

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1249**

State of Minnesota,
Respondent,

vs.

Azzel Mickey Lee Foster,
Appellant.

**Filed August 19, 2024
Affirmed
Halbrooks, Judge***

Hennepin County District Court
File No. 27-CR-22-7837

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

Mary F. Moriarty, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney,
Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Ede, Judge; and Halbrooks,
Judge.

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

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

In this direct appeal from final judgment of conviction of first-degree criminal sexual conduct, appellant contends that the district court abused its discretion by failing to appoint substitute counsel and in making various evidentiary rulings. Appellant also argues that the cumulative effect of these errors warrants a new trial. We affirm.

FACTS

From June 2021 to September 2022, nine-year-old E.H. and twelve-year-old D.H. lived in Minneapolis with their mother A.H. In the summer of 2021, appellant Azzel Mickey Lee Foster introduced himself to A.H. while he was walking around A.H.'s neighborhood. A.H. and Foster became friends and Foster started spending time at A.H.'s apartment. A.H. occasionally asked Foster to babysit E.H. and D.H. while she worked overnight shifts.

At some point, A.H. learned from a neighbor that E.H. had told the neighbor's daughter that Foster had been touching her inappropriately. When A.H. spoke to E.H. about the neighbor's claim, E.H. reported that Foster had sexually penetrated her. After A.H. confronted Foster with E.H.'s allegations, Foster denied them and stopped spending time at A.H.'s apartment. A.H. entered "a state of shock" and did not attempt to file a police report.

In February 2022, A.H. brought E.H. to a scheduled physical. Both E.H. and A.H. told a pediatric physician that E.H. had been sexually abused. E.H. told the physician that Foster touched her breasts and penetrated her vagina and anus with his penis multiple times

over a three-week period. The physician referred A.H. and E.H. to CornerHouse “to provide mental health support” and reported the incident to child protective services.

E.H. was interviewed at CornerHouse in March 2022. E.H. said that Foster “touched [her] inappropriately,” and she described multiple instances of sexual penetration. E.H. said that Foster threatened to kill her and her family if she told anyone. Based on E.H.’s allegations, child protective services performed a “safety check” on her brother, D.H. D.H. told an investigator that Foster had touched his penis. As a result of his disclosure, D.H. was also interviewed at CornerHouse, where he told the interviewer that Foster touched his penis and also described witnessing some of Foster’s abuse of E.H.

In April 2022, respondent State of Minnesota charged Foster with first-degree criminal sexual conduct based on E.H.’s allegations, and with second-degree criminal sexual conduct based on D.H.’s allegations. *See* Minn. Stat. §§ 609.342, subd. 1a(e), .343, subd. 1a(e) (Supp. 2021). Following a trial, a jury found Foster guilty of first-degree criminal sexual conduct (relating to E.H.’s allegations) but not guilty of second-degree criminal sexual conduct (relating to D.H.’s allegations). The district court sentenced Foster to 320 months in prison. This appeal follows.

DECISION

Foster argues on appeal that the district court improperly refused his request for substitute counsel and abused its discretion regarding two evidentiary rulings, and that the cumulative effect of these errors deprived him of a fair trial. We address each of Foster’s arguments in turn.

I. The district court did not abuse its discretion by failing to appoint substitute counsel.

Both the United States and the Minnesota Constitutions guarantee criminal defendants the right to assistance of counsel for their defense. U.S. Const. amend. VI; Minn. Const. art I, § 6; *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Munt*, 831 N.W.2d 569, 586 (Minn 2013). But this right does not give an indigent defendant “the unbridled right to be represented by counsel of his own choosing.” *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001) (quotation omitted). “When a defendant raises complaints about the effectiveness of appointed counsel’s representation and requests substitute counsel, the district court must grant such a request only if exceptional circumstances exist and the demand is timely and reasonably made.” *Munt*, 831 N.W.2d at 586 (quotation omitted).

