STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1021

In the Matter of the Welfare of: D. L. N., Child.

Filed March 6, 2023
Affirmed
Frisch, Judge

Otter Tail County District Court
File No. 56-JV-21-17

Luke T. Heck, Drew J. Hushka, Vogel Law Firm, Fargo, North Dakota (for appellant D.L.N.)

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

Michelle Eldien, Otter Tail County Attorney, Kathleen J. Schur, Assistant County Attorney, Fergus Falls, Minnesota (for respondent State of Minnesota)

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

NONPRECEDENTIAL OPINION

FRISCH, Judge

Following an adjudication of delinquency for first-degree criminal sexual conduct, appellant argues that the district court abused its discretion by admitting *Spreigl* evidence of three prior sexual acts, two acts between appellant and the juvenile victim and one act between appellant and a juvenile relative. Because the district court did not abuse its discretion by admitting the *Spreigl* evidence, we affirm.

FACTS

Respondent State of Minnesota charged appellant D.L.N. with two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct. Trial testimony established that D.L.N., then 16 years old, inserted his fingers into the victim's vagina, forced the victim's hand to rub his penis, and touched the victim's breast. The victim was D.L.N.'s cousin, then 11 years old. The victim's close friend witnessed the incident. Weeks later, the close friend and the victim disclosed the incident to their mothers.

Before trial, the state provided written notice of its intent to introduce *Spreigl* evidence related to incidents involving D.L.N. and non-victims.[1] The notice provided that the purpose for introducing the evidence was to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The state did not provide written *Spreigl* notice for prior incidents involving the victim. D.L.N. objected to the written *Spreigl* notice and moved in limine to preclude the state from introducing the *Spreigl* evidence identified in the written notice. In its response, the state argued that the evidence was admissible to show motive, intent, plan, preparation and "a propensity towards inappropriate sexual contact with young girls and is admissible to prove a common scheme or plan." At the hearing on the motion, the state confirmed that it also sought to

[1] Evidence of other crimes or bad acts is known in Minnesota 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)).

admit additional *Spreigl* evidence regarding prior incidents involving the victim, which D.L.N. opposed.

After hearing the motion, the district court considered all *Spreigl* evidence that the state sought to introduce and determined that evidence of two prior incidents involving the victim and one prior incident involving another of D.L.N.'s juvenile cousins were admissible as *Spreigl* evidence. The district court excluded all other proffered *Spreigl* evidence. The matter proceeded to a jury trial where the state introduced the approved *Spreigl* evidence. The jury heard testimony about a prior incident where D.L.N. offered the victim a massage, told the victim to pull her dress down to her waist, began massaging her, pulled her dress and underwear down to her legs, and massaged her bare buttocks. The jury also heard testimony about a prior incident where the victim woke up and felt D.L.N.'s fingers moving inside her vagina. Finally, the jury heard testimony about a prior incident where D.L.N. put his hand in a juvenile cousin's pants, over her underwear, and near her vagina.

The jury returned a guilty verdict on all counts. Following the jury trial, the district court entered an adjudication of delinquency for one count of first-degree criminal sexual conduct. D.L.N. now appeals.

DECISION

D.L.N. argues that the district court abused its discretion by admitting the *Spreigl* evidence because the state did not clearly indicate its purpose for admitting the evidence, the evidence was not relevant or material, and the potential prejudice to D.L.N. outweighed the probative value of the evidence. D.L.N. argues that because of this abuse of discretion,

his case was prejudiced such that a new trial is warranted. We address each argument in turn.

Evidence of other acts by a defendant "is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1). But evidence of other acts by the defendant may be admissible for non-propensity purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* The principal concern with the admission of *Spreigl* evidence is that "it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006).

Five requirements must be met before *Spreigl* evidence may be admitted:

> (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.

Id. at 685-86.

We 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). The appellant bears the burden of showing that the district court erred in admitting the evidence and any resulting prejudice. *Id.*

Notice of Intended Use

D.L.N. argues that the district court abused its discretion by admitting the *Spreigl* evidence because the state did not set forth in its notice a clear and unambiguous purpose for offering the evidence and because the state explicitly stated that it sought to introduce the evidence for an impermissible purpose—propensity. Although we agree with D.L.N. that one of the state's proffered rationales for introducing the evidence—to establish propensity—is plainly improper, we discern no abuse of discretion by the district court in its determination that D.L.N. received sufficient notice of a proper purpose for the admission of the evidence, and we do not identify any prejudice to D.L.N. resulting from any defect in the state's notice.

First, the district court did not abuse its discretion by independently reviewing the state's *Spreigl* notice and determining that certain evidence was admissible for a proper purpose. Notwithstanding any improper purpose noticed by the state, the district court as the evidentiary gatekeeper bears the responsibility of conducting an independent determination of the true purpose of the proffered evidence. *See Ness*, 707 N.W.2d at 686 ("The district court should not simply take the prosecution's stated purposes for the admission of other-acts evidence at face value. Instead, the court should . . . look to the real purpose for which the evidence is offered." (quotation omitted)). We review the admission of *Spreigl* evidence based on the rationale as identified by the district court, not the rationale identified by the state. *State v. Fardan*, 773 N.W.2d 303, 317 (Minn. 2009); *see also State v. Rossberg*, 851 N.W.2d 609, 615-16 (Minn. 2014) (reasoning that review is limited to the rationale cited by the district court, and not the one supplied by the state).

