

FILE NO. \_\_\_\_\_

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition for Disciplinary Action  
against HENRY J. MARTINEZ,  
a Minnesota Attorney,  
Registration No. 265482.  
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**PETITION FOR  
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition upon the parties' agreement pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility (RLPR). The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on July 26, 1996. Respondent currently practices law in Roseville, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

1. In June 2003 respondent was charged with criminal sexual conduct in the fifth degree, a gross misdemeanor. (Exh. 1.) In the summer of 2002 respondent improperly touched his adult step-daughter without consent.
2. During the trial evidence was introduced that in 1996 respondent kissed a co-worker on the mouth at a party without consent. Respondent was the direct supervisor of this co-worker.
3. During the trial evidence was introduced that in 1997 respondent improperly touched another adult step-daughter without consent.
4. On July 29, 2004, the jury found respondent guilty of the charged crime (Exh. 2). On April 5, 2005, the Minnesota Court of Appeals affirmed respondent's

conviction. *State v. Martinez*, 694 N.W.2d 86 (Minn. Ct. App. 2005), *rev. denied*, July 19, 2005 (Exh. 3).

5. Rule 19(a), RLPR, provides:

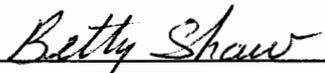
**Criminal Conviction.** A lawyer's criminal conviction in any American jurisdiction . . . is, in proceedings under these Rules, conclusive evidence that the lawyer committed the conduct for which the lawyer was convicted.

6. Respondent's criminal sexual conduct violated Rule 8.4(b), Minnesota Rules of Professional Conduct (MRPC).

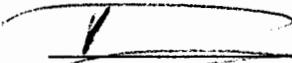
7. Respondent's harassment of a subordinate co-worker violated Rule 8.4(g) and (h), MRPC.

WHEREFORE, the Director respectfully prays for an order of this Court suspending respondent from the practice of law or imposing otherwise appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: February 27, 2006.

  
\_\_\_\_\_  
BETTY M. SHAW  
ACTING DIRECTOR OF THE OFFICE OF  
LAWYERS PROFESSIONAL RESPONSIBILITY  
Attorney No. 130904  
1500 Landmark Towers  
345 St. Peter Street  
St. Paul, MN 55102-1218  
(651) 296-3952

and

  
\_\_\_\_\_  
TIMOTHY M. BURKE  
SENIOR ASSISTANT DIRECTOR  
Attorney No. 19248x

State of Minnesota County of Hennepi District Court

CCT LIST CHARGE STATUTE ONLY MOC GOC CTY ATTY FILE NO. CONTROLLING AGENCY CONTROL NO. 609.3451 LAA37 N 03-5380 0271100 02315475

COURT CASE NO. DATE FILED

Amended Tab Charge Previously Filed

If more than 6 counts (see attached) If Domestic Assault as defined by MS 318B01, sub2a,b

State of Minnesota,

PLAINTIFF,

VS.

SERIOUS FELONY FELONY GROSS MISDM DWI GROSS MISDM SUMMONS WARRANT ORDER OF DETENTION EXTRADITION

NAME: first, middle, last

Date of Birth

Legal Edge Number

Henry John Martinez, Jr. 03025751

10/26/53

LE#: 03-17749

2413 Humboldt Avenue South DEFENDANT. Minneapolis, Minnesota 55405

COMPLAINT

Complainant hereby complains of the above-named court and states that there is probable cause to believe that the defendant committed the above-named offense(s). The complainant states that the following facts exist which are probable cause:

Complainant, Brian Carlson, is a sergeant with the Minneapolis Police Department, and, in that capacity, has investigated the case by reviewing reports of fellow officers and by personally interviewing the victim and witnesses herein.

Complainant has learned from an adult female, K.M.K., whose date of birth is 3/4/82, that in August of 2002, K.M.K. was living in the upper portion of a duplex located in Minneapolis, Hennepin County, Minnesota. K.M.K. states that her mother and stepfather, HENRY JOHN MARTINEZ, JR., were living in the lower portion of the duplex.