“Exceptional circumstances are those that affect appointed counsel’s ability or competence to represent the client.” *Id.* (quotation omitted). “When the defendant voices serious allegations of inadequate representation, the district court should conduct a searching inquiry before determining whether the defendant’s complaints warrant the appointment of substitute counsel.” *Id.* (quotation omitted). We review a district court’s refusal to appoint substitute counsel for an abuse of discretion. *Id.*

At Foster’s initial appearance, the district court appointed an assistant public defender to represent Foster. At a hearing prior to trial, Foster told the district court that he had a “disagreement” with appointed counsel and was looking for a new attorney. The district court instructed Foster that disagreements with appointed counsel were normal

occurrences. The district court did not appoint a new public defender, and Foster was represented by his originally appointed counsel at trial.

Foster contends that exceptional circumstances supported his request for substitute counsel based upon his appointed attorney's refusal to sign an acknowledgment required by Minn. Stat. § 634.35(a)(6) (2022) to obtain recordings of the CornerHouse interviews of E.H. and D.H.¹ Foster argues that “[h]ad the court asked even minimal questions, it would have learned that [his] concern was based on the fact that [appointed counsel] refused to sign the acknowledgement and, therefore, had not received the CornerHouse materials that were critical to preparation for trial.”

But the record reflects that Foster failed to tie his request for substitute counsel to his appointed counsel's refusal to sign the protective order. Foster told the district court only that he did not think that appointed counsel was effective and that they had a “disagreement.” Foster's nondescript mention of a “disagreement” is legally insufficient to constitute an exceptional circumstance. *See id.* (“[A] defendant's general dissatisfaction with his appointed counsel does not amount to an exceptional circumstance.” (quotation omitted)). And Foster did not offer any support for his claim that appointed counsel was ineffective.

¹ Minn. Stat. § 634.35 restricts the reproduction, use, and dissemination of recordings of interviews of child victims of physical or sexual abuse and provides that “no person may be granted access to the [recordings] unless the person has first signed a written agreement that the person is aware of this statute and acknowledges that the person is subject to the court's contempt powers for any violation of it.” Minn. Stat. § 634.35(a)(6).

Foster therefore failed to identify any circumstances “that affect[ed] appointed counsel’s ability or competence to represent [him].” *Id.* (quotation omitted). And because he failed to allege “serious allegations of inadequate representation,” the district court was not required to further conduct a “searching inquiry” to determine whether substitute counsel was appropriate. *Id.* Accordingly, we conclude that the district court did not abuse its discretion by refusing to appoint substitute counsel.²

II. The district court did not abuse its discretion by excluding evidence of prior allegations of sexual abuse by E.H. and D.H.

Foster contends that the district court violated his constitutional right to present a complete defense by refusing to admit evidence of E.H.’s and D.H.’s prior accusations of sexual abuse by another man. Foster asserts that the jury could have used such evidence to question the credibility or motives of E.H. and D.H. “Rulings on evidentiary matters rest within the sound discretion of the district court,” and we will not reverse a district court’s evidentiary decision absent a “clear abuse of discretion.” *State v. Glover*, 4 N.W.3d 124, 136 (Minn. 2024) (quotation omitted). “A court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Id.* at 134 (quotation omitted).

The Due Process Clause of both the federal and state constitutions “guarantee a criminal defendant’s right to present a complete defense.” *State v. Carbo*, 6 N.W.3d 114,

² Foster also argues that the district court erroneously failed to grant substitute counsel during the trial itself. As Foster concedes on appeal, however, he did not actually request substitute counsel and instead merely sought to make “a record about what [he thought was] ineffective assistance of counsel.” Accordingly, the district court was not obligated to take further action and did not err by failing to do so.

123 (Minn. 2024) (citing U.S. Const. amend. XIV; Minn. Const. art. I, § 6). As such, criminal defendants have the right to present their version of the facts through witness testimony. *State v. Smith*, 876 N.W.2d 310, 331 (Minn. 2016). But a defendant’s right to present a complete defense is not absolute. *Carbo*, 6 N.W.3d at 123. A defendant “must comply with established rules of procedure and evidence.” *State v. Guzman*, 892 N.W.2d 801, 811 (Minn. 2017) (quotation omitted).

