment indicates under “Case Charges” that Ware was “convicted” for both first- and second-degree CSC. The warrant of commitment, however, also indicates under “terms of disposition or sentence” that Ware was convicted and sentenced for just first-degree CSC.

We assume that the double conviction listed in the warrant of commitment was a clerical error, and while it does not affect the actual disposition or sentence in this case, we reverse and remand to correct the warrant of commitment to reflect one adjudication. The district court should record the guilty verdicts but only record convictions for first-degree CSC. We reverse and remand to vacate the conviction for second-degree CSC in the warrant of commitment.

Affirmed in part, reversed in part, and remanded.

⁵ To contextualize Ware’s argument, the jury found Ware guilty of count one, second-degree CSC, but the district court did not convict Ware for count one because it was part of the same behavioral incident as count three, first-degree CSC. Yet, the warrant of commitment incorrectly reflects that the court convicted Ware of count one under “Case Charges.” We conclude that the warrant of commitment uses the misnomer “convicted” under “Case Charges” on page 1 of the document to reflect (incorrectly) a jury verdict of guilt.