

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0203**

State of Minnesota,
Respondent,

vs.

Benjamin Joseph Altobelli,
Appellant.

**Filed January 9, 2023
Affirmed
Segal, Chief Judge**

Sherburne County District Court
File No. 71-CR-19-658

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

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Segal, Chief Judge; and Johnson, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges his conviction for solicitation of a child to engage in sexual conduct, arguing that the district court abused its discretion by admitting other-acts

evidence and by denying his motion for in camera review of the child's therapy and psychological records. We affirm.

FACTS

Appellant Benjamin Joseph Altobelli was charged with solicitation of a child to engage in sexual conduct. The charge was based on a report by his daughter, H.J., that Altobelli asked her to engage in sexual acts with him in December 2018. H.J. was ten years old at the time and lived with her mother.

Early in life, H.J. saw Altobelli about every other weekend, but the frequency decreased when Altobelli moved to another city in the state. H.J. had a stronger relationship with her aunt, Altobelli's sister, and her cousins, and frequently visited her aunt's house for weekends and holidays. H.J. sometimes saw Altobelli when visiting her aunt.

In March 2019, H.J. reported to a teacher and school counselor comments that Altobelli made to her when H.J. was at her aunt's house over the Christmas 2018 school break. The school counselor filed a child-protection report, and a child-protection investigator interviewed H.J. H.J. told the investigator that Altobelli asked to see her without her shirt on. H.J. also stated that Altobelli showed her a video that depicted a teenage female and teenage male rubbing each other's genitals and then asked H.J. when she was going to do that to him. H.J. said that Altobelli told her not to tell anyone. Child protection referred the case to law enforcement and Altobelli was eventually charged with solicitation of a child to engage in sexual conduct.

When prosecutors met with H.J. to prepare for her trial testimony, she made two disclosures of additional incidents. The first one was an allegation that the day after the charged offense took place, when H.J. was staying with Altobelli at his apartment, he asked her to take a shower with him. The second alleged incident occurred at Altobelli's apartment in that same time frame. H.J. recounted that she was sleeping and awoke to Altobelli touching her leg. The state filed a notice to admit the two disclosures—that Altobelli had asked H.J. to take a shower with him and that she woke up to Altobelli touching her leg—as immediate-episode evidence, domestic-conduct evidence admissible under Minn. Stat. § 634.20 (2020), and as *Spreigl* evidence under Minn. R. Evid. 404(b).¹

The case was tried to a jury twice. The first trial resulted in a mistrial because the jury was not able to reach a unanimous verdict. The two disclosures by H.J. were allowed in the first trial as *Spreigl* evidence.

The state renewed its notice of intent to admit the two disclosures at the second trial and the district court ruled that the evidence was admissible on all three grounds sought by the state—immediate episode, domestic conduct, and *Spreigl*. The district court, however, denied a pretrial motion by Altobelli to compel discovery of H.J.'s therapy and psychological records or to order in camera review of the records by the court. Altobelli

¹ See *State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965) (stating that evidence of other misconduct may be admissible as an exception to the general prohibition against such evidence for purposes other than propensity, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).

argued that the records were necessary for his defense because the reliability of H.J.'s testimony was a critical issue in the case.

At the second trial, the jury heard the testimony of H.J., her school counselor, the child-protection investigator who interviewed H.J., the investigating officer, H.J.'s mother, and H.J.'s aunt. The jury found Altobelli guilty of solicitation of a child to engage in sexual conduct. The district court stayed imposition of Altobelli's sentence and ordered three years of probation with 60 days in jail as a condition of the stayed sentence.

DECISION

Altobelli contends that the district court abused its discretion by admitting the two disclosures by H.J., that Altobelli asked her to take a shower with him and that she awoke to Altobelli touching her leg. He also argues that the district court erred by denying Altobelli's motion for in camera review of H.J.'s therapy and psychological records.

I. The district court did not abuse its discretion by admitting the two disclosures.

Altobelli disputes the district court's admission of the two disclosures by H.J. Such evidence of other acts by a defendant "is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1). However, there are several exceptions to this rule. The district court admitted the evidence under three of these exceptions: (1) as evidence of intent under a *Spreigl* analysis, (2) as immediate-episode evidence, and (3) as evidence of domestic conduct under Minn. Stat. § 634.20.

This court reviews a district court’s evidentiary rulings for an abuse of discretion. *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). The appellant bears the burden of showing that the district court erred in admitting the evidence and, if the admission was erroneous, that they were prejudiced as a result of the admission. *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016).

We address first whether the other-acts evidence was admissible as *Spreigl* evidence. Under this exception, evidence of other acts by the defendant may be admissible for non-propensity purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Minn. R. Evid. 404(b)(1).

Five requirements must be met before *Spreigl* evidence may be admitted:

- (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, 685-86 (Minn. 2006).