K.M.K. states that at approximately 4:00 a.m. on August 21, 2002, she was lying face down on her bed watching television, as she was unable to sleep. She states that her stepfather, HENRY JOHN MARTINEZ, JR., entered her bedroom and asked her if she had heard a noise. She states that her stepfather was wearing only boxer shorts at the time. He then sat next to her on the bed and began talking to her. While he did so, he began to massage her legs. K.M.K. states that she was wearing a tank top and shorts, with underwear underneath. As he massaged her legs, he moved his hand underneath her shorts and touched both her buttocks and her vaginal area, over her underwear. K.M.K. states that she immediately moved his hand with her own and began to cry. She states that her stepfather continued to talk to her, but that she did not respond. He then pushed her hair back, kissed her on the cheek and left the room. K.M.K. states that she then contacted her sister and told her what had happened, after which she packed some of her belongings and left the residence.

Defendant is not presently in custody.

COMPLAINT SUPPLEMENT

CCT	SECTION/Subdivision	M.O.C.	GOC

OFFENSE

CRIMINAL SEXUAL CONDUCT IN THE FIFTH DEGREE (GROSS MISDEMEANOR)  
 MINN. STAT. 2002, §609.3451, SUBD. 1(1); SUBD. 2  
 PENALTY: 0-1 YEAR AND/OR \$3,000

That on or about August 21, 2002, in Hennepin County, Minnesota, HENRY JOHN MARTINEZ, JR. engaged in nonconsensual sexual contact, with K.M.K.

**NOTICE:** You must appear for every court hearing on this charge. A failure to appear for court on this charge is a criminal offense and may be punished as provided in Minn. Stat. § 609.49.

*HEREBY REQUESTS THAT SAID DEFENDANT SUBJECT TO BAIL OR CONDITIONS OF RELEASE BE ARRESTED OR THAT OTHER APPROPRIATE STEPS BE TAKEN TO OBTAIN DEFENDANT'S APPEARANCE IN COURT OR IF DETAINED OR ALREADY IN CUSTODY PENDING FURTHER PROCEEDINGS THAT SAID DEFENDANT OTHERWISE BE DEALT WITH ACCORDING TO LAW.*

COMPLAINANT'S NAME:  
 Sergeant Brian Carlson

COMPLAINANT'S SIGNATURE:

DATE:  
 June 25, 2003

PROSECUTING ATTORNEY'S SIGNATURE:

lfb

*Gemma E. Graham*

PROSECUTING ATTORNEY:  
 NAME/TITLE:  
 Gemma E. Graham (142086)  
 Assistant County Attorney

ADDRESS/TELEPHONE:  
 C2100 Government Center, Minneapolis, MN 55487  
 Telephone: (612) 348-3113

FILED

04 JAN 29 PM 4:08

State of Minnesota

District Court

County of Hennepin

DEPUTY  
HENNAPIN COUNTY DISTRICT  
COURT OF MINNESOTA

Fourth Judicial District

The State of Minnesota,

Plaintiff,

Verdict of Guilty

v.

Henry John Martinez, Jr.

Court File No. 03025751

Defendant.

We, The Jury, find the Defendant guilty of the charge of Criminal Sexual Conduct in the Fifth Degree.

*Joan S. Frenz*  
Presiding Juror

Dated this 29 day of January, 2004 in Minneapolis, Minnesota.

To be completed by clerk:

Filed in open Court on \_\_\_\_\_ at \_\_\_\_\_ M.

Court Clerk \_\_\_\_\_

MINNESOTA COUNTY OF HENNEPIN  
to be a member of the  
in the State of Minnesota  
S. THOMAS, County of Hennepin  
Deputy

*Sherry J. Jelle*

WARRANT OF COMMITMENT

(CHECK ONLY 1 BOX)

- In Custody
- Out of Custody
- Work Release
- Women's
- Men's

Case Name Henry John Martinez, Jr.

DOB 10-26-1953

True Name \_\_\_\_\_

SIP Person No. 00982925

To: The Sheriff of Hennepin County and to the Commissioner of Corrections/Superintendent of the Adult Corrections Facility Hennepin County, of the State of Minnesota.

The defendant named above was found guilty by this Court of the offense listed. Commencing the date indicated, this defendant must serve the term/days shown and be confined at Henn. Co. Workhouse, Minnesota and/or the Adult Corrections Facility of the County of Hennepin.

In the name of the State of Minnesota, you, the Superintendent or Commissioner, are commanded to receive this defendant into your custody. You are to safely keep him/her for the term indicated unless he/she shall be discharged sooner by due process of law or unless he/she shall pay the stated fine if a fine is shown.

