STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0680

State of Minnesota,
Respondent,

vs.

Mark Scott Hendrickson,
Appellant.

Filed March 13, 2023
Affirmed
Wheelock, Judge

Sherburne County District Court
File No. 71-CR-17-970

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, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Worke, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

In this direct appeal from a final judgment of conviction for first-degree criminal sexual conduct, appellant argues that his conviction must be reversed and remanded for a new trial because (1) the district court committed reversible error by admitting other-crime

evidence (*Spreigl* evidence) and (2) the prosecutor committed prosecutorial misconduct. Because the district court did not abuse its discretion by admitting the *Spreigl* evidence and the prosecutor's conduct was not plain error that affected appellant's substantial rights, we affirm.

FACTS

In 2016, then-13-year-old T.H. informed an adult in her life that her father, appellant Mark Scott Hendrickson, had done "sexually inappropriate things" to her. T.H.'s cousin, A.L., also gave a statement to police that she had "flashbacks" of Hendrickson touching her inappropriately.

Following a police investigation, respondent State of Minnesota charged Hendrickson with two counts of first-degree and two counts of second-degree criminal sexual conduct in July 2017. The complaint alleged that Hendrickson had engaged in sexual penetration and sexual contact with T.H. multiple times between 2009 and 2014. The state did not charge Hendrickson with any offense relating to A.L.'s disclosures.

The state filed an amended notice of intent to offer *Spreigl* evidence[1] at trial on September 21, 2018, indicating that the state planned to offer evidence of Hendrickson's sexual abuse of A.L. to prove motive, intent, absence of mistake or accident, and common scheme or plan. The district court held a jury trial that began three days later. At the outset

[1] *Spreigl* evidence is evidence of "any crime, wrong, or act that may be offered at trial under Minn. R. Evid. 404(b)." Minn. R. Crim. P. 7.02, subd. 1; *see State v. Spreigl*, 139 N.W.2d 167, 168 (Minn. 1965) (requiring the state to submit notice of intent to offer evidence of prior crimes at trial).

of trial, the district court ruled that A.L.'s testimony was admissible over Hendrickson's objection. The following facts summarize the evidence presented at trial.

T.H. testified that her parents ended their relationship when she was young, and she began visiting Hendrickson every other week in the summer and every weekend during the school year. During this time, T.H. lived with her mother in Big Lake, and Hendrickson lived at his parents' house in Blaine. T.H.'s overnight visits took place at the house in Blaine and at Hendrickson's fish house on Lake Mille Lacs. Her cousin, A.L., sometimes joined Hendrickson and T.H. at the Blaine house and the fish house.

T.H. testified that when she was between the ages of five and twelve, she sometimes slept in the same bed as Hendrickson when she visited him. She stated that Hendrickson would occasionally ask her to give him a back massage with lotion and that Hendrickson would sometimes give her back massages as well.

During these massages, Hendrickson would have T.H. take off her shirt, he would rub lotion on her back, and then "he would move to other places over [her] body." After rubbing T.H.'s back, Hendrickson would take off T.H.'s pants and rub lotion on her buttocks before moving to touch her vagina. T.H. testified that Hendrickson touched her vaginal area externally and penetrated her vagina with his fingers.

T.H. testified that this type of sexual contact occurred more than five times, but she was unsure if it occurred more than ten times. She estimated that she was five or six years old the first time it occurred. She testified that she did not remember every time it occurred and could not remember the first or last time it occurred. The sexual abuse occurred at both the Blaine house and the fish house.

T.H. further testified that there were occasions when Hendrickson penetrated T.H.'s vagina with his penis. She stated that this type of penetration occurred more than once and that she was six to eight years old the first time it occurred. T.H. also stated that Hendrickson put his penis in her mouth "twice or more."

T.H. stated that she did not disclose the abuse earlier because Hendrickson threatened to kill whomever she told. She also testified that Hendrickson pointed a gun at her and often carried the gun with him.

A.L. testified that T.H. disclosed the abuse to her on one occasion when T.H. was approximately five or six years old. They were pretending their dolls were going to have a baby, and T.H. stated, "[M]y dad's done that to me." A.L. wanted to tell an adult, but T.H. said, "[N]o, I'll hate you. Please don't."

