

*This opinion is nonprecedential except as provided by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
A24-0367**

State of Minnesota,
Respondent,

vs.

Michael Allen Bauer,
Appellant.

**Filed March 3, 2025
Reversed and remanded; motion denied
Johnson, Judge**

Wadena County District Court
File No. 80-CR-23-538

Keith Ellison, Attorney General, Lisa Lodin, Assistant Attorney General, St. Paul, Minnesota; and

Kyra L. Ladd, Wadena County Attorney, Wadena, Minnesota (for respondent)

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

Considered and decided by Wheelock, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Wadena County jury found Michael Allen Bauer guilty of second-degree criminal sexual conduct based on evidence that he touched a young girl's vagina. We conclude that the district court erred by admitting three forms of *Spreigl* evidence: evidence that Bauer

previously was convicted of possessing child pornography, evidence that Bauer violated a condition of supervised release that prohibited him from having contact with children, and evidence that Bauer was required to register as a predatory offender. Therefore, we reverse and remand for a new trial.

FACTS

In June 2023, H.P. called the county sheriff's office to report that her four-year-old daughter may have been sexually assaulted by Bauer. When Officer Hofer responded to the call, H.P. told him that Bauer and A.B. went to A.B.'s bedroom, which is adjacent to the living room, to watch television. H.P. told the officer that, five or ten minutes later, she walked by the open bedroom door and saw A.B. lying on her back on her bed and saw Bauer lying on top of her. At trial, H.P. testified that she saw Bauer supporting himself with one hand but did not see his other hand. She also testified that Bauer appeared to be "looking down [A.B.'s] shorts at her vagina." She testified that when Bauer noticed her, he quickly moved his other hand to A.B.'s stomach and "pretended like he was tickling her." H.P. told the officer that she took A.B. outside and asked her whether Bauer had touched her vagina and that A.B. answered by saying, "yeah, he did two times."

Two days later, in a forensic interview with a child-protection social worker, A.B. was asked whether someone had touched her body parts the prior weekend, and she said that "Mike" had touched her vagina in her bedroom and that her mother had told him to "get out." A.B. said that her clothes were on when he touched her, that Bauer used his hand, that he touched her inside her underwear, that he used one finger, and that he did not

insert his finger inside of her. A.B. told the social worker that no one saw Bauer touch her vagina but that she told her mother about it.

The state initially charged Bauer with two counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subds. 1a(e), 1a(g) (2022). Three months later, the state amended the complaint to charge Bauer with one count of second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1a(e) (2022), which requires proof that the defendant engaged in sexual contact with a complainant under the age of 14 years old and that the defendant is more than 36 months older than the complainant. “Sexual contact” is defined by statute to include “the intentional touching . . . of the complainant’s intimate parts.” Minn. Stat. § 609.341, subd. 11(a)(i) (2022).

Shortly after charging Bauer, the state gave notice of its intent to introduce *Spreigl* evidence that Bauer previously was convicted of six charges of possessing child pornography “and the facts and circumstances surrounding such.” Bauer filed a motion *in limine*, in which he sought to exclude the state’s *Spreigl* evidence. The state later filed its own motion *in limine*, in which it sought leave to introduce not only Bauer’s prior convictions but also evidence that, as a condition of his supervised release, “he was not to have contact with minors without his supervised-release officer’s consent, which he did not have, and that he was obligated to register as a predatory offender when staying at victim’s home, which he did not do.” The district court denied Bauer’s motion, granted the state’s motion, and allowed the state to introduce evidence that Bauer had been convicted of possessing child pornography in order to show intent and absence of mistake. The district court also allowed the state to introduce evidence that Bauer violated a

condition of his supervised release that prohibited him from having contact with minors without the approval of his supervised-release officer. In its order on the pre-trial motions, the district court did not specifically rule on the state's request to introduce evidence that Bauer was required to register as a predatory offender when visiting H.P.

The case was tried to a jury on three days in September 2023. The state called ten witnesses, including H.P. and A.B. Bauer did not testify and did not present any other evidence. The jury found Bauer guilty. The district court imposed a sentence of 171 months of imprisonment. Bauer appeals.