SIP Case No. 03025751 Court Div. 1  Misdemeanor  Gross Misdemeanor  Felony  
 Charging Community # \_\_\_\_\_ City \_\_\_\_\_ (complete for misdemeanor cases only)  
 Hennepin County to pay (Felony's/GM)  
 Deft to pay (serving time in another county)

Count 1 Offense Crim Sex- 5<sup>th</sup> degree Statute/Ord. No. 609.3451-1.1  
 Days 60 Credit Days \_\_\_\_\_  Rule 25  Telesis

Remarks complete assessment/treatment as ordered by probation/no contact with victim

Reporting Date(s): 4-15-2004 Time: 0800AM  
 Release Date (s): \_\_\_\_\_ Time: \_\_\_\_\_

Sentencing Judge Judith Tilsen (Ramsey County)

CONCURRENT  CONSECUTIVE

SIP Case No. \_\_\_\_\_ Court Div. \_\_\_\_\_  Misdemeanor  Gross Misdemeanor  Felony  
 Charging Community # \_\_\_\_\_ City \_\_\_\_\_ (complete for misdemeanor cases only)  
 Hennepin County to pay (Felony's/GM)  
 Deft to pay (serving time in another county)

Count \_\_\_\_\_ Offense \_\_\_\_\_ Statute/Ord. No. \_\_\_\_\_  
 Days \_\_\_\_\_ Credit Days \_\_\_\_\_

Remarks \_\_\_\_\_  
 Sentencing Judge \_\_\_\_\_  Re-commitment on Revocation

Date 3-19-2004 By: (Court Deputy) Leo Willey  
 Telephone # 612-348-2612 Initials LW

Div. 1 Page 1 of 1 Pages

STATE OF MINNESOTA, COUNTY OF HENNEPIN  
 Certified to be a true and correct copy of the original on file and of record in my office.  
 MARK S. THOMPSON, Court Administrator

*Sherry Ryle*  
 Deputy

WH Use Only  
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Westlaw.

694 N.W.2d 86

Page 1

694 N.W.2d 86

(Cite as: 694 N.W.2d 86)

**H**

Court of Appeals of Minnesota.  
STATE of Minnesota, Respondent,  
v.  
Henry John MARTINEZ, Jr., Appellant.  
No. A04-546.

April 5, 2005.  
Review Denied July 19, 2005.

**Background:** Defendant was convicted by jury in the District Court, Hennepin County, Judith M. Tilsen, J., of fifth-degree criminal sexual conduct. Defendant appealed.

**Holdings:** The Court of Appeals, Crippen, Acting J., held that:

- (1) defendant was not entitled to more particular instruction on purposes for which jury could use *Spreigl* prior bad acts evidence, and
  - (2) victim's statement was not inadmissible hearsay evidence.
- Affirmed.

## West Headnotes

[1] **Criminal Law** ⇨835  
110k835 Most Cited Cases

[1] **Criminal Law** ⇨1152(1)  
110k1152(1) Most Cited Cases  
Refusal to give a requested jury instruction lies within the discretion of a district court and will not be reversed absent an abuse of discretion.

[2] **Criminal Law** ⇨805(1)  
110k805(1) Most Cited Cases  
Trial courts are allowed considerable latitude in the selection of language for jury instructions.

[3] **Criminal Law** ⇨822(1)  
110k822(1) Most Cited Cases  
Jury instructions must be viewed in their entirety to

determine whether they fairly and adequately explained the law of the case.

[4] **Criminal Law** ⇨783(1)  
110k783(1) Most Cited Cases  
Although, upon the request of counsel, a district court's cautionary instruction on *Spreigl* evidence must be modified to specify the issue to which this evidence is relevant, the more general instruction of the jury instruction guides remains appropriate when the evidence relates to multiple questions.

[5] **Criminal Law** ⇨830  
110k830 Most Cited Cases  
Defendant was not entitled to more particular instruction on purposes for which jury could use *Spreigl* prior bad acts evidence, in prosecution for criminal sexual conduct, where defendant's request on intent was incomplete, and record indicated that evidence was admitted not only for purpose of showing intent, common scheme, and absence of mistake, but also was admitted under *Wermerskirchen*, which allowed admission of evidence where defendant's theory of case was that victim fabricated or misperceived conduct giving rise to offense. 50 M.S.A., Rules of Evid., Rule 404(b).

