STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1075

State of Minnesota,
Respondent,

vs.

Kyle Grayling Tweed,
Appellant.

Filed July 22, 2024
Affirmed
Bratvold, Judge

Dakota County District Court
File No. 19HA-CR-19-2394

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

Kathryn M. Keena, Dakota County Attorney, Jessica A. Bierwerth, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Bratvold, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this direct appeal from a judgment of conviction for third-degree criminal sexual conduct involving a mentally impaired or physically helpless victim, appellant argues that the district court abused its discretion by admitting evidence that appellant previously had

sexually assaulted two other women while they were asleep. We conclude that the district court did not abuse its discretion. Thus, we affirm.

FACTS

Respondent State of Minnesota charged appellant Kyle Grayling Tweed with third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d) (2018), alleging that the victim, S.M., was mentally impaired or physically helpless when Tweed sexually assaulted her in September 2019. The district court conducted a jury trial in February 2023, and the following summarizes the evidence received along with the relevant procedural history.

On August 31, 2019, S.M. and her friend D.R. ate at a restaurant in Minneapolis. During dinner, they consumed some alcohol. After dinner, they went to a bar, where they "had a couple drinks" with D.R.'s friend J.W., who introduced them to his friend Tweed and Tweed's girlfriend.

After leaving the bar, the five of them went to Tweed's split-level townhome in Apple Valley. They drank more alcohol and used cocaine. Three times during the night, Tweed's girlfriend saw Tweed and S.M. downstairs on the lower level together and observed that they were "facing each other, but they weren't touching." At one point, Tweed asked his girlfriend and S.M. "to take off [their] tops," but they refused. Eventually, Tweed's girlfriend got into an argument with Tweed, "kind of punched him in the face," "grabbed [her] stuff," and "left." D.R. and J.W. fell asleep while S.M. danced to music and videos in the living room. Tweed also remained awake.

S.M. and Tweed went to his bedroom. They talked about a man S.M. was dating, and S.M. asked Tweed for a massage. Tweed pulled up S.M.'s dress, and she told him, "Don't do that." Eventually, S.M. fell asleep. S.M. dreamed about having sex and woke up; Tweed was penetrating her vagina with his penis. S.M.'s underwear was pulled down around her legs. S.M. yelled at Tweed, and he denied penetrating her. D.R. "woke up to [S.M.] screaming, 'You raped me,'" at Tweed. Tweed left, and S.M. called 911. Law enforcement responded to the call; S.M. gave a recorded statement, cooperated with the investigation, and submitted to a sexual-assault exam.

At trial, the state offered testimony from S.M.'s mother that S.M. had died.[1] Tweed's girlfriend and D.R. also testified. S.M.'s recorded statements to law enforcement and the medical report from the sexual-assault nurse-examiner who examined S.M. were received into evidence. A forensic scientist testified that vaginal swabs from S.M. contained "a Y chromosome profile that matched Kyle Tweed," meaning that "neither Kyle Tweed nor any of his paternally-related male relatives [could] be excluded as a contributor." As discussed below, the state also offered *Spreigl* evidence about two times when Tweed sexually assaulted other women while they were sleeping.[2]

[1] S.M. died for reasons unrelated to this case.

[2] "*Spreigl* evidence is evidence of a defendant's prior crimes, wrongs, or acts, which would otherwise be inadmissible, but which the state can seek to have admitted for the limited purpose of showing motive, intent, absence of mistake, identity, or a common scheme or plan." *State v. Asfeld*, 662 N.W.2d 534, 542 (Minn. 2003); *see* Minn. R. Evid. 404(b)(1); *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

Tweed testified that, while he and S.M. were downstairs at his house, they flirted and did "body bumps." He added that he snorted cocaine "off her vagina," they "performed oral sex on each other," and the oral sex was consensual. Tweed also testified that "[t]here was no time [he] penetrated" S.M. with his penis. Tweed called no other witnesses.

The jury found Tweed guilty, and the district court imposed a sentence of 180 months in prison. Tweed appeals.

DECISION

Tweed raises one issue in his brief to this court. He argues that "the district court committed reversible error by allowing the state to introduce irrelevant and unfairly prejudicial *Spreigl* evidence showing that on two prior occasions Tweed had sexually assaulted women while they were asleep." Tweed contends that he is entitled to a new trial. Appellate courts review a district court's decision to admit *Spreigl* evidence for an abuse of discretion. *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016). On appeal, a defendant challenging the admission of *Spreigl* evidence "bears the burden of showing an error occurred and any resulting prejudice." *State v. Buchan*, 993 N.W.2d 614, 626 (Minn. 2023) (quotation omitted).

