

*This opinion is nonprecedential except as provided by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
A24-0415**

State of Minnesota,
Respondent,

vs.

Rigoberto Izucar Espitia,
Appellant.

**Filed June 30, 2025
Affirmed in part, reversed in part, and remanded
Wheelock, Judge**

Hennepin County District Court
File No. 27-CR-21-22417

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

Mary F. Moriarty, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

In this direct appeal from his convictions for criminal sexual conduct, appellant asserts that the district court abused its discretion by denying his request for a continuance

on the morning of trial and by entering a judgment of conviction on a lesser included offense. We affirm in part, reverse in part, and remand.

FACTS

Respondent State of Minnesota charged appellant Rigoberto Izucar Espitia in December 2021¹ with three criminal offenses against his stepchild: (1) first-degree criminal sexual conduct involving a victim under age 16 with whom Espitia had a significant relationship and multiple acts over a period of time from May 2017 through October 2021, in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2016); (2) first-degree criminal sexual conduct involving a victim aged 13 to 15 over whom Espitia was in a position of authority, taking place from July 2019 through September 2021, in violation of Minn. Stat. § 609.342, subd. 1(b) (Supp. 2019); and (3) second-degree criminal sexual conduct involving a victim aged 13 to 15 over whom Espitia was in a position of authority, taking place from May 2017 through October 2021, in violation of Minn. Stat. § 609.343, subd. 1(b) (2016).

Espitia is the stepfather of D.M.B., the victim in this matter. D.M.B. has known Espitia for most of their life, as they were born in 2006 and their family moved in with Espitia when they were roughly five years old. The abuse at issue in this case began in the spring of 2017 and ended in the fall of 2021.

¹ The state amended its complaint in February 2023 to add count three, the second-degree charge, and during trial, it amended count three to correct the date range of the offense.

Espitia appeared for an omnibus hearing in March 2022, and the parties scheduled a jury trial to start in July 2022.² In October 2022, the state submitted a proposed witness list that included a forensic interviewer, and in February 2023, the state filed a notice of intent to introduce expert testimony that identified the forensic interviewer as its expert. The parties appeared for a hearing the next week, at which the state requested a two-week continuance of the trial date. Espitia opposed the admission of the expert's testimony and the request for a continuance but agreed that, if the expert's testimony were admitted, he "would need a lot more time than a week or two to prepare for that." The district court ruled that it would admit the state's expert's testimony, granted a continuance to give Espitia time to review the expert's information, and rescheduled the trial for April 2023.

Espitia ultimately found an expert to testify about a range of topics, including "the science of memory, the science of memory contamination, the science of proper investigations, the science of 'clinical judgment' by investigators, interviewers, and other professionals, the science of confirmation bias, [and] the history of memory contamination by counselors-investigators-therapists-peers and others." Espitia filed a request for funds to obtain the expert pursuant to Minn. Stat. § 611.21(a) (2024). In March 2023, the district court granted the request, and a few weeks later, Espitia filed an amended witness list to include his expert. Espitia submitted a request for additional funds because the expert lived out of state.

² There are gaps in the record on appeal, and therefore, we do not know the cause for the delays in proceeding from charging to trial.

During a hearing in June 2023, the state argued that Espitia's expert's testimony should be excluded, contending that the expert report was general and not relevant to the case. At the hearing, the district court mentioned Espitia's request for additional funds for the expert's travel expenses, and Espitia assured the district court that no funds would be used unless the expert were permitted to testify at trial; however, the district court did not rule on the motion. The district court then rescheduled the trial for October 2023. A week or two before trial was set to begin, the district court inquired about the status of Espitia's request for additional funds pursuant to section 611.21(a), but Espitia never responded to the inquiry or followed up on his request.

At the beginning of the trial, the district court ruled on the scope of Espitia's expert's testimony, limiting it to the "science of memory" and prohibiting testimony on most of the expert's proposed topics. Espitia immediately requested a continuance to provide time for the release of additional funds and to allow for the expert to travel to Minnesota. Espitia had not yet arranged for the expert's travel for the trial because the district court had not granted the additional funds. The state objected to a continuance because of the length of time the case had been pending, the number of times the trial had been rescheduled, and Espitia's knowledge of the trial date for several months. The district court opined that "the date should have been at least secured with the . . . expert if there was any intent to . . . use the expert in trial." The district court also observed that Espitia's counsel had never followed up with it about the status of the request for additional funds. The district court denied Espitia's request for a continuance because of the length of time since the trial date had been set and for which the case had been pending, but it approved the immediate

release of the additional funds Espitia requested. On the third day of trial, which was the day the state rested its case, Espitia expressed his hope that he would be able to “get [the expert witness] here tomorrow”; however, his expert did not testify at trial.

