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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1282**

State of Minnesota,
Respondent,

vs.

Ernan Patricio Ortega Lazo,
Appellant.

**Filed July 1, 2024
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-CR-21-19691

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

Mary F. Moriarty, Hennepin County Attorney, Mark V. Griffin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Kirk M. Anderson, Anderson Law Firm, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Smith, Tracy M., Judge;
and Slieter, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this appeal from the final judgment of conviction for first-degree criminal sexual conduct, appellant argues that his conviction must be reversed because the district court abused its discretion by admitting *Spreigl* evidence and by denying his motions for a

mistrial after the *Spreigl* witness fainted twice during trial. Because the district court acted within its discretion to allow the *Spreigl* evidence and to deny a mistrial, we affirm.

FACTS

In October 2021, respondent State of Minnesota charged appellant Ernan Patricio Ortega Lazo with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. The complaint alleged that Ortega Lazo sexually abused his daughters, J.O.A. and G.O.A. The first-degree charge was based on the allegation that, between September 2002 and July 2007, Ortega Lazo engaged in multiple acts of sexual penetration with J.O.A. The second-degree charge was based on the allegation that, between July 2018 and July 2019, Ortega Lazo engaged in sexual contact with G.O.A. on one occasion. Ortega Lazo moved to sever the charges, and the district court granted the motion.

After the district court severed the charges, the state filed notice of its intent to introduce evidence of Ortega Lazo's sexual abuse of G.O.A.—the basis for the second-degree charge—as relationship evidence pursuant to Minn. Stat. § 634.20 (2022) or, in the alternative, as *Spreigl* evidence,¹ at the trial for the first-degree charge. Ortega Lazo opposed the admission of the evidence. The district court determined that the evidence was not admissible as relationship evidence but was admissible as *Spreigl* evidence. When the state met with G.O.A. to prepare her for trial, she made statements

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)).

that suggested Ortega Lazo may have committed additional acts of sexual abuse against her. Based on these statements, the state scheduled a forensic interview with G.O.A. in April 2023 and requested a brief continuance. The district court granted a two-week continuance.

After the forensic interview, Ortega Lazo filed a motion requesting that the district court reconsider its decision on the admissibility of the *Spreigl* evidence. Ortega Lazo asserted that during the interview G.O.A. “gave a completely different version” of the alleged instance of sexual abuse. Ortega Lazo contended that, based on this new and conflicting information, there was not the requisite clear and convincing evidence that the incident occurred to admit G.O.A.’s testimony as *Spreigl* evidence. The district court denied the motion on the record.

At trial J.O.A. testified about the sexual abuse that occurred between 2002 and 2007. She testified that the first instance of sexual abuse occurred when she was 9 years old. She described multiple instances of digital and oral penetration and other forms of sexual contact, and stated that Ortega Lazo told her not to tell anyone. She testified that the last instance of abuse occurred on the day G.O.A. was born, that Ortega Lazo then apologized, and said he realized it “was wrong and . . . swore he would never do it again.”

The state also called G.O.A. to testify about the *Spreigl* incident. G.O.A. was crying when she got to the witness stand, and the district court ordered a recess after asking G.O.A. if she would like to take a moment. As the jury was exiting the courtroom, G.O.A. fainted. Ortega Lazo moved for a mistrial, but the district court denied the motion. The district court explained that it was unclear whether any members of the jury actually saw G.O.A.

faint because their backs were to her at the time and no one turned around. The district court reasoned that what the jury did witness “was not that outside the realm of what can be normal witness reaction or emotion in certain cases.”

When trial reconvened, G.O.A. testified about the *Spreigl* incident. She testified that on one occasion when she was 11 years old Ortega Lazo rubbed her inner thigh and upper chest. As G.O.A. was leaving the witness stand after being excused, she fainted again, this time in full view of the jury. Ortega Lazo again moved for a mistrial. The district court denied the motion.

Ortega Lazo testified in his own defense. He denied that he had ever inappropriately touched J.O.A. or G.O.A. He acknowledged that when G.O.A. testified it was the first time he had seen her in almost three years, and that he was very emotional and had a difficult time with the testimony as a result. He testified that “[i]t was very hard for [him]” to see her cry and that seeing her faint “hurt [his] soul.” But he testified that while J.O.A. was testifying he did not turn away and “was always looking at her” to “make sure” J.O.A. had to tell “her lies” in front of him.

The jury found Ortega Lazo guilty of first-degree criminal sexual conduct. The district court sentenced him to the presumptive sentence of 144 months in prison. Ortega Lazo appeals.

DECISION

I. The district court acted within its discretion in admitting the *Spreigl* evidence.

Ortega Lazo argues that the district court abused its discretion in determining that G.O.A.’s testimony about his alleged sexual abuse of her was admissible as *Spreigl*

evidence. 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).

A district court acts within its discretion to admit *Spreigl* evidence if five requirements are met:

- (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.