In a prosecution for criminal sexual conduct, evidence of an alleged victim’s prior sexual conduct is generally inadmissible under Minnesota Rule of Evidence 412 and Minnesota Statutes section 609.347 (2022), also known as the “rape-shield law.”³ *State v. Wenthe*, 865 N.W.2d 293, 306 (Minn. 2015). But the purpose of the rape-shield law is to “emphasize the general irrelevance of a victim’s sexual history, not to remove relevant evidence from the jury’s consideration.” *Id.* (quotation omitted). Thus, evidence of a victim’s prior sexual conduct can be admissible “when admission is constitutionally required by the defendant’s right to due process.” *Id.* (quotation omitted).

Here, Foster sought to introduce testimony indicating that the children were previously interviewed regarding separate allegations of sexual abuse by another person. Foster argued that the evidence would (1) demonstrate that the children “received a tremendous amount of focus and attention” on account of their prior allegations, thereby giving them a motive to fabricate allegations against Foster and (2) place the children’s allegations regarding Foster in context “vis-à-vis what their previous experience was,”

³ Rule 412 enumerates two exceptions to the general rule against admissibility that are inapplicable here. *See* Minn. R. Evid. 412(1)(A), (B).

thereby establishing an alternative source for the children's knowledge of age-inappropriate terms.

The district court determined that evidence of the children's prior allegations fell under the rape-shield law and assessed whether due process nevertheless required its admission. The district court concluded that the evidence held low probative value regarding both motive and source of knowledge, and that the evidence carried a greater risk of unfairly prejudicing E.H. and D.H. Accordingly, the district court denied Foster's motion to admit the evidence of the children's prior allegations of sexual abuse. On appeal, Foster asserts that the evidence was admissible to show the children's motive to fabricate or their source of knowledge.

Motive

Foster contends that evidence of the children's prior allegations was admissible to demonstrate the children's motive to fabricate. Inadmissible evidence of prior sexual conduct under the rape-shield law includes evidence of prior allegations of sexual abuse. *State v. Kowbow*, 466 N.W.2d 747, 750 (Minn. App. 1991), *rev. denied* (Minn. Apr. 18, 1991). But evidence of a witness's prior sexual conduct that suggests the witness's motive to fabricate allegations of sexual abuse can be admissible when its risk of unfair prejudice does not outweigh its probative value. *State v. Olsen*, 824 N.W.2d 334, 340 (Minn. App. 2012), *rev. denied* (Minn. Feb. 27, 2013).

Here, the district court determined that the evidence's risk for unfairly prejudicing D.H. and E.H. outweighed its low probative value and noted that Foster made no showing that the children's past allegations were fabricated or that the children understood that

making false allegations was a method for “get[ting] rid of” men in their mother’s life. On appeal, Foster appears to assert that the mere existence of the children’s prior allegations demonstrates their potential motive to fabricate the allegations against him. But evidence of a witness’s prior allegations of sexual abuse alone “does not show a predisposition to fabricate.” *State v. Kroshus*, 447 N.W.2d 203, 205 (Minn. App. 1989), *rev. denied* (Minn. Dec. 20, 1989). And the record also demonstrates that Foster was nevertheless permitted to develop his defense theory that the children had a motive to fabricate their allegations. During Foster’s cross-examination of E.H., E.H. testified that she did not like it when her mother spent time with men. And during closing argument, Foster’s attorney emphasized that the children had a motive to lie because they craved their mother’s attention, and the investigation process gave them an additional source of attention. Thus, the evidence of the children’s prior allegations of sexual abuse was not “constitutionally required by [Foster’s] right to due process.” *Wenthe*, 865 N.W.2d at 306.

The district court’s ruling, therefore, did not infringe on Foster’s due-process right to present a defense regarding the children’s motives. And because evidence of the prior allegations was unnecessary for Foster’s defense theory, we discern no abuse of discretion in the district court’s conclusion that the evidence’s probative value was outweighed by its risk of unfair prejudice.