At trial, D.M.B. testified about pervasive abuse throughout an almost five-year period. Some of D.M.B.’s family members, including their mother and older sister, presented testimony that, at times, called into question the truthfulness of D.M.B.’s statements. Espitia testified on his own behalf, refuting all of D.M.B.’s testimony. The state played two video recordings for the jury: a very brief video recording that D.M.B. made of Espitia running his hand up their thigh on one occasion and D.M.B.’s forensic interview. The forensic interviewer testified at the trial, explaining forensic interviewing, why children incrementally disclose abuse and wait to disclose abuse, and how abuse affects a teenager’s already heightened emotions.

During its closing argument, the state discussed memory and referenced the forensic interviewer’s testimony about delayed disclosure of abuse and changing details in a victim’s reports of abuse. The state also emphasized those details in D.M.B.’s testimony that were corroborated by other family members to demonstrate D.M.B.’s credibility. Espitia’s closing argument highlighted the testimony of family members who questioned D.M.B.’s truthfulness, and it pointed to the inconsistencies within D.M.B.’s testimony.

The jury found Espitia guilty of all three charges. The district court entered judgments of conviction for all three offenses but imposed a sentence of 144 months in prison for only count one.

Espitia appeals.

DECISION

Espitia asserts that the district court abused its discretion by denying his motion for a continuance and that it erred by entering a conviction on count three because it was a lesser included offense.³ We address Espitia's arguments in that order.

I. The district court did not abuse its discretion by denying Espitia's request for a continuance on the morning of trial.

"The decision whether to grant a continuance is within the [district] court's discretion and will be reversed upon a showing that the [district] court abused its discretion." *State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990). "In evaluating a request for a continuance, the test is whether the denial of a continuance prejudices the outcome of the trial." *Id.* The reviewing court considers the circumstances that existed at the time the motion to continue was made. *State v. Turnipseed*, 297 N.W.2d 308, 311 (Minn. 1980). But the central question remains whether the defendant was so prejudiced as to materially affect the outcome of the trial. *State v. Smith*, 932 N.W.2d 257, 268 (Minn. 2019).

When determining the extent of any prejudice from the denial of a continuance, we may consider many factors, including the length of time in which the party could have addressed the problem without the continuance, the length of time between the moving party's awareness of the need for a continuance and the motion for a continuance, the

³ Espitia raises four additional arguments in a pro se brief; however, "[a]rguments are forfeited if they are presented in a summary and conclusory form, do not cite to applicable law, and fail to analyze the law when claiming that errors of law occurred." *State v. Bursch*, 905 N.W.2d 884, 889 (Minn. App. 2017). Because Espitia's additional arguments are forfeited, we do not address them.

reason for the continuance and its effect on the merits of the moving party's case, the time that the case was pending, the proximity of the request to the start of trial, the number of continuances requested by the moving party, and the strength of the evidence to support the verdict. *See id.* at 269 (considering whether defendant's counsel had "ample time" to acquire and review the evidence); *State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987) (affirming the denial of a continuance because receiving a report 13 days before the start of trial provided sufficient time to address the asserted problem); *State v. Lloyd*, 345 N.W.2d 240, 247 (Minn. 1984) (considering the length of time between the indictment and trial and the proximity of the continuance motion to the start of trial); *Turnipseed*, 297 N.W.2d at 311-12 (concluding that there was no abuse of discretion in denying a continuance because a "fair reading of the record" showed the strength of the state's case and that the witness's testimony would not have helped the defendant's case); *State v. Beveridge*, 277 N.W.2d 198, 199 (Minn. 1979) (considering the number of requests for continuances, the proximity of the request to the start of trial, and the strength of the evidence to support the verdict).

Espitia argues that good cause existed to grant the continuance because his expert's testimony was an important part of his defense, he made the request as soon as the district court determined what testimony was admissible, he had not previously requested a continuance, and the interests of justice required granting the request because he was not incarcerated and there was no speedy-trial request that would be violated. He argues that he was prejudiced because the case hinged on the victim's credibility and the testimony of his expert would have explained the inconsistencies in the victim's testimony, the state

presented an expert and it was “lopsided” not to continue the trial to allow his expert’s testimony, and his expert was the only unbiased person who would testify at trial. Thus, he contends that the denial of the continuance caused the jury to return a guilty verdict.