[6] **Criminal Law** ⇨1153(1)  
110k1153(1) Most Cited Cases  
A reviewing court will not reverse a district court's admission of evidence of other crimes or bad acts unless an abuse of discretion is clearly shown. 50 M.S.A., Rules of Evid., Rule 404(b).

[7] **Criminal Law** ⇨1163(3)  
110k1163(3) Most Cited Cases  
To prevail, a defendant claiming error in reception of evidence must show the error and the prejudice resulting from the error. 50 M.S.A., Rules of Evid., Rule 404(b).

[8] **Criminal Law** ⇨369.1

694 N.W.2d 86

Page 2

694 N.W.2d 86

(Cite as: 694 N.W.2d 86)

## 110k369.1 Most Cited Cases

*Spreigl* evidence is appropriate when a district court, acting within the bounds of its discretion, determines that the evidentiary value of the proof exceeds its prejudicial effect. 50 M.S.A., Rules of Evid., Rule 404(b).

**[9] Criminal Law** ↪ 369.2(5)

## 110k369.2(5) Most Cited Cases

Trial court did not abuse its discretion in admitting prior bad act evidence under *Spreigl* standards, in prosecution for criminal sexual conduct; court found prior incidents to be same or similar for purposes of rule of evidence governing other crimes or acts evidence, insofar as prior acts and subsequent alleged conduct all involved "unwanted sexual touching," court's finding was adequately supported by record, and court's determination that prejudice to defendant in proof of his prior acts was not greater than its evident probative value did not fall outside scope of court's broad discretion. 50 M.S.A., Rules of Evid., Rule 404(b).

**[10] Criminal Law** ↪ 419(2)

## 110k419(2) Most Cited Cases

Victim's statement, that the reason she disliked defendant immediately upon knowing him was because her aunt and sister had told her about several bad acts in his past, was not inadmissible hearsay evidence, and thus, was properly admitted in prosecution for criminal sexual conduct; statement was not offered for truth of matter asserted, but rather was offered to show victim's beliefs about defendant.

**[11] Criminal Law** ↪ 406(1)

## 110k406(1) Most Cited Cases

**[11] Criminal Law** ↪ 419(13)

## 110k419(13) Most Cited Cases

Statement of witness, that victim told her that defendant made inappropriate comments of a sexual nature, was admissible as non-hearsay in prosecution for criminal sexual conduct; defendant's statements to victim were admissions of party-opponent, and all prongs of rule defining prior statements by witness as non-hearsay when declarant testified at trial, was subject to

cross-examination concerning statement, and statement was consistent with declarant's testimony and helpful to trier of fact to evaluate declarant's credibility, were met. 50 M.S.A., Rules of Evid., Rules 801, 805.

**\*88 Syllabus by the Court**

1. Although, upon the request of counsel, the district court's cautionary instruction on *Spreigl* evidence must be modified to specify the issue to which this evidence is relevant, the more general instruction of the jury instruction guides remains appropriate when the evidence relates to multiple questions.

2. *Spreigl* evidence is appropriate when the district court, acting within the bounds of its discretion, determines that the evidentiary value of the proof exceeds its prejudicial effect.

Mike Hatch, Attorney General, St. Paul, MN; and Amy Klobuchar, Hennepin County Attorney, Jean E. Burdorf, Assistant County Attorney, Minneapolis, MN, for respondent.

Joseph S. Friedberg, Minneapolis, MN; and Lisa Lodin Peralta, Minneapolis, MN, for appellant.

Considered and decided by KLAPHAKE, Presiding Judge, PETERSON, Judge, and CRIPPEN, Judge.

**OPINION**

CRIPPEN, Judge. [FN\*]

FN\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Appellant John Henry Martinez, Jr. was convicted of fifth-degree criminal sexual conduct based on an incident involving his adult stepdaughter. Appellant challenges (1) the admission of two incidents of prior bad acts as overly prejudicial; (2) the admission of two statements he asserts are hearsay; and (3) a jury instruction. We affirm.

**FACTS**

694 N.W.2d 86

Page 3

694 N.W.2d 86

(Cite as: 694 N.W.2d 86)

Appellant was charged after his stepdaughter reported to police that he had touched her inappropriately. Appellant was convicted after a jury trial. During trial, the district court admitted several evidentiary items that appellant now challenges as inadmissible bad acts evidence.

