This opinion is nonprecedential except as provided by Minn.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
A19-1346

State of Minnesota,
Respondent,

vs.

Jimmy Jay Hortiz,
Appellant.

Filed June 7, 2021
Affirmed in part, reversed in part, and remanded
Segal, Chief Judge

Hennepin County District Court
File No. 27-CR-18-29441

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

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Senior Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Bjorkman, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this direct appeal from a judgment of conviction for first-degree criminal sexual conduct, and following a stay and remand for postconviction proceedings, appellant argues

that the district court erred (1) in its ruling on a motion to admit *Spreigl* evidence and that this improperly induced his decision not to testify, (2) in denying appellant an evidentiary hearing on his petition for postconviction relief, and (3) in ordering appellant to reimburse the public defender in the amount of $10,000 without first holding a hearing. We affirm with respect to the first two issues but, because appellant is entitled to a hearing before reimbursement can be ordered, we reverse and remand on the third issue.

FACTS

The following summarizes the testimony presented at the trial. On November 29, 2018, K.N. went to a bar in Bloomington for a date. After discovering that the bar was at a hotel, she "kind of blew [her date] off because [she] thought it was really inappropriate," and her date left. K.N. remained at the bar and continued to drink alcoholic beverages and socialize with other people at the bar. There was a group of people at the bar who were at the hotel for a work conference, but K.N. did not interact with this group.

K.N. testified that, as the evening wore on, she began to feel intoxicated. Her last memory of being in the bar area was that she was sitting by herself and talking to her ex-husband on the phone. K.N.'s next memory was waking up on a bed in a hotel room with a man on top of her penetrating her vagina with his penis. She did not recognize the man and yelled at him to get off of her, but he did not. During the sexual assault, the man grabbed K.N.'s hair to tilt her head back, strangled her, and repeatedly told her that he was going to kill her. She lost consciousness several times.

K.N. eventually managed to escape and ran into the hallway. She attempted to call 911, but the man had broken her phone. She curled up in a ball and began having a panic

attack. A hotel employee called 911 to report a guest hyperventilating, and law enforcement and paramedics responded to the call. K.N. did not want to speak with the officers because they were male, but allowed the female paramedics to take her to the hospital. She was admitted to the hospital at approximately 1:00 a.m. When K.N. arrived at the hospital, she was wearing a coat, men's T-shirt, leggings, underpants, a men's sock, an anklet sock, and boots. The coat, leggings, underpants, anklet sock, and boots belonged to K.N., but the T-shirt and other sock did not. She was missing the dress, bra, and other anklet sock that she had been wearing earlier that night, along with her eyeglasses.

A police officer was dispatched to the hospital based on a report of a sexual assault. The officer took a statement from K.N. and took photographs to document her injuries, the damage to her cell phone, and the clothing she was wearing when she arrived at the hospital. The officer then passed along the information to two detectives, who went to the hotel to investigate the incident. When the detectives arrived at the hotel, they first spoke with one of the individuals in charge of the conference. He informed the detectives that another employee attending the conference had sent him a text message the previous night to inform him that "[c]ops and paramedics are here assisting a young lady" whom he believed "was in one [of] our employees' rooms." The detectives spoke with the employee who sent the text message, and the employee reported that he had heard yelling and crying coming from room 464. Specifically, a male was yelling and a female was crying and asking to leave.

Appellant Jimmy Jay Hortiz was the individual staying in room 464. The detectives spoke with Hortiz, and he acknowledged that he had seen K.N. at the bar the previous night

and offered to call her a cab at one point because she was crying. Hortiz denied that a woman had been in his hotel room, gave the detectives permission to search the hotel room, and assured them that none of K.N.'s property would be discovered in the room. The detectives then searched room 464. They observed a blood-like substance and strands of long hair on the bed. They reported their discovery to Hortiz, who again denied that there had been a woman in his room and stated the blood may have been his. The detectives then returned to room 464 and conducted a more thorough search with the assistance of a crime-scene technician. The crime-scene technician discovered a piece of a red acrylic fingernail that matched the one K.N. was missing. Based on this discovery, Hortiz was placed under arrest. The crime-scene technician and detectives then continued to search the room and discovered K.N.'s missing dress, anklet sock, and bra hidden above the ceiling tiles in the room.[1] The dress and sock were damp, and the bra was torn.