A. The *Spreigl* Evidence

Before trial, the state filed a notice of its intent to offer *Spreigl* evidence showing that Tweed previously sexually assaulted two women while they were sleeping. Tweed moved in limine to exclude the proposed *Spreigl* evidence, including Tweed's "two [prior sexual-assault] convictions or any facts associated with them." After hearing arguments on the *Spreigl* evidence, the district court denied Tweed's motion, stating that while "there is

some prejudice to [Tweed] . . . the incidents do meet the standard to allow them" into evidence "based upon modus operandi."[3]

Before the two *Spreigl* witnesses testified and outside the presence of the jury, Tweed's attorney objected to their testimony to preserve the issue for appeal. The district court reiterated that, before trial, it determined "that the [*Spreigl*] incidents go towards modus operandi" and "that the probative value outweighs the prejudice based upon the similarity between the offenses to the current events charged."

The first *Spreigl* witness, M.C., testified that, in September 2009, she went out drinking in Minneapolis with two friends. Tweed, who was the "on-and-off-again boyfriend" of friend one, met up with them. The four of them went to three clubs, an after-party, and then to friend one's apartment. M.C. "felt pretty intoxicated" but consumed more alcohol at the apartment. M.C. "started to feel a little sick" and went to "lay down" in friend one's bedroom. Tweed and M.C.'s two friends "were still up partying."

When M.C. went to bed, she "had just night shorts on." Later, M.C. woke up "a little bit" because she felt "somebody on top" of her and "knew that [she] was having sex"; M.C. "felt a penis inside of [her] vagina," but she was "too intoxicated" and "not awake enough to try to stop what was happening."

When M.C. fully woke up, her underwear and night shorts "were looped around one leg" and her vagina was "kind of swollen" and "wet." M.C. confronted Tweed, who was "asleep on the couch," and said, "What the f--k did you do last night?" Tweed "woke up

[3] The district court determined that Tweed's two prior sexual-assault convictions related to the two other incidents were not admissible "for impeachment purposes."

right away" and said, "I know, I know. I'm sorry I was just f--ked up. I f--ked up." M.C. "started crying" and told friend one that Tweed "raped [her] last night." Tweed "ran out of the apartment," and friend one "ran after him . . . and called the police."

The second *Spreigl* witness, B.B., testified that, in January 2010, she lived with two roommates in Savage. Roommate one "had dated" Tweed. One evening, B.B. watched movies with her roommates and went to bed around 1:30 a.m. B.B. had consumed no alcohol or drugs. B.B. did not know that Tweed was in her home when she went to bed.

B.B. woke up, and Tweed was "on top of [her], penetrating [her]" with his penis. B.B. said, "No. Stop," and Tweed instead placed his hand inside B.B.'s vagina. B.B. again said, "Stop," and "there was a noise upstairs," which caused Tweed to leave her room.

B.B. went to roommate two's bedroom and told him "what had just happened." Roommate one then "came downstairs," and B.B. told her what happened as well. Roommate one "left the room to go talk with [Tweed]," and they both "came downstairs." B.B. "didn't talk to" Tweed because she was "[s]cared" and called the police after Tweed left.

At trial, after the parties concluded their presentation of the evidence and during final jury instructions, the district court gave a limiting instruction about the *Spreigl* evidence that Tweed had sexually assaulted M.C. and B.B.[4]

[4] The instruction followed the pattern jury instruction. *See* 10 *Minnesota Practice*, CRIMJIG 3.05 (2023).

B. The *Spreigl* Analysis

"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." Minn. R. Evid. 404(b)(1). Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* The supreme court has established a five-step test to determine the admissibility of evidence of a prior bad act or crime, referred to as *Spreigl* evidence:

> (1) the State must provide notice of its intent to use the evidence; (2) the State must clearly indicate what the evidence is being offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the other act; (4) the *Spreigl* evidence must be relevant and material; and (5) the probative value of the evidence must not be outweighed by the potential prejudice.

Buchan, 993 N.W.2d at 626 (quotation omitted). Tweed concedes that the state satisfied steps one and three. This opinion considers Tweed's arguments about steps two, four, and five in turn.

Step 2: The state clearly indicated what the evidence was offered to prove.