DECISION

Bauer makes four arguments for reversal. First, he argues that the district court erred by admitting the state's *Spreigl* evidence. Second, he argues that the prosecutor engaged in misconduct during closing argument. Third, he argues that the cumulative effect of the two alleged trial errors warrants a new trial. And fourth, he argues that the district court erred by imposing a sentence based on an incorrect criminal-history score. Because we conclude that Bauer is entitled to a new trial for the reasons asserted in his first argument, we need not consider his second, third, and fourth arguments.

I. *Spreigl* Evidence

Bauer'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). In Minnesota, evidence of other crimes

or bad acts is known as “*Spreigl* evidence.” *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (citing *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965)). Such evidence generally is inadmissible 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. Smith*, 9 N.W.3d 543, 561 (Minn. 2024).¹

A. Prior Convictions

Bauer argues that, for three reasons, the district court erred by admitting evidence of his prior convictions of possessing child pornography: (1) the prior convictions are not relevant or material because they do not serve the purposes identified by the district court, (2) the conduct underlying the prior convictions is not relevant or material because it occurred too long ago, and (3) the probative value of the *Spreigl* evidence is outweighed by its prejudicial impact.

¹The state argues that this court should apply the plain-error test, which applies if an appellant did not preserve an argument in the district court by objecting to the error that is challenged on appeal. But Bauer challenged the state’s *Spreigl* evidence by filing a motion *in limine*, in which he sought to exclude evidence of his prior convictions “and the facts and circumstances surrounding such,” which is the same language the state used in its *Spreigl* notice. Bauer cited the appropriate rule of evidence and the caselaw governing *Spreigl* evidence. The district court construed Bauer’s motion as a challenge to all of the state’s proffered *Spreigl* evidence. Thus, Bauer preserved his challenge to the state’s *Spreigl* evidence, so the plain-error test does not apply.

1. Purposes of Spreigl Evidence

We begin with Bauer’s first contention. In determining whether *Spreigl* evidence is relevant and material, a court must “identify the precise disputed fact to which the *Spreigl* evidence would be relevant.” *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006) (quotation omitted). After “isolating the consequential fact for which the evidence is offered,” a court then must “determin[e] the relationship of the offered evidence to that fact and the relationship of the consequential fact to the disputed issues in the case.” *Id.*

The district court identified two disputed issues for which the state’s *Spreigl* evidence might be relevant and material: intent and absence of mistake. With respect to the first, Bauer contends that intent is not in dispute. He relies on *Ness*, in which the supreme court stated that the admissibility of *Spreigl* evidence for purposes of proving intent “requires an analysis of the kind of intent required and the extent to which it is a disputed issue in the case.” *Id.* at 687. In *Ness*, the defendant denied touching a child’s intimate body parts. *Id.* at 679-82, 687. The supreme court reasoned that “the real issue was not Ness’s intent, but whether or not Ness touched [the child’s] intimate parts.” *Id.* at 687. If Ness engaged in the alleged act, the supreme court continued, the defendant’s “sexual or aggressive intent can readily be inferred from the contacts themselves” because “there could be no other reason” for the contacts. *Id.* For that reason, the supreme court determined that the *Spreigl* evidence in that case—which consisted of the defendant’s inappropriate touching of a child—was only “marginally admissible at best on the issue of intent.” *Id.*

In this case, the district court assumed that Bauer would dispute that he engaged in the alleged conduct. The district court’s assumption was accurate. In closing argument, Bauer’s attorney argued that the state did not prove beyond a reasonable doubt that Bauer touched A.B.’s vagina. Bauer’s attorney emphasized H.P.’s statements that she did not see any such touching and her uncertainty as to whether such conduct had occurred. Bauer’s attorney also argued that A.B.’s testimony was unreliable because she was very young and had been exposed to statements by adults suggesting that Bauer had touched her vagina. As in *Ness*, because Bauer’s intent was not in dispute, the state’s *Spreigl* evidence of his prior convictions was only “marginally” relevant and material, at best, to the issue of intent. *See State v. Mejia-Bonilla*, No. A22-0770, 2023 WL 2359428, *3 (Minn. App. Mar. 6, 2023) (concluding that *Spreigl* evidence was inadmissible to prove defendant’s intent to engage in criminal sexual conduct toward child because defendant denied alleged conduct and did not argue lack of intent), *rev. denied* (Minn. June 20, 2023); *see also* Minn. R. Civ. App. P. 136.01, subd. 1(c) (providing that nonprecedential opinions are “not binding authority” but “may be cited as persuasive authority”).