Before A.L. began the portion of her testimony that district court admitted as *Spreigl* evidence, the court gave the following instruction to the jury:

> You are about to hear testimony of occurrences on or about 2012 to 2015. This testimony is being offered for the limited purpose of demonstrating the defendant's motive, intent, absence of mistake or accident, and a common scheme or plan in order to assist you in determining whether the defendant committed the acts against [T.H.] with which he is charged in this case. The defendant is not being tried for and may not be convicted of any offenses other than the charged offenses. You are not to convict the defendant on the basis of occurrences on or about 2012 through 2015 against anyone other than [T.H.]. To do so might result in unjust double punishment.

A.L. then testified that Hendrickson would give her backrubs as well. She stated that she had "flashbacks" of a time at the fish house when she was eight or nine years old, and Hendrickson reached his hand down her pants to stroke her vaginal area. She testified that

she did not remember this incident right away when T.H. came forward with her allegations. A.L. conceded that she has memory issues related to trauma.

The state also called T.H.'s mother, A.L.'s mother, and a detective from the Anoka County Sheriff's Office to testify. Hendrickson called his mother to testify.

At the conclusion of the trial, the jury found Hendrickson guilty on all four counts. The district court convicted Hendrickson of first-degree criminal sexual conduct and sentenced him to 172 months in prison.

Hendrickson filed his notice of appeal in May 2019. This court initially stayed Hendrickson's appeal to allow him to pursue postconviction relief. This court dissolved the stay and reinstated Hendrickson's direct appeal in June 2022.

DECISION

I. The district court did not commit reversible error by admitting A.L.'s testimony that Hendrickson sexually abused her.

The district court uses a five-step test to determine whether to admit *Spreigl* evidence:

> (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. Tomlinson, 938 N.W.2d 279, 286 (Minn. App. 2019), *rev. denied* (Minn. Feb. 26, 2020); *see also* Minn. R. Evid. 404(b)(2).

Appellate courts "review[] the district court's decision to admit *Spreigl* evidence for an abuse of discretion." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). A district court abuses its discretion if its conclusion "is against logic and the facts on record." *State v. Vasquez*, 912 N.W.2d 642, 648 (Minn. 2018).

The appellant bears the burden of showing the district court's error in admitting *Spreigl* evidence and the evidence's prejudicial effect. *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016). If the appellate court determines that the district court erred in admitting the evidence, it next "determine[s] whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id.* at 262.

Hendrickson contends that the district court erred in admitting the portion of A.L.'s testimony that was *Spreigl* evidence of Hendrickson's sexual abuse of her. He argues specifically that (1) the state did not provide proper notice of its intent to offer *Spreigl* evidence, (2) the state did not prove the other crime by clear and convincing evidence, and (3) the potential for unfair prejudice from A.L.'s testimony outweighed its probative value. We address each of these issues in turn.

A. Even if the state did not provide proper notice of its intent to offer *Spreigl* evidence, Hendrickson's substantial rights were not affected by the district court's admission of the *Spreigl* evidence.

Hendrickson first argues that the district court erred in admitting the *Spreigl* evidence because the state did not provide proper notice of its intent to offer the evidence. He argues that the notice did not describe the other-crime evidence "with sufficient particularity to enable the defendant to prepare for trial" as required by Minn. R. Crim. P. 7.02, subd. 3. He further argues that the notice was untimely under Minn. R. Crim.

P. 7.02, subd. 4(a), which states that the prosecution must provide written notice of its intent to offer *Spreigl* evidence "at or before the Omnibus Hearing . . . or as soon after that hearing" as the evidence "becomes known to the prosecutor." Here, the prosecutor did not file the notice of intent to offer A.L.'s testimony as *Spreigl* evidence until three days before the jury trial began.

Although Hendrickson objected at trial to the admission of the *Spreigl* evidence on substantive grounds, he did not raise a procedural objection regarding the prosecutor's notice of intent to offer *Spreigl* evidence. Hendrickson forfeited this objection by failing to raise it at trial. *See Vasquez*, 912 N.W.2d at 649 ("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."). Therefore, we review this procedural issue for plain error. *See id.* at 650 (stating that appellate courts review forfeited evidentiary issues for plain error).