Because the district court followed the directive in *Ness* by independently determining the proper basis for admission of the *Spreigl* evidence, we see no abuse of discretion.

Second, the district court did not abuse its discretion in concluding that D.L.N. was not prejudiced by any deficiency in the state's notice. "The notice requirement is designed to give a defendant sufficient opportunity to prepare for trial and to avoid situations where a defendant must defend against unexpected testimony regarding prior offenses." *State v. Bolte*, 530 N.W.2d 191, 197 (Minn. 1995); *see also* Minn. R. Juv. Delinq. P. 10.03 ("Such additional acts shall be described with sufficient particularity to enable the child to prepare for the trial."). The notice requirement also helps "ensure that the evidence is subjected to an exacting review." *Ness*, 707 N.W.2d at 685 (quotation omitted). Notice defects do not require reversal when there was "substantial compliance with the notice requirements and lack of prejudice to the defendant." *Bolte*, 530 N.W.2d at 199.

The district court reasoned that D.L.N. was not prejudiced by the state's failure to "formally or artfully" express the purpose for which it sought to introduce *Spreigl* evidence because he had a chance to respond to the state's arguments and "no potential argument favorable to the defense [was] ignored." The record supports this determination. In its written notice, the state identified that its purpose for introducing *Spreigl* evidence was proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In its memorandum opposing D.L.N.'s motion in limine, the state further argued that the similarities between the prior incidents justified admissibility of the *Spreigl* evidence as a common plan or scheme and to show intent, motive, and preparation. The state also asserted that the evidence would be particularly relevant "for the jury to

determine which version of events to believe." The motion in limine was heard and decided months before trial began. D.L.N. therefore suffered no prejudice, as he had ample opportunity to prepare for trial.

Relevance and Materiality

D.L.N. asserts that the district court abused its discretion by admitting the *Spreigl* evidence because the incidents were not relevant or material. We disagree.

To assess whether *Spreigl* evidence is relevant and material to the state's case, "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); *see also* Minn. R. Evid. 401 (defining "relevant evidence" as evidence tending to make more or less probable the existence of any consequential fact). "This entails isolating the consequential fact for which the evidence is offered, and then determining the relationship of the offered evidence to that fact and the relationship of the consequential fact to the disputed issues in the case." *Ness*, 707 N.W.2d at 686.

The district court explained that prior incidents involving the victim were relevant and material in relation to the victim's credibility and her recounting of the incident, which D.L.N. suggested he would argue was fabricated. The district court reasoned that *Spreigl* evidence of prior incidents between D.L.N. and the victim would allow the prosecution to give context to and explain certain details offered by the victim, such as why the victim came up with a codeword before meeting up with D.L.N. and certain reactions following the incident. The district court also reasoned that the evidence would show D.L.N.'s

preparation, opportunity, and motive through D.L.N.'s "grooming" of the victim and desire for sexual gratification from the victim specifically.

The district court also concluded that one prior incident involving another juvenile cousin of D.L.N. was admissible as a common scheme because it was relevant to whether the victim fabricated the story. Common-scheme evidence may be admissible to refute an assertion that the victim fabricated testimony or is mistaken. *Id.* at 688; *see also State v. Wermerskirchen*, 497 N.W.2d 235, 240-42 (Minn. 1993) (recognizing the relevance of common-scheme evidence "to the specific issue of whether the conduct on which the charge was based actually occurred or was . . . a fabrication or a mistake in perception by the victim"). Such incidents must have a "marked similarity in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688. While remoteness of an act is a relevant consideration, the focus should be on the closeness of the relationship between the incident in terms of factors such as time, place, and modus operandi, which the district court is in the best position to weigh. *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005). The district court considered the similarity of the relationship between the parties and the ages of the victims at the time of the incidents, and emphasized the common means of abuse—touching underneath clothing.

The district court thoughtfully considered the relevance and materiality of each proffered *Spreigl* incident. It determined that the defense was likely to dispute the victim's narrative and suggest that she fabricated the story. It reasoned that the admissible *Spreigl* evidence was relevant to the victim's credibility and tended to show D.L.N.'s preparation,

opportunity, motive, and plan. We see no abuse of discretion in the district court's analysis on relevance and materiality.

Probative Value and Potential Prejudice

D.L.N. argues that the district court abused its discretion by admitting the *Spreigl* evidence because the evidence was only probative to show D.L.N.'s propensity to commit sexual assault. We disagree.