For essentially the same reasons, the district court’s second rationale for admitting the state’s *Spreigl* evidence—absence of mistake—also is lacking in relevance and materiality. In *Ness*, the supreme court concluded that the state’s *Spreigl* evidence was inadmissible to prove absence of mistake because the defendant denied touching the child’s intimate parts. 707 N.W.2d at 687. As stated above, Bauer’s primary defense was that he did not touch A.B.’s vagina.

Both parties also discuss whether the state's *Spreigl* evidence is relevant and material to the issue of fabrication, which the district court mentioned in its order denying Bauer's motion *in limine*. Bauer acknowledges that, in some cases, *Spreigl* evidence may be offered to prove a common scheme or plan, which may tend "to refute the defendant's contention that the victim's testimony was a fabrication or a mistake in perception." *See id.* at 687-88. But, as Bauer argues, *Spreigl* evidence is admissible for that purpose only if it has "a *marked similarity* in modus operandi to the charged offense." *Id.* at 688 (quotation omitted); *see also State v. Gomez*, 721 N.W.2d 871, 878 (Minn. 2006). In a case such as this one, the "marked similarity" requirement may be satisfied if the *Spreigl* evidence consists of other, similar acts of sexual conduct. *See State v. Clark*, 738 N.W.2d 316, 346-47 (Minn. 2007); *Kennedy*, 585 N.W.2d at 391; *State v. Blom*, 682 N.W.2d 578, 611-12 (Minn. 2004). But there is little similarity between Bauer's prior convictions of possessing child pornography and the offense in this case. Both offenses involve an improper sexual interest in children. But the two offenses do not have any elements in common, and the offense of possessing child pornography does not require any physical contact with a child. *Compare* Minn. Stat. § 617.247, subd. 4 (2010) *with* Minn. Stat. § 609.343, subd. 1a(e). The state does not contend otherwise. Thus, the state's *Spreigl* evidence of Bauer's prior convictions of possessing child pornography is not relevant and material to the absence of fabrication or common scheme or plan. *See State v. Matusovic*, No. A09-485, 2010 WL 520594, *5 (Minn. App. Feb. 16, 2010) (concluding that *Spreigl* evidence of defendant's prior conviction of possessing child pornography "is wholly distinct from second-degree

criminal sexual conduct” and, thus, “not markedly similar to the charged offense in modus operandi or any other way”); *see also* Minn. R. Civ. App. P. 136.01, subd. 1(c).

2. *Age of Spreigl Evidence*

Bauer’s second contention is that his prior convictions are not relevant or material because the conduct underlying those convictions occurred 14 years before the alleged conduct in this case. The supreme court has declined to adopt a bright-line rule for determining when *Spreigl* evidence loses relevance and probative value based on the passage of time. *See Ness*, 707 N.W.2d at 688. The caselaw indicates that Bauer’s prior convictions are arguably too remote in time to be relevant and material. *Compare State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995) (concluding that 15-year-old incidents were inadmissible) *with State v. Washington*, 693 N.W.2d 195, 201-03 (Minn. 2005) (concluding that 16-year-old incidents were admissible); *State v. Rainer*, 411 N.W.2d 490, 497-98 (Minn. 1987) (concluding that 16- to 19-year-old incidents were admissible); *State v. Wermerskirchen*, 497 N.W.2d 235, 242-43, 242 n.3 (Minn. 1993) (concluding that 19-year-old incidents were admissible); *Blom*, 682 N.W.2d at 617 (concluding that 16-year-old incidents were admissible).

If *Spreigl* evidence is arguably stale, a court must “focus on the closeness of the relationship between the other crimes and the charged crimes in terms of time, place and modus operandi.” *Ness*, 707 N.W.2d at 688-89 (quotation omitted). “[T]he more distant the *Spreigl* act is in terms of time, the greater the similarities as to place and modus operandi must be to retain relevance.” *Id.* at 689 (quotation omitted). In this case, there are essentially no similarities as to place and modus operandi, for the reasons discussed above.

