STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1577

State of Minnesota,
Respondent,

vs.

Christopher Lee Konakowitz,
Appellant.

Filed January 30, 2023
Affirmed
Johnson, Judge

Brown County District Court
File No. 08-CR-19-938

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

Charles W. Hanson, Brown County Attorney, Jill M. Green, Assistant County Attorney, New Ulm, Minnesota (for respondent)

Michelle K. Olsen, Birkholz & Associates, L.L.C., Mankato, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Connolly, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Brown County jury found Christopher Lee Konakowitz guilty of two counts of second-degree criminal sexual conduct based on evidence that he engaged in sexual contact with two young girls while they slept in a bedroom in his home. We conclude that the

evidence is sufficient to support the verdicts. We also conclude that the district court did not err by admitting *Spreigl* evidence. Therefore, we affirm.

FACTS

In 2019, eight-year-old C.K. and nine-year-old L.K. reported to their then-stepmother that Konakowitz, who is their uncle, had engaged in sexual conduct toward them four or five years earlier. The children's mother reported the matter to law enforcement, which investigated by conducting forensic interviews of the two girls and interviewing other witnesses.

In October 2019, the state charged Konakowitz with two counts of second-degree criminal sexual conduct of a person younger than 13 years old, in violation of Minn. Stat. § 609.343, subd. 1(a) (2014). The state alleged that Konakowitz engaged in sexual contact with C.K. and L.K. on or about October 31, 2014, in his home in the city of Hanska. Specifically, the state alleged that, while the girls were sleeping together on the lower level of a bunk bed, Konakowitz entered the bedroom and touched C.K.'s buttocks with his hand, under her clothing, and touched and rubbed L.K.'s vaginal area with his hand, under her clothing.

In December 2019, the state gave notice of its intent to introduce evidence of three other acts by Konakowitz pursuant to rule 404(b) of the rules of evidence and *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965). Specifically, the state sought to introduce evidence that (1) in late 2001, Konakowitz used his hand to touch the bare genitals of J.M., who was younger than 13 years old; (2) between January 1999 and January 2000, Konakowitz used his hand to touch the vaginal area of B.K., a then-five-year-old girl who is his younger

cousin; and (3) between January 1999 and January 2002, Konakowitz again used his hand to touch B.K.'s vaginal area. In May 2020, the state amended its *Spreigl* notice by adding a fourth other act: that between 2001 and 2002, Konakowitz used his hand to touch the vulva and labia of C.R., who was younger than 13 years old.

The state later filed a motion *in limine* concerning numerous issues, including a request for leave to introduce its *Spreigl* evidence. The parties submitted memoranda of law concerning the admissibility of the state's *Spreigl* evidence. In June 2020, the district court filed an order in which it provisionally granted the state's motion with respect to the first, second, third, and fourth *Spreigl* incidents but reserved a final ruling until the evidentiary phase of trial.

The state also amended its *Spreigl* notice by adding a fifth other act: that, between January 1999 and January 2002, Konakowitz used his hand to penetrate C.R.'s vagina. Konakowitz filed an additional memorandum of law in which he argued that the state's fifth *Spreigl* incident is inadmissible. In September 2020, the district court denied the state's motion *in limine* with respect to the fifth *Spreigl* incident.

The matter was tried to a jury on five days in July 2021. The state's first witness was L.K. She testified that, on a Halloween night when she was younger, she slept in a bedroom at Konakowitz's home with her sister, C.K., and a friend, E.H. She testified that she awoke during the night after Konakowitz placed his hand under her pajamas and rubbed her vaginal area. The state's second witness was C.K. She testified that, on the same night, while in the same bed as L.K., she awoke after Konakowitz placed his hand under her pajamas and touched her body near her buttocks. The girl's mother and former stepmother

corroborated L.K.'s and C.K.'s testimony by testifying about the girls' initial disclosures of the incidents.