"[T]he probative value of the [*Spreigl*] evidence must not be outweighed by its potential prejudice to the defendant." *Ness*, 707 N.W.2d at 686. As previously discussed, the district court determined that there were proper purposes for the *Spreigl* evidence. The district court noted that *Spreigl* evidence is particularly important when the defendant denies the act occurred, the victim is underage, and the defendant argues that the victim had a motivation to fabricate the allegation, which D.L.N. indicated he would argue here.

In the context of the admission of *Spreigl* evidence, "prejudice does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015) (quotation omitted). The district court reasoned that the risk of presenting cumulative or distracting evidence was sufficiently lowered by limiting evidence allowed at trial.[2] We see no abuse of discretion in this analysis.

[2] We note that district courts may minimize the risk of admitting *Spreigl* evidence that is more prejudicial than probative by deferring a final ruling until after the state has presented its evidence to determine whether *Spreigl* evidence is crucial to the state's burden of proof. *See State v. DeWald*, 464 N.W.2d 500, 504-05 (Minn. 1991) (explaining that the need to

Prejudice to D.L.N.'s Case

Although the district court did not abuse its discretion by admitting the *Spreigl* evidence, we nevertheless address D.L.N.'s argument that his case was prejudiced by the erroneous admission of evidence.

"To warrant a new trial, the erroneous admission of *Spreigl* evidence must create a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Fardan*, 773 N.W.2d at 320 (quotation omitted). In assessing this possibility, we consider whether the district court issued a cautionary instruction to the jury, which we presume the jury followed, whether the state "dwelled on the evidence in closing argument," and "whether the evidence of guilt was overwhelming." *State v. Thao*, 875 N.W.2d 834, 839 (Minn. 2016).

First, D.L.N. asserts that the district court abused its discretion because it did not issue a cautionary instruction after every mention of *Spreigl* evidence at trial.[3] "The

introduce *Spreigl* evidence may be diminished if the state's case is stronger than was expected before trial). We encourage district courts to exercise their discretion to use this procedure where appropriate.

[3] D.L.N. also asserts that the district court abused its discretion by giving a cautionary instruction that did not specify the precise purpose for which the *Spreigl* evidence could be used. D.L.N. did not request that the *Spreigl* evidence jury instructions include such content or object to the final instructions that were given, and he therefore forfeited this argument. *See State v. Zinski*, 927 N.W.2d 272, 275 (Minn. 2019) (stating that the defendant forfeited their right to appellate review of jury instructions where they did not request that an instruction include the proper use for certain evidence or object to the final jury instructions). Even so, we are unaware of any Minnesota authority requiring a district court to instruct the jury as to the precise purpose for which the jury can use the *Spreigl* evidence, particularly when no such instruction was requested. *See State v. Broulik*, 606 N.W.2d 64, 68-71 (Minn. 2000) (analyzing whether jury instruction should have included the specific purpose for which the jury could use *Spreigl* evidence and concluding that no

[district] court *should* give an appropriate cautionary instruction both upon receipt of the other-crime evidence and as part of the final instructions, even if not specifically requested to do so by defense counsel." *Bolte*, 530 N.W.2d at 197 (emphasis added). While the district court did not consistently offer the cautionary instruction at every mention of the *Spreigl* evidence during trial, the district court did read the cautionary instruction multiple times during trial, including when it was requested, and in its closing instructions. Because the district court gave instructions several times and we presume that the jurors followed those instructions, *Thao*, 875 N.W.2d at 839, this factor does not weigh in favor of prejudice.[4]

Second, D.L.N. argues that the state purposefully and repeatedly elicited *Spreigl* evidence at trial. But our review of the record shows that the state did not dwell on or lead the jury to an inference about the *Spreigl* evidence in its closing argument. On this record, we conclude that this factor does not demonstrate prejudice.

Third, D.L.N. argues that the state's evidence of D.L.N.'s guilt was weak because the state did not have physical evidence and relied mostly on the victim's allegations

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such instruction was required when no request was made); *State v. DeYoung*, 672 N.W.2d 208, 212 (Minn. App. 2003) (applying *Broulik* and holding that the district court erred by denying an appellant's request for a specific instruction).

[4] We note that trial counsel may, as a matter of trial strategy, have elected to not request a cautionary instruction each time *Spreigl* evidence was elicited at trial so as to avoid drawing more attention to the evidence. *See State v. Eling*, 355 N.W.2d 286, 293 (Minn. 1984) (reasoning that a decision not to request a cautionary instruction about the possibility of the defendant appearing in handcuffs could have been a tactical decision to avoid drawing attention to that fact). We generally do not review trial strategy decisions on appeal. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004).

against D.L.N. We acknowledge that there was no physical evidence and that the state relied on witness testimony to establish its case. But despite the lack of physical evidence, the testimony about the charged incident was mostly consistent and corroborated. Even if it was not, consideration of these three factors leads us to conclude that there was not a reasonable possibility that the *Spreigl* evidence significantly affected the verdict.

We therefore see no abuse of discretion by the district court by admitting *Spreigl* evidence.

Affirmed.