Thus, the conduct underlying Bauer's prior convictions occurred too long ago to allow a determination that they are relevant and material in this case. *See Bolte*, 530 N.W.2d at 198 (concluding that conduct underlying 15-year-old aggravated-rape conviction was not similar enough to charged offense of first-degree murder).

Thus, the state's *Spreigl* evidence of Bauer's prior convictions of possessing child pornography is not relevant and material in light of the asserted purposes of the evidence and the long interval of time between his prior conduct and the alleged conduct in this case. Because Bauer's first two challenges to the state's *Spreigl* evidence are valid, we need not reach the merits of his third challenge.

B. Supervised-Release Condition

Bauer also argues that the district court erred by admitting evidence that he violated a condition of his supervised release that prohibited him from having contact with children without the approval of his supervised-release officer. The district court ruled that this evidence was "relevant to the question of whether [Bauer] acted with sexual or aggressive intent." Bauer contends that this evidence is not relevant and material to a disputed issue because he did not challenge the state's evidence of his intent. As stated above, if sexual contact with a child is proved, "sexual or aggressive intent can readily be inferred from the contacts themselves" because "there could be no other reason" for an adult to touch a child's intimate body parts. *Ness*, 707 N.W.2d at 687. For essentially the same reasons as are stated above, the state's evidence that Bauer violated a condition of his supervised release that prohibited him from having contact with children is not relevant and material to a disputed issue. *See supra* part I.A.1.

C. Registration Requirement

Bauer last argues that the district court erred by admitting evidence that he was required to register as a predatory offender when visiting H.P. Bauer contends that the registration requirement is not relevant and material to any disputed issue. The state does not make any responsive argument specifically relating to this form of *Spreigl* evidence. For the reasons stated above, the state's evidence that Bauer was required to register as a predatory offender is not relevant and material to a disputed issue.

In sum, the district court erred by admitting the state's three forms of *Spreigl* evidence.

D. Harmlessness

Bauer argues that he was prejudiced by the erroneous admission of the state's *Spreigl* evidence. In response, the state argues that any such error would be harmless.

If a district court has erroneously admitted *Spreigl* evidence, an appellate court “must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *Ness*, 707 N.W.2d at 691; *see also State v. Rossberg*, 851 N.W.2d 609, 616 (Minn. 2014); *State v. Fardan*, 773 N.W.2d 303, 320-21 (Minn. 2009). This standard is, in essence, the test for harmless error. *See Ness*, 7907 N.W.2d at 691 (citing *Bolte*, 530 N.W.2d at 198; *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994)); *see also* Minn. R. Crim. P. 31.01. In applying the harmless-error test, we generally consider factors such as “the manner in which the party presented the evidence,” whether the erroneously admitted evidence “was highly persuasive,” “whether the party who offered the evidence used it in closing argument,” “whether the defense effectively

countered the evidence,” and whether there was other “[s]trong evidence of guilt.” *State v. Bigbear*, 10 N.W.3d 48, 54 (Minn. 2024) (quotations omitted).

In seeking leave to admit *Spreigl* evidence, the state argued to the district court that Bauer had a “predilection” for and an “attraction” to children, “as evidenced by the prior convictions,” and that his “predilection towards minors and his sexual preference towards the same is why [he] did what he did.” The prosecutor pursued this theme in closing argument by telling the jury, “This is the kind of guy that’s into kids. Not in a good way. In a sexual way. And we know he likes kids, right? Remember the six felony convictions for possession of the pornographic works involving minors?” The prosecutor also referred to Bauer’s violation of a supervised-release condition and the fact that Bauer is a “registered sex offender for possessing child pornography.”

The prosecutor’s statements in closing argument that Bauer is a certain “kind of guy” are problematic because they imply that Bauer has a propensity based on his character. “[T]he overarching concern over the admission of *Spreigl* evidence is that it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime.” *Ness*, 707 N.W.2d at 685 (quotation omitted). In addition, the prosecutor made a statement during closing argument that indicates that the jury was especially interested in the state’s evidence of the prior convictions. In connection with the statements quoted above concerning the child-pornography convictions, the prosecutor said to the jury: “Each and every one of you took your time when that conviction was passed around. It took 12 minutes to go around the jury box for you to look at that.”