The plain-error standard requires the appellant to show that there was plain error that affected their substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). In showing that a plain error affected their substantial rights, the appellant "bears a heavy burden of persuasion to show that the error was prejudicial and affected the outcome of the case." *Bernhardt v. State*, 684 N.W.2d 465, 475 (Minn. 2004). If the court finds that any one of the plain-error prongs is not satisfied, it need not address the others. *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017).

We need not decide whether the district court erred in admitting the *Spreigl* evidence due to the alleged deficiency in notice because there is no reasonable possibility that the admission of the *Spreigl* evidence affected Hendrickson's substantial rights.

The "substantial rights" analysis under the plain-error test is equivalent to a "harmless error" analysis. *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011). In the context of *Spreigl* evidence, the district court's erroneous admission "must create a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009) (quotation omitted). In evaluating this, we consider whether the district court provided a cautionary instruction, whether the state "dwelled on the evidence in closing argument," and whether the remaining evidence of guilt was overwhelming. *State v. Thao*, 875 N.W.2d 834, 839 (Minn. 2016) (quotation omitted).

Here, the district court provided a cautionary instruction to the jury at the beginning of A.L.'s *Spreigl* testimony and during the jury instructions at the conclusion of trial. The prosecutor referenced this cautionary instruction in her closing argument, stating, "And for the purpose and only the purpose that the judge told you to recall that, you remember what [A.L.] told you." Although the prosecutor reviewed A.L.'s testimony in her closing argument, the majority of the closing argument focused on T.H.'s testimony and did not dwell on the *Spreigl* evidence. Furthermore, the testimony of T.H. alone was more than sufficient to support Hendrickson's conviction. For these reasons, we conclude that there is no reasonable possibility that the *Spreigl* evidence significantly affected the verdict.

Thus, even if the district court's admission of the evidence with deficient notice was plain error, it did not affect Hendrickson's substantial rights and does not warrant reversal.

B. The state proved the other crime by clear and convincing evidence.

Hendrickson next argues that the district court erred in admitting the *Spreigl* evidence because the state did not prove his sexual abuse of A.L. by clear and convincing evidence. Hendrickson argues that A.L.'s testimony did not meet the clear-and-convincing threshold because her memory was unreliable, vague, and influenced by T.H.'s disclosures.

"To be clear and convincing, the evidence surrounding a defendant's participation in a *Spreigl* incident should have a high probability of truthfulness." *Tomlinson*, 938 N.W.2d at 287 (citing *Ness*, 707 N.W.2d at 686). The uncorroborated testimony of a single witness can meet this standard. *State v. Hormann*, 805 N.W.2d 883, 890 (Minn. App. 2011), *rev. denied* (Minn. Jan. 17, 2012). We defer to the district court's credibility determinations regarding *Spreigl* witnesses. *Tomlinson*, 938 N.W.2d at 287.

Here, the district court implicitly determined that A.L. was a credible witness by reviewing her statement to police and ruling to admit her testimony because "there is clear and convincing evidence that it's relevant to the case and that the probative value is not outweighed by its potential for unfair prejudice." A.L.'s testimony was substantially similar to her statement to police, and she was candid about her memory issues in both her police statement and her testimony. The state was also forthright about A.L.'s memory issues, which allowed the district court to weigh this factor when deciding whether to admit her testimony.

Contrary to Hendrickson's assertions, A.L.'s memory and testimony did not appear to be influenced by T.H.'s disclosure. A.L. testified that she had not heard the details of T.H.'s allegations of abuse before she experienced her "flashback" memories of Hendrickson touching her. Instead, her mother's questions prompted A.L.'s memory of the abuse. Notably, A.L. had an independent recollection of Hendrickson giving her back massages that led to sexual contact before she learned the details of T.H.'s allegations.

We therefore conclude that A.L.'s testimony met the clear-and-convincing standard for the admission of *Spreigl* evidence, and the district court did not abuse its discretion by admitting the evidence for this reason.

C. The potential for unfair prejudice did not outweigh the probative value of the *Spreigl* evidence.

Finally, Hendrickson argues that the district court erred in admitting the *Spreigl* evidence because the potential for unfair prejudice from A.L.'s testimony outweighed its probative value.