The district court admitted the other-acts evidence for intent purposes, noting that “the State has to prove that it was an intentional action under the elements of the crime here.” The court concluded that “under the *Spreigl* analysis the *Spreigl* incident is relevant and material to the State’s case” and “[i]t is probative evidence of intent, which is not outweighed by potential prejudice.”

Altobelli contests only the district court's determinations on the fourth and fifth prongs of the test; he argues that the evidence was neither relevant nor material and that any value it had was outweighed by the risk of potential prejudice.

A. The district court was within its discretion in determining that the other-acts evidence was relevant and material.

Altobelli contends that H.J.'s testimony that Altobelli asked her to take a shower with him and that she woke up to him touching her leg was not relevant or material for the purposes of intent because his intent was not actually a disputed fact. Altobelli argues that his intent was not at issue because he never claimed that he had an innocent explanation for the conduct; he asserts that, instead, he simply denied that it happened.

As the district court commented, however, the record contradicts Altobelli's claim that he consistently denied the conduct. The district court reasoned that

the testimony advanced the last time [was that] Mr. Altobelli denied this happened. Although, he . . . was quoted by the police officer after the initial interrogation saying when he's asked if the child was lying . . . , "I can't say she's lying. It must be true then." That's at least an equivocal recognition or admission that something happened.

Additionally, even without such contradiction, Altobelli's intent was necessarily an issue in the case because Altobelli did not stipulate to or admit the element of intent and intent to engage in sexual conduct is an element of the crime. Minn. Stat. § 609.352, subd. 2 (2018); *State v. Johnson*, 979 N.W.2d 483, 505 (Minn. App. 2022) (affirming the district court's admission of *Spreigl* evidence for the purpose of intent when "[t]he record d[id] not show that [appellant] conceded the element of intent at any point prior to or during the trial, forcing the state in its case-in-chief to establish her intent beyond a reasonable

doubt”), *rev. granted* (Minn. Nov. 23, 2022)²; *State v. Coleman*, 944 N.W.2d 469, 481 (Minn. App. 2020) (“The state may use *Spreigl* evidence to prove knowledge or intent if knowledge or intent is an element of the charged offense.”), *aff’d on other grounds*, 957 N.W.2d 72 (Minn. 2021).

Therefore, the district court was within its discretion in concluding that the other-acts evidence was relevant and material to the case.

B. The district court did not abuse its discretion in determining that the probative value of the other-acts evidence was not outweighed by the potential for prejudice.

In applying the fifth prong of the test—whether the probative value of the evidence was outweighed by the potential for prejudice—the district court must “balance the relevance of the [other acts], the risk of the evidence being used as propensity evidence, and the State’s need to strengthen weak or inadequate proof in the case.” *State v. Fardan*, 773 N.W.2d 303, 319 (Minn. 2009). In the event of “a close call, [the evidence] should be excluded.” *Ness*, 707 N.W.2d at 685.

Altobelli argues that the other-acts evidence here had minimal probative value because “the charged conduct alone, if it occurred, met the state’s burden of proving Altobelli’s sexual intent.” To support his argument, Altobelli cites *Ness*, where the supreme court stated that other-acts evidence was “marginally admissible at best on the issue of intent” when “sexual or aggressive intent [could] readily be inferred from the [charged conduct itself].” *Id.* at 687. The court reasoned that, when intent could be readily

² The supreme court granted review on a separate issue in *Johnson*, not on the *Spreigl* issue discussed here.

inferred, intent was not the “real issue” of the case and additional evidence would not be probative. *Id.*

However, even if we accept the argument that the probative value of the other-acts evidence is lessened because Altobelli’s intent could be inferred from the charged conduct, there are other factors that support the district court’s determination that the probative value of the evidence was not outweighed by the potential for prejudice. First, Altobelli and H.J. were the only witnesses to the alleged crime, so the other-acts evidence was probative to fulfill the “State’s need to strengthen weak or inadequate proof in the case.” *Fardan*, 773 N.W.2d at 319.

Additionally, the other-acts evidence did not create a significant potential for prejudice. The evidence was not cumulative and, because it was related and close in time to the alleged solicitation, it is unlikely that the jury would have been tempted to fixate independently on the other acts for propensity purposes. *Ture v. State*, 681 N.W.2d 9, 16 (Minn. 2004) (stating that the probative value of *Spreigl* evidence may be outweighed by the risk of unfair prejudice where it is merely cumulative); *cf. Fardan*, 773 N.W.2d at 319 (affirming the admission of other-acts evidence where it was “not so similar or presented with enough detail that it would cause the jury to convict based on the other offenses rather than the charged crime”).

Finally, we note that the same two disclosures were introduced at the first trial and that trial resulted in a mistrial because the jury was not able to reach a unanimous verdict. This also supports the conclusion that any prejudicial impact was limited.