The state next introduced its *Spreigl* evidence. With respect to the first *Spreigl* incident, a prosecutor read from the transcript of a 2003 hearing in which Konakowitz pleaded guilty to fourth-degree criminal sexual conduct for using his hand to touch J.M.'s vaginal area. With respect to the second and third *Spreigl* incidents, a law-enforcement investigator testified, based on his review of records, that Konakowitz was convicted by a jury of first-degree criminal sexual conduct for engaging in sexual penetration of B.K. The district court gave the jury a cautionary instruction with respect to each incident. The state did not introduce any evidence concerning the fourth *Spreigl* incident.

The state then called as a witness the person who conducted forensic interviews of both children, and the state played for the jury video-recordings of those forensic interviews. In addition, the state called a forensic-interview expert, who testified that, if a child has delayed in reporting a sexual assault, the child may misremember or forget peripheral details of the event.

The defense called four witnesses. E.H.'s mother testified that E.H., who was sleeping in the same bed as C.K. and L.K., told her that Konakowitz did not touch her that night. Konakowitz's wife testified that she saw L.K., C.K., and E.H in the bed together and that Konakowitz did not enter the bedroom while she was there. During E.H.'s testimony, the defense played a video-recording of her forensic interview, in which she said that C.K. and L.K. did not mention any sexual abuse. A clinical psychologist testified as an expert about the camera angles of the video-recordings of L.K's and C.K.'s forensic

interviews, the lack of follow-up questions during the interviews, and the possibility that L.K. and C.K. have distorted memories of the incident because of the long time interval between the incident and their testimony. Konakowitz did not testify.

The jury found Konakowitz guilty on both counts. The district court imposed consecutive sentences of 210 months and 36 months of imprisonment. Konakowitz appeals.

DECISION

I. Sufficiency of the Evidence

Konakowitz first argues that the evidence is insufficient to support the jury's guilty verdicts.

When reviewing the sufficiency of the evidence, we undertake "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient" to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). A verdict will not be overturned if the jury, "acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

"A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if . . . the complainant is under 13 years of age and the actor is more than 36 months older than the complainant." Minn. Stat. § 609.343, subd. 1,

1(a). In this context, "sexual contact" is defined by statute to include "the intentional touching by the actor" of the victim's "intimate parts," if the act was "committed with sexual or aggressive intent." Minn. Stat. § 609.341, subd. 11(a)(i) (2014). The term "intimate parts" is defined by statute to include "the primary genital area, groin, inner thigh, buttocks, or breast of a human being." *Id.*, subd. 5.

Konakowitz challenges the sufficiency of the evidence in three ways. First, he contends that the evidence is insufficient on the ground that C.K. and L.K. are not credible witnesses because they provided testimony that is unclear and contradictory concerning various peripheral factual issues, such as which girls slept on which sides of the bunk bed. We defer to a jury's assessment of a witness's credibility. *See State v. Green*, 719 N.W.2d 664, 673-74 (Minn. 2006); *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004); *State v. Reichenberger*, 182 N.W.2d 692, 695 (Minn. 1970). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Furthermore, a jury is permitted to believe some parts of a witness's testimony and not believe other parts. *State v. Landa*, 642 N.W.2d 720, 726 (Minn. 2002). Accordingly, inconsistencies and conflicts in evidence do not require reversal. *State v. Wright*, 679 N.W.2d 186, 190 (Minn. App. 2004), *rev. denied* (Minn. June 29, 2004). We have recognized that inconsistencies in a witness's testimony "are a sign of human fallibility and do not prove testimony is false, especially when the testimony is about a traumatic event." *Id.* (quotation omitted). And in this particular case, the state introduced expert testimony that children often forget or misremember peripheral details if

a report of criminal sexual conduct has been delayed. Consequently, we will not reverse the jury's verdicts by second-guessing the credibility of the state's witnesses.