The district court may not admit other-crime evidence "unless . . . the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant." Minn. R. Evid. 404(b)(2). "Prior bad act evidence can be unfairly prejudicial if it is used by the jury for an improper purpose, such as proof of a defendant's propensity to commit the charged offense or general propensity for violence." *State v. Scruggs*, 822 N.W.2d 631, 644 (Minn. 2012) (citing *Ness*, 707 N.W.2d at 685). A determination of whether the probative value outweighs the potential for unfair prejudice involves "balanc[ing] the relevance of the bad acts, the risk of the evidence being used as propensity

evidence, and the State's need to strengthen weak or inadequate proof in th[e] case." *Id.* (quoting *Fardan*, 773 N.W.2d at 319). "In assessing the probative value and need for the evidence, the district court must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *Ness*, 707 N.W.2d at 686.

Here, the district court admitted A.L.'s testimony to prove motive, opportunity, absence of mistake or accident, and a common scheme or plan. Hendrickson argues that the testimony is not admissible to prove any of these points. The state argues that the testimony is relevant to and admissible under all of these points.

We conclude that A.L.'s testimony was relevant and admissible to prove Hendrickson's common scheme or plan. The supreme court has held that *Spreigl* evidence is admissible under the common-scheme-or-plan exception when the evidence shows "a marked similarity in modus operandi to the charged offense." *Id.* at 688.

We conclude that the relevance and probative value of A.L.'s testimony in this respect outweighs its potential for unfair prejudice because A.L.'s testimony of Hendrickson's behavior had a marked similarity to T.H.'s testimony regarding the charged offense. Both girls testified that the acts occurred at the fish house, that they would share a bed with Hendrickson, that Hendrickson would give them back massages and receive back massages from them, and that the massage would begin at their backs before Hendrickson moved his hands to their genitals.

Furthermore, the potential for unfair prejudice from A.L.'s testimony was mitigated by the district court's jury instruction. *See State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998) (stating that the district court's cautionary instructions to the jury "lessened the

probability of undue weight being given by the jury to the evidence"). The district court twice gave a jury instruction that A.L.'s testimony was admitted only "for the limited purpose of demonstrating [Hendrickson's] motive, intent, absence of mistake or accident, and a common scheme or plan in order to assist [the jury] in determining whether [Hendrickson] committed the acts against [T.H.] with which he is charged in this case."

In sum, we conclude that the district court did not abuse its discretion in admitting A.L.'s testimony as *Spreigl* evidence because the admission of *Spreigl* evidence did not affect Hendrickson's substantial rights, A.L.'s testimony met the clear-and-convincing standard for *Spreigl* evidence, and the probative value of the testimony outweighed its potential for unfair prejudice.

II. The prosecutor did not commit plain error that affected Hendrickson's substantial rights.

Next, Hendrickson argues that the prosecutor committed prosecutorial misconduct during her closing argument by misstating the state's burden of proof and by referring to facts not in evidence. Hendrickson did not object to the prosecutor's closing-argument statements at trial.

This court reviews claims of unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 296 (Minn. 2006). The defendant bears the burden of satisfying the first two prongs of the plain-error test "to demonstrate both that error occurred and that the error was plain." *Id.* at 302. "An error is plain if it was clear or obvious," and plain error may be demonstrated "if the error contravenes case law, a rule, or a standard of conduct." *Id.* (quotations omitted). This

court assesses "the closing argument as a whole" to determine whether a prosecutor engaged in misconduct. *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009) (quoting *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004)); *accord State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007); *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Once the defendant demonstrates plain error, the burden shifts "to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Ramey*, 721 N.W.2d at 302 (citing Minn. R. Crim. P. 31.02; *Griller*, 583 N.W.2d at 741). The misconduct affected substantial rights if there is "a reasonable likelihood that the error actually impacted the verdict." *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010).

If the court finds that any one of the plain-error prongs is not satisfied, it need not address the others. *Lilienthal*, 889 N.W.2d at 785. If all three prongs of the plain-error test are satisfied, this court "assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740.