The state argues that the district court did not abuse its discretion for numerous reasons. Principally, the state argues that Espitia cannot show prejudice because his theory of the case—that D.M.B. lied—was fully presented to the jury and the expert’s testimony would not have supported this theory. In making this argument, the state notes that Espitia’s brief does not explain the content of his expert’s testimony that would have supported this theory. The state maintains that Espitia should have raised the outstanding motions on his expert’s funds prior to the start of trial if the expert was necessary to his case and that, although Espitia never requested a continuance, the district court granted him a continuance after it admitted the state’s expert. Finally, the state argues that granting a continuance on the first day of trial would have prejudiced the state because the victim deserves resolution.

We are not persuaded that the district court abused its discretion by denying the continuance request. Here, the district court expressly considered the prejudice that would result if the continuance were or were not granted, acknowledging that the case had been pending for two years, that the charges were serious, and that Espitia might not be able to present his expert’s testimony. Upon review, we conclude that, overall, the balance of factors is fairly even—ultimately weighing against a determination that Espitia was prejudiced by the denial of the continuance. The factors that weigh in favor of granting the continuance are that Espitia had not yet requested a continuance and that he requested

the continuance as soon as the district court ruled on the scope of his expert's testimony that was admissible. The factors weighing against the continuance are that he made the request as the trial was beginning, the case had been pending for nearly two years, he had at least three months to arrange for the expert to be available during trial, and he did not request a ruling on his pending motion for additional funds even though he knew the dates for which the trial was scheduled. Moreover, the charges against Espitia were serious and the jury-trial transcript demonstrates that Espitia was able to make his arguments about D.M.B.'s credibility and memory even without his expert because multiple witnesses questioned the honesty of D.M.B.'s testimony, Espitia questioned the accuracy of D.M.B.'s memories and highlighted the discrepancies in their disclosures at every turn, Espitia testified and refuted D.M.B.'s testimony, and the forensic interviewer admitted that there was no way to know whether D.M.B. was telling the truth.

Based on the strength of the state's case, Espitia cannot show that the denial of his motion for a continuance so prejudiced him as to materially affect the outcome of his trial and, thus, that his convictions should be reversed and the case remanded for a new trial. Other witnesses corroborated various details of D.M.B.'s testimony, and the state published to the jury a video of Espitia stroking D.M.B.'s thigh. The absence of testimony from Espitia's expert about the "science of memory" did not compel the jury to find Espitia guilty, as his argument suggests. The jury had the ability to make credibility determinations of all the witnesses, and the jury returned guilty verdicts.

Although two factors weighed in favor of granting the continuance, many factors weighed against it, and we discern no abuse of discretion by the district court when it

denied Espitia's motion for a continuance. Thus, we conclude that Espitia is not entitled to a new trial.

II. The district court erred by entering a judgment of conviction for count three because it was a lesser included offense.

Espitia argues, and the state agrees, that the district court erred by entering a judgment of conviction for count three, second-degree criminal sexual conduct, because it is a lesser included offense of first-degree criminal sexual conduct. The jury found Espitia guilty of all three charges, and the district court entered judgments of conviction on each count.

A criminal defendant “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2016). A lesser degree of the same crime is considered an included offense. *Id.* Whether a conviction is barred by section 609.04 is a legal question reviewed de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

Here, the district court entered judgments of conviction on two counts of first-degree criminal sexual conduct (counts one and two) and one count of second-degree criminal sexual conduct (count three). A conviction for second-degree criminal sexual conduct requires “sexual contact,” whereas a conviction for first-degree criminal sexual conduct requires “penetration.” *Compare* Minn. Stat. § 609.342, subd. 1 (first degree), *with* Minn. Stat. § 609.343, subd. 1 (second degree). Second-degree criminal sexual conduct is a lesser included offense of a first-degree criminal sexual conduct because it is “a lesser degree of the same crime,” Minn. Stat. § 609.04, subd. 1, and therefore, we reverse and remand for

the district court to vacate the entry of judgment of conviction on count three but leave the jury's finding of guilt intact. *See State v. Hallmark*, 927 N.W.2d 281, 300 (Minn. 2019).

Affirmed in part, reversed in part, and remanded.