Second, Konakowitz contends that the evidence is insufficient on the ground that the evidence does not prove that he touched C.K.'s "intimate parts," as required by the statutory definition of "sexual contact." Minn. Stat. § 609.341, subd. 11(a)(i). On direct examination, C.K. testified that Konakowitz touched her "near [her] butt" and "a few inches" away from her buttocks. She also testified that she told her mother and her then-stepmother that Konakowitz "touched me in my privates." C.K.'s former stepmother generally corroborated that part of C.K.'s testimony. C.K.'s mother testified with specificity that C.K. told her that Konakowitz touched both C.K. and L.K. "under their pants in their private area." In addition, the forensic interviewer testified that C.K. stated that Konakowitz touched her "bottom or buttocks area." This evidence, considered as a whole, is sufficient to allow a jury to find that Konakowitz touched C.K.'s "intimate parts." We are mindful that the statutory definition of that term does not require a touching of buttocks themselves; the definition merely "includes" buttocks as well as other body parts that are near the buttocks, including "groin" and "inner thigh." Minn. Stat. § 609.341, subd. 5. The jury could reasonably interpret the evidence to establish that, when Konakowitz reached under C.K.'s clothing while she was sleeping, he touched her body in a place that is intimate.

Third, Konakowitz contends that the evidence is insufficient on the ground that the evidence does not prove beyond a reasonable doubt that he touched the children "with sexual or aggressive intent," as required by the statutory definition of "sexual contact."

Minn. Stat. § 609.341, subd. 11. In this context, "an act is committed with sexual intent when the actor perceives himself to be acting based on sexual desire or in pursuit of sexual gratification." *State v. Austin*, 788 N.W.2d 788, 792 (Minn. App. 2010), *rev. denied* (Minn. Dec. 14, 2010). Sexual intent may be proved with circumstantial evidence if there is no direct evidence of the defendant's intent. *Id.*

If a conviction depends on circumstantial evidence, we apply a heightened standard of review, which consists of two steps. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017). First, we identify the circumstances proved, disregarding evidence that is inconsistent with the verdict. *Id*. Second, we consider the reasonable inferences that can be drawn from the circumstances proved. *Id.* "To sustain the conviction, the circumstances proved, when viewed as a whole, must be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.* at 601. At the second step of the analysis, we give no deference to the fact-finder's verdict. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017).

In this case, the relevant circumstances proved are that Konakowitz entered the guest bedroom of his home on Halloween night in either 2014 or 2015 while C.K. and L.K. were sleeping, reached his hand under each girl's clothing, touched and rubbed L.K.'s vaginal area, and touched C.K.'s body near her buttocks. The state contends that these circumstances support a reasonable inference that Konakowitz had a sexual intent. We agree that such an inference is reasonable.

The remaining question is whether there are reasonable inferences that are inconsistent with guilt, *i.e.*, whether the circumstances support a reasonable inference that

Konakowitz did *not* act with sexual intent. *See Harris*, 895 N.W.2d at 600-01. In his appellate brief, Konakowitz does not attempt to explain how the circumstances support any such inference. In other words, Konakowitz does not provide this court with an innocent explanation for his touching of the girl's intimate parts. In the absence of an innocent explanation, we conclude that, in light of the circumstances proved, there is no rational hypothesis that Konakowitz did not act with sexual intent. Our conclusion is supported by *State v. Vick*, 632 N.W.2d 676 (Minn. 2001), in which the supreme court concluded that there was sufficient evidence of sexual intent because the appellant's touching of the young victim's buttocks, both over and under her clothes, which was "accompanied by vaginal touching, negates the possibility of an innocent explanation such as accidental touching or touching in the course of caregiving." *Id.* at 691.

Thus, the evidence is sufficient to support the jury's guilty verdicts.

II. *Spreigl* Evidence

Konakowitz also argues that the district court erred by admitting the state's *Spreigl* evidence.