Under step two, "the State must clearly indicate what the [*Spreigl*] evidence is being offered to prove." *Id.* (quotation omitted). "Implicit in the requirement that the proponent of *Spreigl* evidence disclose its purpose is that there also be some showing or determination that the evidence reasonably and genuinely fits that purpose." *State v. Montgomery*, 707 N.W.2d 392, 398 (Minn. App. 2005). The state cannot merely "recite a [rule] 404(b) purpose without also demonstrating at least an arguable legitimacy of that purpose." *Id.*

Tweed argues that "the state failed to articulate a specific purpose for admission of the *Spreigl* evidence" and "merely recited the bulk of the allowed purposes for admitting other-bad-acts evidence as set forth in Minn. R. Evid. 404(b)." The state disagrees, arguing that its memorandum to the district court in support of admitting the *Spreigl* evidence "indicated that modus operandi in the charged offense and the proposed *Spreigl* incident[s] was the same," "that [Tweed's] similar behavior of penetrating women with his penis while they were sleeping shows intent, motive, absence of mistake, common scheme or plan," and that the allegations were not fabricated.

The record shows that the state clearly indicated what the *Spreigl* evidence was offered to prove. While the state's initial notice was broad and stated all the rule 404(b) permissible purposes for introducing *Spreigl* evidence, its later submission was more specific. The state's supporting memorandum focused on modus operandi, which when repeated is synonymous with a common plan or scheme. *See State v. Forsman*, 260 N.W.2d 160, 167 (Minn. 1977) (stating that the common-scheme-or-plan exception "has evolved to embrace evidence" of modus operandi). The state also explained how the *Spreigl* evidence fit that purpose. The state's memorandum argued that the "three offenses [were] very similar" and that Tweed showed the "same modus operandi in each case" by "penetrat[ing] each of the victims' vaginas with his penis while they were sleeping" and by having no preexisting romantic relationship with the victims. Accordingly, the state satisfied step two of the *Spreigl* analysis.

Step 4: The *Spreigl* evidence was relevant and material.

Step four of the *Spreigl* analysis requires that the evidence be relevant and material. *Buchan*, 993 N.W.2d at 626. "[T]he closer the relationship between the other acts and the charged offense, in terms of time, place, or modus operandi, the greater the relevance and probative value of the other-acts evidence and the lesser the likelihood that the evidence will be used for an improper purpose." *State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006). To show a common plan or scheme, the *Spreigl* evidence must "have a marked similarity in modus operandi to the charged offense." *Id.* (emphasis omitted) (quotation omitted).

Tweed argues that the *Spreigl* evidence was "not relevant to the charged offense" because there was a "lack of similarity between the *Spreigl* evidence and the charged offense." The state responds that the *Spreigl* evidence was "relevant to the charged offense" because "the three offenses, while not identical, are very similar." The state contends that, in each sexual assault, Tweed "penetrated each of the victims' vaginas with his penis while they were sleeping," which "is the same modus operandi."

Precedent guides us in this step of the *Spreigl* analysis. Minnesota courts have repeatedly recognized the relevance of *Spreigl* evidence in criminal-sexual-conduct cases. *See State v. Boehl*, 697 N.W.2d 215, 219 (Minn. App. 2005) ("In criminal sexual conduct cases . . . prior acts of sexual conduct are often relevant where the defendant disputes that the sexual conduct occurred or where the defendant asserts the victim is fabricating the allegations."), *rev. denied* (Minn. Aug. 16, 2005).

For example, in *State v. Wermerskirchen*, the state charged Wermerskirchen with second-degree criminal sexual conduct involving his nine-year-old daughter. 497 N.W.2d

235, 236 (Minn. 1993). The district court admitted *Spreigl* evidence of similar incidents of sexual contact between Wermerskirchen and his stepdaughter and two nieces. *Id.* at 237. Wermerskirchen appealed his conviction, and the supreme court determined that the district court did not abuse its discretion. *Id.* at 243. The supreme court stated that the *Spreigl* "evidence was highly relevant in that it showed an ongoing pattern of opportunistic fondling of young girls within the family context and, therefore, tended to disprove the defense that [the victim] was fabricating or imagining the occurrence of sexual contact." *Id.* at 242.

Similarly, in *State v. Washington*, the supreme court upheld the admission of *Spreigl* evidence during Washington's trial for sexually abusing his girlfriend's 15-year-old daughter. 693 N.W.2d 195, 198 (Minn. 2005). The *Spreigl* evidence showed Washington previously had sexually assaulted a 15-year-old girl. *Id.* The supreme court determined that the *Spreigl* evidence was relevant because it suggested "that Washington's modus operandi was to initiate sexual contact with teenage girls, train them to perform sexual acts on him, control them by threats and coercion, and encourage them to exploit their sexuality." *Id.* at 203. The supreme court also noted that "evidence of modus operandi was relevant because Washington claimed that [the victim] had fabricated her claims." *Id.*

Based on this caselaw, we conclude that the *Spreigl* evidence in Tweed's case is markedly similar to the charged offense involving S.M. and relevant to prove modus operandi. *See Ness*, 707 N.W.2d at 688 (requiring a marked similarity in modus operandi between the *Spreigl* evidence and the charged offense). In all three sexual assaults, the women met Tweed through a friend, had no preexisting romantic relationship with Tweed,

and after going to sleep, woke up as Tweed was penetrating their vaginas with his penis. Tweed had also been in or was currently in a romantic relationship with one of the other women who was present for the events right before the sexual assault. Two of the three sexual assaults involved the victim consuming alcohol.