The state sought to admit four prior bad acts by appellant. The prosecutor argued at the pretrial hearing that the prior bad acts were admissible under Minn. R. Evid. 404(b) to show appellant's intent, common scheme and plan, absence of mistake or accident, and lack of fabrication under *State v. Wermerskirchen*, 497 N.W.2d 235 (Minn.1993). The district court admitted two incidents of prior bad acts because the conduct was either the "same" or similar, involving "unwanted sexual touching that was done ... without the consent, and with the making the other party very uncomfortable...."

The district court also refused to grant appellant's request for a limiting instruction that the prior bad acts evidence was admitted for the sole purpose of proving \*89 intent. [FN1] Appellant's counsel argued that "even though [the district court's instruction in this matter] is in the jury instruction guide, which to a degree is law, at least advisory law, it is conceptually wrong and it's legally wrong." The state responded that appellant had been notified of the issues justifying the offer of the evidence and that, according to commentary in the jury instruction guide, the instruction was purposely worded in general language to avoid injecting argument into a judge's charge. The court concluded that the jury instruction adequately and correctly stated the law and denied appellant's request to modify the instruction.

FN1. During jury deliberations, appellant renewed his request for a limiting instruction, arguing that the jury should have been instructed that the prior bad acts evidence was admitted for the purpose of proving intent and absence of mistake. This request was untimely because the jury had already been instructed. Moreover, if the instruction had been made in a timely

fashion, the court properly denied the instruction for reasons stated in this opinion.

#### ISSUES

1. Is appellant entitled to the jury instruction that he requested on the purposes for which the jury could use prior bad acts evidence admitted at trial?
2. Did the district court otherwise err in admitting evidence?

#### ANALYSIS

##### I.

[1][2][3] The refusal to give a requested jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn.1996). "Trial courts are allowed 'considerable latitude' in [the] selection of language" for the jury instructions. *State v. Gray*, 456 N.W.2d 251, 258 (Minn.1990) (quoting *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn.1986)). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn.1988).

In *State v. DeYoung*, 672 N.W.2d 208, 212 (Minn.App.2003), this court held that when a defendant requests an instruction limiting the specific purpose for which *Spreigl* evidence may be considered, the district court must give the instruction. The *DeYoung* court concluded that this result was mandated by *State v. Broulik*, 606 N.W.2d 64 (Minn.2000) in which the Minnesota Supreme Court questioned the rationale behind the relevant CRIMJIG instruction and endorsed the practice of the federal courts, which require a specific limiting instruction when requested. See *Broulik*, 606 N.W.2d at 68-71. [FN2]

FN2. In *Broulik*, 606 N.W.2d at 71, the supreme court held that the district court did not err by failing to give a limiting instruction because the defendant did not request a limiting instruction at trial. It is evident that the defendant's failure to

694 N.W.2d 86

Page 4

694 N.W.2d 86

(Cite as: 694 N.W.2d 86)

request a limiting instruction was a significant factor in the supreme court's decision that the district court did not abuse its discretion. *Id.* at 68-69.

In *Ture v. State*, 681 N.W.2d 9, 18-19 (Minn.2004), the supreme court held that where a defendant asked for the Eighth Circuit Model Instruction, which instructed that evidence of prior bad acts was admitted solely for the purposes of proving identity, the district court did not err in denying the request where the evidence was admitted for other purposes along with identity.

Finally, in *State v. Babcock*, 685 N.W.2d 36 (Minn.App.2004), *review denied* (Minn. Oct. 19, 2004), this court, on remand, had to determine in another setting whether \*90 the district court erred in denying the defendant's request for a limiting instruction. Babcock requested that the district court instruct the jury on the specific purposes for which it had admitted the bad acts evidence but left the content of the instruction to the discretion of the district court. *Id.* at 39. This court determined that the district court erred in denying defendant's request for a limiting instruction. *Id.* at 42. Unlike the circumstances in *Ture*, where the request failed to identify all of the purposes for which prior bad acts evidence was admitted, the defendant in *Babcock* did not make an incomplete request; he only requested that the district court specify to which purposes the bad acts evidence was admitted. *Id.*

[4][5] In the case on appeal here, the state notified appellant that it would seek to admit certain bad acts evidence to show intent, common scheme, and absence of mistake, all in respect to appellant's state of mind, but also reported that the state would seek to admit the bad acts evidence under *Wermerskirchen*, which allows admission in cases where a defendant's theory of the case is that the victim fabricated or misperceived the conduct giving rise to the offense. See *State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn.1993) (holding that where defendant contended an accusation was a "fabrication or a mistake in perception by the victim," bad act evidence is

proper to show the veracity of the testimony if the district court is satisfied that other conduct is sufficiently relevant to charged crime). [FN3] Appellant's request on intent was incomplete. The record indicates that the evidence was admitted not only for the purpose of showing intent, common scheme, and absence of mistake, but under *Wermerskirchen* as well. As in *Ture*, 681 N.W.2d 9, the district court did not err in denying appellant's incomplete request for a more particular instruction.