Angus v. State, 695 N.W.2d 109, 119 (Minn. 2005) (quotation omitted).

The district court admitted evidence of Ortega Lazo's sexual abuse of G.O.A. as *Spreigl* evidence after determining that all five requirements were satisfied. Ortega Lazo concedes that the state provided notice of its intent to admit the evidence, but he argues that the district court erred in determining that the remaining four requirements were satisfied. We disagree.

The state filed notice of its intent to admit the evidence in March 2023. That notice states: "The purpose of the *Spreigl* evidence is to prove [Ortega Lazo's] intent, absence of mistake, common scheme or plan, and/or rebutting fabrication." As the district court noted, "[t]hese purposes are legitimate under the rule and relevant case law." *See* Minn. R. Evid. 404(b); *State v. Ness*, 707 N.W.2d 676, 687-88 (Minn. 2006). The purposes were also relevant to the arguments being presented at trial. The record, therefore, supports the district court's determination that the state clearly indicated what G.O.A.'s testimony would be offered to prove at trial.

Ortega Lazo next argues that the district court erred in determining that there was clear and convincing evidence that the sexual abuse of G.O.A. occurred. Evidence is clear and convincing if there is a high probability that the facts asserted are true. *Kennedy*, 585 N.W.2d at 389. Ortega Lazo’s argument focuses on the discrepancies in G.O.A.’s accounts of the incident. In May 2021, after J.O.A. reported that she had been sexually abused, law enforcement spoke with G.O.A. According to the incident report, G.O.A. “had nothing to say to [the officer] and stated she was safe.” A month later, G.O.A. disclosed a single instance of sexual contact in which Ortega Lazo allegedly touched her breasts and vagina. During the forensic interview in April 2023, G.O.A. stated that on one occasion when she was in sixth grade, she was in the bedroom that had previously belonged to J.O.A. when Ortega Lazo came home drunk and went into that room. Ortega Lazo had G.O.A. sit next to him on the bed and then touched her upper leg and arms. When asked where exactly Ortega Lazo touched her, G.O.A. gestured to the upper part of her right leg near her hip and the top of her chest near her right shoulder. According to G.O.A., Ortega Lazo stopped touching her after her brother came downstairs.

In denying Ortega Lazo’s request to reconsider the *Spreigl* ruling in light of the forensic interview, the district court acknowledged that G.O.A. gave inconsistent statements about precisely where Ortega Lazo touched her. But the district court explained that this likely only impacted what level of charge Ortega Lazo could be prosecuted for with respect to his conduct toward G.O.A. and reasoned that the inconsistencies did not undermine its determination that there was clear and convincing evidence that the incident occurred. The district court further explained:

I find that in part, given her details are still very consistent with respect to what happened for that touching. She's even really clear on what she was wearing. That he's coming from work. That he was drunk. She's very clear on sensory details that provide clear and convincing evidence. Smelling of cigarettes. She's—says that often.

Her demeanor also supports that there was the inappropriate touching by clear and convincing evidence. She jiggles her leg really quite nervously and consistently when disclosing. She looks distraught. She has the manner and consistency in some details of someone who did experience—and I'm saying, quote, “a bad act,” since that doesn't have to be a criminal act to fit the purposes of *Spreigl* but that the—something had happened to her from defendant.

The district court's determination that there was clear and convincing evidence that the prior incident occurred is based, in part, on its finding that G.O.A. was generally credible. We defer to the district court's credibility findings. *State v. Heath*, 685 N.W.2d 48, 59 (Minn. App. 2004), *rev. denied* (Minn. Nov. 16, 2004). And we agree with the district court that the inconsistencies do not undermine the determination that an incident involving inappropriate touching occurred. As the district court noted, many details—such as where and when the incident occurred, what G.O.A. was wearing, and that Ortega Lazo was drunk—remained consistent, and it is clear from G.O.A.'s mannerisms during the forensic interview that she was extremely uncomfortable with what occurred. Therefore, the record supports the district court's determination that there was clear and convincing evidence that the prior incident occurred.

The fourth requirement is that the evidence be “relevant and material to the state's case.” *Angus*, 695 N.W.2d at 119 (quotation omitted). Ortega Lazo asserts that “it is unknown why this evidence is relevant or material to this case.” But *Spreigl* evidence is

admissible to respond to a defense of mistake or fabrication if the *Spreigl* evidence depicts conduct that is similar to the trial allegations, suggesting a common scheme or plan. *Ness*, 707 N.W.2d at 688; *see also State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993) (determining that evidence of prior sexual abuse was admissible to rebut a fabrication defense where it “showed an ongoing pattern of opportunistic fondling of young girls within the family context”).