Hendrickson's first argument is that the prosecutor misstated the burden of proof by stating, "[L]et's cut to the chase, if you believe [T.H.], Mark Hendrickson is guilty. Period." A prosecutor's misstatement of the burden of proof is "highly improper." *State v. Strommen*, 648 N.W.2d 681, 690 (Minn. 2002) (quotation omitted). However, "corrective instructions by the court can cure prosecutorial error." *McDaniel*, 777 N.W.2d at 750; *accord State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986) (stating that the trial court's reiteration of the correct burden of proof cured any improper comments by the prosecutor).

Looking at the prosecutor's closing argument as a whole, we conclude that this isolated statement does not constitute plain error. The prosecutor stated at the beginning of her closing argument, "It is my burden to prove each and every element beyond a reasonable doubt. The testimony that the State presented has to prove each and every element beyond a reasonable doubt." The prosecutor made the challenged statement in the context of describing how T.H.'s testimony established each element of the charged offenses beyond a reasonable doubt.

Furthermore, even assuming that the prosecutor's statement was plain error, it is unlikely that the error affected Hendrickson's substantial rights because the district court properly instructed the jury on the burden of proof: "The State must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged." The prosecutor's and the district court's reiterations of the correct burden of proof make it unlikely that the prosecutor's challenged statement affected the jury's verdict, and thus, the statement did not affect Hendrickson's substantial rights.

Hendrickson's second argument is that the prosecutor referred to facts not in evidence when she stated, "We saw, ladies and gentlemen what happens firsthand when I asked, any of you, if you had a secret? And how a member of our panel was drawn to tears because she never even thought about it until we asked that question." Here, the prosecutor was referring to an incident during jury voir dire when a prospective juror cried in response to a question to the jurors.

Although a prosecutor's closing argument need not be "colorless," it must be "based on the evidence produced at trial, or the reasonable inferences from that evidence." *State*

v. Coleman, 944 N.W.2d 469, 485 (Minn. App. 2020) (quotation omitted), *aff'd on other grounds*, 957 N.W.2d 72 (Minn. 2021).

When we review the prosecutor's closing argument as a whole, we note that the vast majority of the argument referred to T.H.'s testimony and other evidence presented at trial. The prosecutor did not state that the jury voir dire incident was evidence that supported Hendrickson's guilt; rather, she briefly mentioned the jury voir dire incident as an analogy to A.L.'s memory of the abuse. Although the prosecutor's reference to this incident was inadvisable as an emotional appeal to the jury, it did not rise to the level of plain error. Therefore, we conclude that Hendrickson's claim of prosecutorial misconduct does not merit reversal.

III. The arguments in Hendrickson's pro se brief do not merit relief.

Hendrickson submitted a pro se supplemental brief that raised thirteen additional issues and corrected several statements in the appellate brief. The supplemental brief includes bare allegations of fraud, jury prejudice, due-process violations, ineffective assistance of counsel,[2] improper venue, and entrapment, among other arguments.

[2] As to the assistance of Hendrickson's trial counsel, Hendrickson did not explain how his trial counsel's performance was deficient or how he was prejudiced by it. We do not consider his argument on this issue because it is not supported by the record or by legal authority. *See State v. Benton*, 858 N.W.2d 535, 542 (Minn. 2015). We are unable to determine from Hendrickson's pro se brief whether his claim for ineffective assistance of trial counsel could be resolved on the district court record alone; if it cannot be adjudicated on the basis of the district court record, it is possible that Hendrickson could pursue a claim for ineffective assistance of trial counsel in a postconviction petition. *See Leake v. State*, 737 N.W.2d 531, 535-36 (Minn. 2007). We note that Hendrickson may still pursue a claim for ineffective assistance of appellate counsel in a petition for postconviction relief. *See id.* at 536 ("Claims of ineffective assistance of appellate counsel on direct appeal are not

Appellate courts will not consider arguments that are unsupported by the record and devoid of legal authority. *Benton*, 858 N.W.2d at 542. Hendrickson's pro se arguments are not supported by the record or appropriate legal authority, and therefore, we do not consider these arguments on appeal.

Affirmed.

barred by the *Knaffla* rule in a first postconviction appeal because they could not have been brought at any earlier time.").