Source of Knowledge

Foster asserts that he also should have been permitted to introduce the evidence of the children’s prior allegations to show that the children had an alternative source of knowledge of sexual matters. “[E]vidence tending to establish a source of knowledge of

or familiarity with sexual matters may be admitted in cases where the jury might otherwise infer that the defendant was the source.” *Id.*

In excluding the evidence for this purpose, the district court noted that Foster had not established that the jury would be left with the impression that the children’s source of sexual knowledge was due to Foster’s conduct alone. But Foster now argues that the testimony of D.H.’s CornerHouse interviewer created such an impression because he stated that the “sensory and contextual information” provided by D.H. “stood out” and because he questioned how D.H. could know about the things he described if they had not actually happened. Accordingly, Foster asserts that the district court’s exclusion of evidence of the prior allegations was an abuse of discretion. We disagree.

First, the CornerHouse interviewer’s testimony came after the district court’s ruling, and Foster did not object to the interviewer’s testimony or renew his request to introduce evidence of the prior allegations. Second, appellate courts have upheld rulings excluding evidence of prior sexual conduct while still providing “leeway” for questioning based on how the testimony plays out. *Kowbow*, 466 N.W.2d at 750-51 (Minn. App. 1991); *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986). Similarly here, despite denying Foster’s motion, the district court specifically ruled that Foster could “probe the basis” of the children’s knowledge if any suggestion arose that their knowledge could have only come from interactions with Foster.

The district court therefore appropriately balance Foster’s right to present a defense relating to the children’s sources of knowledge against the risk of unfairly prejudicing the children. And the district court’s ruling was sufficiently flexible to allow Foster to respond

to any suggestion that the children's source of sexual knowledge was limited to Foster's conduct. Accordingly, we conclude that the district court did not abuse its discretion.

III. The district court did not abuse its discretion by admitting evidence of Foster's prior criminal-sexual-conduct offense.

Foster next argues that the district court abused its discretion by admitting evidence of his previous conviction of a criminal-sexual-conduct offense as *Spreigl* evidence. *Spreigl* evidence is evidence of a prior bad act and "is generally not admissible to prove the defendant's character for committing crimes, but it can be admitted to show motive, intent, absence of mistake, identity, or a common scheme or plan." *State v. Gomez*, 721 N.W.2d 871, 877 (Minn. 2006) (citing *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965)); see also Minn. R. Evid. 404(b) (providing rules for admissibility of prior bad acts).

For *Spreigl* evidence to be admissible,

- (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. Ness, 707 N.W.2d 676, 686 (Minn. 2006). Here, Foster argues that the *Spreigl* incident was insufficiently similar in modus operandi to be relevant, that its risk for unfair prejudice outweighed its probative value, and that the evidence as presented at trial failed to establish a marked similarity with the charged conduct. As discussed below, we disagree.

Marked Similarity

Spreigl evidence can be relevant for establishing a common scheme or plan in cases in which “whether the act occurred” is at issue, such as it is here. *State v. Kennedy*, 585 N.W.2d 385, 391 (Minn. 1998). “When determining whether past misconduct is admissible under the common scheme or plan exception, the misconduct must have a *marked similarity* in modus operandi to the charged offense.” *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007) (quotation omitted).

Here, the district court observed six commonalities between the *Spreigl* incident and the allegations at hand:

- (1) Defendant was babysitting the victims at the time of the abuse;
- (2) the victims were children under the age of thirteen;
- (3) the abuse took place in victims’ homes;
- (4) Defendant engaged in sexual contact with victims on multiple occasions;
- (5) the incidents occurred even when another child was in the home; and
- (6) Defendant penetrated the *Spreigl* victim and [E.H.] anally and vaginally.

Based on those similarities, the district court concluded that the prior act was sufficiently similar in modus operandi to be relevant.