Ortega Lazo’s defense at trial was that J.O.A. fabricated the allegations of sexual abuse. The evidence of the alleged abuse of G.O.A. was, therefore, relevant to rebut that defense if it involved conduct that was similar to the charged offense. The district court found that the alleged conduct involving J.O.A. and G.O.A. shared several notable features: Ortega Lazo had caretaking authority over them at the time of the offenses; Ortega Lazo lived in the same house as them; they were near the same age—between 9 and 13 years old—at the time of the abuse; and the abuse took place in the same bedroom. Like the conduct at issue in *Wermerskirchen*, these similarities are sufficient to suggest a common scheme or plan. Accordingly, the *Spreigl* evidence was “highly relevant” to rebut Ortega Lazo’s fabrication defense.

Finally, Ortega Lazo argues that, even if the other requirements were met, the evidence was nonetheless inadmissible “because the probative value [was] far outweighed by the prejudicial effects.” To support his argument, Ortega Lazo generally asserts that the evidence “likely influenced” the jury to convict him based on the *Spreigl* allegations and “was confusing to the Jury.” We are not persuaded.

“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 (quotation omitted). The district court determined that the evidence had “substantial probative value” because it was relevant to rebut the fabrication defense. As discussed above, rebutting a fabrication defense is a proper use of *Spreigl* evidence. *See Wermerskirchen*, 497 N.W.2d at 242 (stating that *Spreigl* evidence was “highly relevant” to rebut a fabrication defense). Furthermore, the potential for prejudice and misuse of the evidence was lessened by the fact that it involved less-serious allegations than those at issue during the trial and by the cautionary instruction given by the district court prior to the admission of the *Spreigl* evidence. *See State v. Clark*, 738 N.W.2d 316, 347 (Minn. 2007) (concluding that the defendant was not prejudiced by the admission of the *Spreigl* evidence because, among other factors, the district court provided a “cautionary jury instruction before the *Spreigl* evidence was admitted”). Because the record supports the district court’s determination that all five requirements for the admission of *Spreigl* evidence were satisfied, the district court acted within its discretion in admitting the evidence.

II. The district court acted within its discretion in denying the motions for a mistrial.

A mistrial should be granted only if there is a reasonable probability that the outcome of the trial would be different had the incident resulting in the motion not occurred. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). We review the denial of a motion for a mistrial for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133

(Minn. 2003). And we consider the entirety of the trial when determining whether a mistrial was warranted. *Griffin*, 887 N.W.2d at 262.

Ortega Lazo argues that the district court abused its discretion in denying his motions for a mistrial. Ortega Lazo made two motions for a mistrial; each motion was based on G.O.A. fainting during trial. The district court denied both motions after determining that G.O.A. fainting was within the range of normal emotional responses and that Ortega Lazo was not unfairly prejudiced as a result.

We agree with the district court. As discussed above, it is unclear whether any members of the jury saw G.O.A. faint the first time. Any prejudice resulting from that incident is, therefore, speculative. And although it is undisputed that G.O.A. was in full view of the jury when she fainted the second time, we must consider the entirety of the trial in assessing whether a mistrial was warranted. *Id.* In light of the trial as a whole, there is not a reasonable probability that the outcome would have been different had G.O.A. not fainted.

As the state notes, G.O.A., J.O.A., and Ortega Lazo were all emotional at times during the trial. The jury witnessed a number of emotional responses from multiple people. And the fact that G.O.A. was emotional was explicitly addressed during cross-examination. In the final questions before G.O.A. fainted, defense counsel elicited testimony about G.O.A.'s difficult relationship with her mother and concluded cross-examination by asking the following questions:

Q: Is it fair to say that when you entered this courtroom, you were quite emotional?

A: When I entered what?

Q: When you entered the courtroom you were very emotional?

A: Yeah.

Q: Were you emotional because you haven't seen your father since December 2020?

A: Yeah.

Q: Is it hard for you to be separated from your father?

A: Yeah.

Q: Do you miss your father?

A: Yes.

This testimony lessened the possibility that the jury would be improperly influenced to convict Ortega Lazo based on G.O.A. fainting, as it may have suggested that G.O.A.'s heightened emotions were the result of being separated from Ortega Lazo for so long. The district court acknowledged this when denying the motion for mistrial, stating that, based on the testimony elicited at the end of cross-examination, G.O.A. fainting "could cut in favor for [Ortega Lazo]."

Finally, to the extent Ortega Lazo suggests that the district court should have given a limiting instruction after G.O.A. fainted, we agree with the state that defense counsel at least implicitly opposed such an instruction at trial. When arguing in support of the second motion for a mistrial, defense counsel stated, "often we say, 'Well, we could put a limiting instruction here,' but we know limiting instructions don't always work" and "there are reasons [appellate courts] reverse cases that a limiting instruction was given." At a minimum, it is clear that defense counsel acknowledged the possibility of giving a limiting instruction but did not ask for one and instead argued that such an instruction would be

insufficient. On this record, the district court acted within its discretion in denying Ortega Lazo's motions for a mistrial.

Affirmed.