FN3. The parties have not briefed and we do not decide whether a specific instruction would be appropriate in a *Wermerskirchen* case and if so, how the request for instruction might be made.

## II.

[6][7] The reviewing court will not reverse the district court's admission of evidence of other crimes or bad acts unless an abuse of discretion is clearly shown. *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn.1988); see also *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn.1998) (characterizing evidence of other crimes or bad acts as "*Spreigl*" evidence). To prevail, an appellant must show the error and the prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn.1981).

[8][9] Appellant challenges the admission of two prior incidents: one involving appellant's other adult stepdaughter, and the other involving a male subordinate at work. The district court evaluated the two incidents separately using the rubric of Minn. R. Evid. 404(b). The court found the two incidents to be the "same" or similar for purposes of the rule at least insofar as the two acts and the alleged conduct in question all involved "unwanted sexual touching that was done ... without the consent, and with the making the other party very uncomfortable...." [FN4] After fully \*91 reviewing the relevant evidence, we conclude that this district court finding is adequately supported by the record. The court's determination that the prejudice to appellant in proof of his prior acts was not greater than its evident probative value does not fall outside the scope of the court's broad discretion.

694 N.W.2d 86

Page 5

694 N.W.2d 86

(Cite as: 694 N.W.2d 86)

FN4. Other than the similarities between the incidents, the record does not contain a declaration of the district court's explanation on the relevancy of the specific evidence or its specific expression that the evidence is more probative than prejudicial. We necessarily infer in the district court's deliberation on the similarities of the past and present conduct its reflection on the state's position that the evidence related both to the issue of intent and the fabrication attack on the state's witness. The court's deliberation on the standard of "more probative than prejudicial" is suggested by the court's additional comments when it excluded other bad acts evidence, its conclusion that evidence of this conduct should be excluded because it was too "highly inflammatory."

Because we conclude that the district court did not abuse its discretion in admitting the bad act evidence under *Spreigl* standards, we do not review the state's alternative claim that both reference to the prior acts and proof of their detail could have properly been admitted as a rebuttal to appellant's efforts to show the bias and fabrication of the accuser.

[10] Appellant also challenges two statements as inadmissible hearsay. During cross-examination, the victim testified that the reason she disliked appellant immediately upon knowing him was because her aunt and sister had told her about several bad acts in his past. If this statement had been offered to prove the truth of the matter asserted, that is, that the incidents as told to the stepdaughter were true, it would be hearsay, and likely inadmissible. But the statement was not offered for the truth of the matter asserted; it was offered to show the victim's beliefs about appellant. It is not hearsay evidence and was properly admitted.

[11] During direct examination of the victim's adult sister, the witness testified that the victim told her that appellant made inappropriate comments of a

sexual nature. This challenged statement involves hearsay within hearsay. "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in [the] rules." Minn. R. Evid. 805.

Appellant's statements to the victim are admissions of a party-opponent, and are non-hearsay under Minn. R. Evid. 801(d)(2). The victim's statement to her sister would be hearsay if offered for the truth of the matter asserted-- that appellant made inappropriate comments of a sexual nature. But Minn. R. Evid. 801(d)(1) defines prior statements by a witness as non-hearsay when the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony and helpful to the trier of fact to evaluate the declarant's credibility. All of the prongs of this rule are met, and the court did not err in admitting the evidence.

#### DECISION

Because of the multiple subjects to which the state's bad acts evidence was directed, the district court did not err in refusing to instruct the jury that the evidence regarded only appellant's state of mind. In addition, the court's admission of *Spreigl* evidence and alleged hearsay evidence, viewed according to the applicable rules of evidence, was within the scope of its broad discretion.

**Affirmed.**

694 N.W.2d 86

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