Konakowitz's argument is based on a rule of evidence that provides, "Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith," though it may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b)(1). Evidence of other crimes or bad acts is known in Minnesota as "*Spreigl* evidence." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (citing *Spreigl*, 139 N.W.2d 167). Such evidence is admissible only if

> the prosecutor, consistent with the rules of criminal procedure, gives notice of its intent to offer the evidence. The notice must include a summary of the evidence and the specific purpose(s) for which the evidence will be offered. Such evidence shall not be admitted in a criminal prosecution unless (a) the proffered evidence is relevant to an identified material issue other than conduct conforming with a character trait; (b) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; and (c) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Minn. R. Evid. 404(b)(2). This court applies an abuse-of-discretion standard of review to a district court's admission of *Spreigl* evidence. *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016).

Konakowitz challenges the state's *Spreigl* evidence in two ways. First, he contends that his prior acts are not sufficiently similar to the acts that were alleged and proved in this case. To determine whether *Spreigl* evidence is relevant, a district court "should consider the issues in the case, the reasons and need for the evidence, and whether there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in time, place, or modus operandi." *State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984). If *Spreigl* evidence is being offered to show a common scheme or plan, "the misconduct must have a marked similarity in modus operandi to the charged offense." *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007) (quotation omitted).

In its order granting the state's motion *in limine* with respect to *Spreigl* evidence, the district court identified several similarities between the prior acts and the then-alleged acts in this case and determined that the prior acts were relevant to show a common scheme or plan. The district court noted that one of the prior acts against B.K. occurred while she

was in Konakowitz's bedroom in his home, which is similar to the location of Konakowitz's acts in this case—a guest bedroom in his home. In addition, Konakowitz touched both J.M. and B.K. in their genital areas, which is similar to his sexual conduct toward C.K. and L.K. Furthermore, the children victimized by Konakowitz's prior acts were approximately five years old, which is very similar to the ages of L.K. and C.K. at the time of the criminal conduct in this case. Moreover, in both the prior acts and the acts in the present case, Konakowitz was in a position of authority over the victims as either a family member or an intimate partner of a child's mother. *See State v. Tomlinson*, 938 N.W.2d 279, 282-83, 287 (Minn. App. 2019) (affirming admission of *Spreigl* evidence because appellant established rapport with victims by befriending family members), *rev. denied* (Minn. Feb. 26, 2020). Accordingly, the prior acts are markedly similar to Konakowitz's acts toward L.K. and C.K. in this case. *See State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993) (affirming admission of *Spreigl* evidence because it was "highly relevant in that it showed an ongoing pattern of opportunistic fondling of young girls within the family context").

Second, Konakowitz argues that the prior acts were too remote in time to be relevant. There is no bright-line rule as to when a prior bad act is too remote in time to be relevant. *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005); *see also State v. Blom*, 682 N.W.2d 578, 612 (Minn. 2004) (affirming admission of *Spreigl* evidence that occurred 16 years before offense but noting that duration of time was "troubling"); *Wermerskirchen*, 497 N.W.2d at 242 n.3 (affirming admission of *Spreigl* evidence that occurred 19 years before offense). But if a defendant "was actually convicted of a crime based on the prior

bad acts," the "process of securing a conviction . . . reduces the actual prejudice to the defendant of being required to defend against claims concerning acts that occurred years ago." *Washington*, 693 N.W.2d at 202.

In this case, the prior acts in the state's *Spreigl* evidence occurred between 12 and 15 years before Konakowitz's acts in this case. That is a relatively long time period, but it is shorter than the time periods in the cases cited above, in which the admission of *Spreigl* evidence was affirmed. *See Blom*, 682 N.W.2d at 612 (16 years); *Wermerskirchen*, 497 N.W.2d at 242 n.3 (19 years). The concern about time is mitigated by the fact that Konakowitz pleaded guilty for his prior act against J.M. and was found guilty by a jury for his prior acts against B.K. *See Washington*, 693 N.W.2d at 202. Consequently, the prior acts are not too remote in time to be relevant as *Spreigl* evidence.

Thus, the district court did not err by admitting the state's *Spreigl* evidence.

Affirmed.