In sum, the district court’s prejudice determination was not “based on an erroneous view of the law or . . . against logic and the facts in the record.” *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017). We therefore discern no abuse of discretion by the district court in determining that the other-acts evidence was admissible as *Spreigl* evidence. Because the district court did not err in admitting the two disclosures as *Spreigl* evidence, we need not decide whether the court abused its discretion in alternatively admitting the evidence as immediate-episode or domestic-conduct evidence.

II. The district court did not abuse its discretion by rejecting Altobelli’s request for the court to review H.J.’s therapy and psychological records in camera.

We turn now to Altobelli’s second argument, that the district court erred by denying his motion for in camera review of H.J.’s therapy and psychological records. Medical and psychological records are protected confidential information under Minn. Stat. § 595.02, subd. 1(d), (g) (2020).

The right of criminal defendants to discovery to prepare a defense is broad but has limits. *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012) (citing *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987)). When a criminal defendant seeks confidential records, “the district court may screen the confidential records *in camera* to balance the right of the defendant to prepare and present a defense against the rights of victims and witnesses to privacy.” *Id.*

However, “*in camera* review [of confidential records] is not a right . . . and the defendant must first establish a plausible showing that the information sought would be both material and favorable to his defense.” *Id.* (quotations omitted). The defendant’s

request must be for relevant records and it must be “reasonably specific.” *State v. Lynch*, 443 N.W.2d 848, 852 (Minn. App. 1989), *rev. denied* (Minn. Sept. 15, 1989). We review a district court’s denial of a motion for in camera review for abuse of discretion. *State v. Evans*, 756 N.W.2d 854, 872 (Minn. 2008).

Before the second trial, Altobelli moved to compel H.J.’s therapy and psychological records or, alternatively, for in camera review, arguing:

Because the reliability of [H.J.’s] testimony will be a critical issue in this case, defense counsel must have access to [H.J.]’s therapy and psychological records to determine if in the past two years this child has suffered trauma, bullying, or pressure from adults to cause her mental health to decline. All of these things may impact her ability to testify reliably

Altobelli reasoned that H.J.’s additional disclosures during trial preparation indicate that adults may have attempted to “color” her recollections through bullying or pressure, thus impacting her credibility regarding events that occurred in 2018. Altobelli argued that H.J. had testified in the first trial that she was in therapy and that her therapy records may therefore uncover what led her to make later “inconsistent” reports compared to her first interview with social services.

The district court denied Altobelli’s motion, determining that Altobelli had not identified, “beyond mere speculation, a basis upon which it would be reasonable to conclude that the requested records would be material and favorable to Defendant’s defense.” We agree.

The Minnesota Supreme Court recently reiterated in *State v. Conrad (In re Hope Coalition)* that the applicable standard “requires the defendant to make a plausible showing

that the records will be material and *favorable* to the defense.” 977 N.W.2d 651, 659 n.6 (2022). Altobelli offers no information about the records to support his claim the records may be material and favorable to the defense. Indeed, Altobelli’s argument appears to be based on nothing more than that H.J. was in therapy and speculates that it is possible that the therapist’s records might show that H.J. felt pressured by the prosecution to lie by making additional disclosures.³ This is not a sufficient showing to require even in camera review of these confidential records. *Conrad*, 977 N.W.2d at 659 n.6 (“Fishing expeditions are never sufficient.” (quotation marks omitted)). Moreover, Altobelli had the opportunity to cross-examine H.J. about her interviews with the prosecution, her failure to disclose the added allegations in earlier interviews, and any inconsistencies in her statements and testimony.

Altobelli failed to establish a plausible showing that H.J.’s therapy and psychological records would be both favorable and material to his defense. We therefore

³ Altobelli primarily supports his argument by citing a nonprecedential opinion, *State v. Eubanks*, No. A19-2042, 2021 WL 318260 (Minn. App. Feb. 1, 2021). However, *Eubanks* is not binding on this court and is distinguishable. In *Eubanks*, this court held that the district court applied an erroneously high standard of review to the defendant’s motion for in camera review of records in the defendant’s case for sexually abusing a child because it denied the motion based on the defendant’s lack of certainty about the existence of credibility-undermining interviews of the child and the child’s mother in a child-protection case. 2021 WL 318260, at *3. But the defendant in *Eubanks* clearly identified the records and their potential favorability—he pointed to “a specific juvenile court file involving the child” and argued at his motion hearing that he and the child’s mother had a “history in juvenile court . . . related to their older children.” *Id.* at *2-3. He believed that the child’s mother had motive based on that history to manipulate her children against him. In contrast, Altobelli made a broad request for two years of “therapy and psychological records” with no basis for his allegation that the prosecutor pressured or bullied H.J. or that H.J. had a different reason to testify unreliably, beyond that the interviews resulted in H.J. making additional disclosures.

discern no abuse of discretion by the district court in denying Alotbelli's motion for in camera review of those records.

Affirmed.