The state acknowledges a “risk” that the jury used the *Spreigl* evidence “for improper propensity purposes” but contends that this risk is “by no means dispositive of the harmless-error analysis.” Specifically, the state notes that the evidence of Bauer’s prior convictions was introduced through only one witness, whose testimony was relatively brief and “was not given undue prominence.” But the brevity of that testimony is less significant than the prosecutor’s repeated references to the prior convictions during closing argument, including the prosecutor’s reminder that, during the evidentiary phase of trial, the jury had paid especially close attention to the evidence of Bauer’s prior convictions.

The state also contends that the evidence of Bauer’s guilt was strong. The state’s evidence showed that Bauer lay on top of a shirtless four-year-old girl while she lay on her bed. But to satisfy its burden of proof, the state was required to prove that Bauer engaged in “sexual contact” with A.B., and the state sought to do that by proving that Bauer touched A.B.’s vagina. The state’s case depended heavily on the testimony of a very young child, whose reliability was called into question with evidence that she was exposed to suggestive statements by adults. The evidentiary record includes H.P.’s contemporaneous statements to a police officer that she could not see both of Bauer’s hands and was unsure whether Bauer touched A.B.’s vagina.

In light of these considerations, we conclude that there is a “reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *Id.* at 691. As a consequence, Bauer is entitled to a new trial.

II. Motion to Strike

Before closing, we must resolve a pending motion. Bauer moved to strike a letter that the state filed with this court pursuant to rule 128.05 of the rules of appellate procedure.

The applicable rule states that a letter with citations to supplemental authorities “must state *without argument* the reasons for the supplemental citations, referring either to the page of the brief or to the point argued orally.” Minn. R. Civ. App. P. 128.05 (emphasis added). A comment to the rule states, “The rule contemplates a very short submission, simply providing the citation of the new authority and enough information so the court can determine what previously-made argument it relates to.” Minn. R. Civ. App. P. 128.05, 2000 advisory committee cmt. A letter that does not comply with rule 128.05 may be stricken. *State v. Minnesota Sch. of Bus., Inc.*, 935 N.W.2d 124, 140 n.10 (Minn. 2019).

The state filed its rule 128.05 letter 12 days after Bauer filed his reply brief and 43 days before oral argument. In the two-page letter, the state called the court’s attention to six opinions of the Minnesota appellate courts, which were issued between 1962 and 2020. Included with each citation is an explanatory parenthetical phrase describing the court’s holding or quoting the court’s opinion. Some of the parentheticals are long enough to require five lines of text.

Bauer argues in his motion that the letter does not comply with rule 128.05 because it goes beyond merely providing citations. Bauer asserts that “every citation contains responsive argument in the form of parentheticals, . . . most of which include extensive quotes from the cases.” We share Bauer’s concern. The basic purpose of an explanatory parenthetical phrase is “to explain the relevance of a particular authority.” *The Bluebook*:

A Uniform System of Citation, R. 1.5(a), at 65 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020). The applicable rule instructs attorneys to accomplish that purpose by merely “setting forth the citations” and “referring either to the page of the brief or to the point argued orally.” Minn. R. Civ. App. P. 128.05. The state’s letter referred to the briefs by page number, so it was unnecessary to include explanatory parenthetical phrases. We are aware that some attorneys use long parenthetical phrases as a means of persuasion. *Cf.* Bryan A. Garner, *The Winning Brief* 207-09 (3d ed. 2014). In some situations, an explanatory parenthetical phrase could be considered a form of “argument.” An argumentative parenthetical phrase should not be used in a rule 128.05 letter.

We need not determine whether the state’s letter complies with rule 128.05. We have not cited any of the supplemental authorities cited in the letter. In addition, we are granting relief to Bauer on the merits of his first argument. Thus, we deny Bauer’s motion to strike as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying motion to strike as moot because court did not rely on challenged material); *In re Purported Financing Statement*, 745 N.W.2d 878, 882 (Minn. App. 2008) (same).

Reversed and remanded; motion denied.