Foster argues that the district court erred in this conclusion because the following differences show that the *Spreigl* incident and the charged offense share “few common threads”: (1) the *Spreigl* victim was “significantly” younger than E.H. and D.H.; (2) the *Spreigl* incident involved just one female victim, whereas this case involves one male and one female victim; (3) the *Spreigl* incident involved a significant relationship as Foster is the *Spreigl* victim’s uncle; and (4) the *Spreigl* incident did not involve allegations of

nonsexual, physical violence, while E.H. claimed that Foster punched her and pulled her hair.

The similarities identified by the district court, however, go far beyond merely outlining crimes “of the same generic type,” as Foster asserts. And Foster cites no authority supporting his claim that the discrepancies he identified are sufficient to overcome the overwhelming similarities between the circumstances of the *Spreigl* incident and those of the charged offenses. On this record, the district court did not abuse its discretion when it found that the *Spreigl* incident bore a marked similarity to the charged conduct.

Probative Value Versus Potential Prejudice

Foster also argues that the district court erroneously admitted the *Spreigl* evidence because its risk of unfair prejudice outweighed its probative value. Unfairly prejudicial evidence “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. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

Here, the district court found that the *Spreigl* evidence “has substantial probative value to demonstrate common scheme or plan” and “to rebut any claims of fabrication.” The district court recognized the inherent prejudicial effect of admitting evidence of Foster’s prior conviction but concluded that its high probative value outweighed the risk for unfair prejudice and that this risk could be mitigated by providing the jury with a limiting instruction or by excluding any facts from the testimony that “do not have independent probative value.”

Because, as discussed above, the *Spreigl* incident bore a marked similarity to the charged offense involving E.H., it carried significant probative value as evidence of a common scheme or plan. *See Kennedy*, 585 N.W.2d at 391. And the district court’s order demonstrates that it cautiously balanced the probative value of the evidence against its risk of unfairly prejudicing Foster in light of measures that could reduce this risk. Therefore, the district court did not abuse its discretion by admitting the *Spreigl* evidence in its pretrial order.

The Evidence as Presented at Trial

At trial, the peace officer who provided the state’s evidence of the *Spreigl* incident testified only that it involved “vaginal and anal penetration with a juvenile female,” that the victim was five or six years old, and Foster was approximately 18 years old at the time of the incident, and that Foster pleaded guilty to the charges that arose from the incident. Foster moved to strike the officer’s testimony, arguing that the state did not introduce the underlying facts identified in the district court’s order that made the prior act admissible as *Spreigl* evidence.

In denying Foster’s motion, the district court expressed “concern” that the state did not produce more testimony from the officer about some of the commonalities that the district noted in its *Spreigl* order but concluded that “enough facts came in” about the nature of the offense and the victim to establish a permissible *Spreigl* use of Foster’s prior criminal-sexual-conduct offense. Foster argues that the district court erred in declining to strike the officer’s testimony.

We conclude that the district court did not abuse its discretion. Although the officer's testimony did not include all the facts enumerated in the district court's pretrial order, the testimony established that Foster had previously engaged in anal and vaginal penetration with a prepubescent girl. These details alone bear a sufficiently marked similarity to the charged conduct involving E.H. to make the testimony admissible to rebut Foster's defense that E.H. was fabricating her allegations.

IV. Foster is not entitled to a new trial due to the cumulative effect of the alleged errors.

Lastly, Foster contends that, even if the district court's substitute-counsel and evidentiary rulings do not independently warrant relief, he is entitled to a new trial due to the cumulative effect of those purportedly erroneous rulings. "In rare cases, an appellant is entitled to a new trial when the cumulative effect of trial errors results in denying the appellant a fair trial." *State v. Gilleylen*, 993 N.W.2d 266, 286 (Minn. 2023). But having determined that the district court did not abuse its discretion with regard to its substitute-counsel or evidentiary rulings, we conclude that Foster has failed to demonstrate any error, let alone cumulative error. Accordingly, Foster is not entitled to a new trial.

Affirmed.