Tweed argues that the prior sexual assaults were "markedly different" because they "occurred at the homes of friends of Tweed's . . . whereas the events alleged in this case occurred . . . at Tweed's home," and the incident with B.B. did not involve "a high consumption of alcohol." Tweed also argues that, unlike M.C. and B.B., S.M. "flirted with Tweed," "actively sought opportunities to be alone with him," and was "alert" due to her drug use. Even so, the *Spreigl* evidence shows Tweed's modus operandi amounted to a common plan or scheme of sexually assaulting sleeping women. Thus, we conclude that the *Spreigl* evidence admitted in Tweed's case is "highly relevant." *See Wermerskirchen*, 497 N.W.2d at 242.

Tweed also claimed that S.M. fabricated the sexual assault. Tweed testified that "[t]here was no time [he] penetrated [S.M.]" and that the alleged sexual assault "didn't happen." The *Spreigl* evidence is thus also relevant to determine whether S.M. fabricated the sexual assault. *See id.* (determining that *Spreigl* evidence was relevant where it tended to disprove the defense that the sexual-assault allegations were fabricated).

Step 5: The probative value of the *Spreigl* evidence outweighed its potential unfair prejudice.

Under step five of the *Spreigl* analysis, "the probative value of the evidence must not be outweighed by the potential prejudice." *Buchan*, 993 N.W.2d at 626 (quotation

omitted). To make this determination, appellate courts "balance the relevance of the [prior] offenses, 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). "[E]vidence of criminal sexual conduct can be highly prejudicial." *Id.* Unfair prejudice, however, "is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

Tweed argues that the "prejudicial effect of the prior offenses substantially outweighed any probative value." Tweed contends that the *Spreigl* evidence was "not relevant" and that the state "did not need the *Spreigl* evidence to strengthen otherwise weak or inadequate proof." The state contends that the "district court properly exercised its discretion in admitting the *Spreigl* evidence."

At a pretrial hearing, the district court discussed step five and stated that, while "there is some prejudice to the defendant, . . . the incidents do meet the standard to allow them" into evidence "based upon modus operandi." In response to Tweed's objection to the *Spreigl* evidence at trial, the district court reiterated that it found "that the probative value outweighs the prejudice based upon the similarity between the [prior] offenses to the current events charged."

The district court's determination is supported by the record and relevant caselaw. As detailed above, Tweed's prior sexual assaults are markedly similar to the sexual assault of S.M. and thus are "highly relevant" as they establish modus operandi, a common plan or scheme, and help the jury determine whether S.M. fabricated the sexual assault.

Wermerskirchen, 497 N.W.2d at 242; *see also Ness*, 707 N.W.2d at 688 (stating that the "closer the relationship between the other acts and the charged offense, in terms of . . . modus operandi, the greater the . . . probative value of the other-acts evidence and the lesser the likelihood that the evidence will be used for an improper purpose").

While the risk exists that the jury would improperly use the *Spreigl* evidence to assess Tweed's propensity to sexually assault women, the risk was reduced by the district court's limiting instruction. *See State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008) (explaining, in the context of *Spreigl* evidence, that "a cautionary instruction lessens the probability of undue weight being given by the jury to the evidence" (quotation omitted)); *see also State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015) (stating that appellate courts presume the jury followed cautionary instructions).

We also observe that Tweed denied penetrating S.M. with his penis while she was asleep—claiming instead that they had consensual oral sex—and that S.M. did not testify because she died before trial. In these circumstances, the district court did not abuse its discretion by determining that the probative value of the *Spreigl* evidence outweighed any potential for unfair prejudice.

In sum, the district court did not abuse its discretion when it admitted the *Spreigl* evidence of Tweed's two prior sexual assaults of sleeping women. We conclude that the evidence satisfies steps two, four, and five of the *Spreigl* analysis. And Tweed concedes that steps one and three of the analysis were satisfied. Because the district court's admission

of *Spreigl* evidence was not an abuse of discretion, we need not consider Tweed's argument that the erroneous admission of *Spreigl* evidence was prejudicial.

Affirmed.