The detectives next spoke with Hortiz for a third time after giving him a *Miranda* warning. Hortiz stated that K.N. had followed him up to his hotel room, and that he allowed her into his room to use the bathroom. He told the detectives that she came out of the bathroom wearing only a towel and attempted to kiss him, and then became angry and threw the phone when he told her to get off of him. Hortiz further stated that she became increasingly angry but willingly left his room after approximately ten minutes. He denied touching her other than to push her away when "she was trying to force herself" on him. He told the detectives that he hid her clothing because he was embarrassed, and denied that

[1] Her eyeglasses were never found.

she was ever on the bed. After the detectives reminded Hortiz that they had discovered strands of long hair on the bed, he changed his statement and told them that K.N. had lain down on the bed and stated, "I'm sleeping right here." After the detectives described K.N.'s injuries, including that she suffered significant damage to her vagina, Hortiz stated that K.N. had masturbated while lying in the bed.

Respondent State of Minnesota charged Hortiz with first-degree criminal sexual conduct and third-degree assault. K.N., the forensic nurse who had examined K.N., the detectives, the crime-scene technician, and the two individuals from the conference testified at the trial. Hortiz waived his right to testify. The state also introduced the test results from the DNA swabs collected during the sexual-assault examination. The samples taken from K.N.'s neck and under her fingernails both revealed a mixture of DNA from at least two individuals. The DNA test results showed that, while more than 99.99% of the general population could be excluded as contributors, Hortiz could not be so excluded. Hortiz was a match for the DNA found in the samples from K.N.'s vagina, perineum, cervix, and mons pubis. The jury found Hortiz guilty on both counts and he was sentenced to 171 months in prison.

Hortiz appealed his conviction and also pursued a petition for postconviction relief. The district court denied the petition without an evidentiary hearing.

DECISION

I. Hortiz's waiver of his right to testify was not rendered invalid by the district court's *Spreigl* ruling.

The first error asserted by Hortiz is that the district court abused its discretion in ruling on the state's motion to admit *Spreigl* evidence[2] and that this improperly induced him to waive his right to testify. We review challenges related to whether a defendant's waiver of the right to testify was voluntary and knowing for an abuse of discretion. *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014); *State v. Berkovitz*, 705 N.W.2d 399, 405 (Minn. 2005). The right to testify is personal and may only be waived by the defendant. *State v. Rosillo*, 281 N.W.2d 877, 878-79 (Minn. 1979).

Through its *Spreigl* motion, the state sought to admit evidence that Hortiz had allegedly sexually assaulted a different woman at a hotel while on a business trip in California a number of years earlier. Hortiz was criminally charged, but the charge was dismissed by the California court and no trial was held.

The district court denied the state's motion to admit the evidence in an oral ruling from the bench. The district court, however, noted that the state might be able to question the defendant about it on cross-examination or in rebuttal if Hortiz opened the door by lying about the prior incident. The district court stated as follows:

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[2] In Minnesota, evidence of other crimes and prior bad acts is "often referred to as *Spreigl* evidence after the supreme court's decision in *State v. Spreigl*." *State v. Babcock*, 685 N.W.2d 36, 40 (Minn. App. 2004), *review denied* (Minn. Oct. 20, 2004); *see also* Minn. R. Evid. 404(b); *State v. Spreigl*, 139 N.W.2d 167, 170-71 (Minn. 1965).

> And again, we don't know because the court records are gone why it got dismissed, but as everyone agrees, I need to assume it was dismissed by the Court at the preliminary hearing for basically a lack of [probable cause], and so while it is not an acquittal and it is fair game for *Spreigl*—my— . . . ruling on this matter is that it is not admissible, that does not mean that it did not happen and that if the door [is] opened, I mean like nobody can lie about it, right?
>
> But—and so it may be that there's some questioning on cross-examination of the defendant or in rebuttal but in the State's case in chief it is not admissible and that portion of [Hortiz's statement to law enforcement] needs to be redacted.

The prosecutor asked the district court to clarify whether its reason for denying the motion was that the state had failed to establish by clear and convincing evidence that the incident occurred. The district court confirmed that was the ruling, and neither party asked for any additional clarification.

Hortiz argues that the district court abused its discretion in its evidentiary ruling because the ruling was "confusing and it confused" him. He acknowledges that the district court went through the proper analysis to evaluate the admissibility of the *Spreigl* evidence and properly determined that the evidence was inadmissible because the state failed to establish clear and convincing evidence that the prior incident occurred. *See State v. Asfeld*, 662 N.W.2d 534, 542 (Minn. 2003) (describing the five-prong analysis for *Spreigl* determinations). Horitz argues, however, that "[t]he analysis should have stopped there. But instead, the court qualified its ruling, stating that the evidence 'may' be admissible in cross-examination of Hortiz, 'or in rebuttal'" and that this qualification rendered the evidentiary ruling erroneous and improperly induced Hortiz to forego his right to testify. Hortiz maintains that he is thereby entitled to a new trial. We disagree.

First, we note that the ruling of the district court is that the *Spreigl* evidence was not admissible. The district court's comment about what the court would allow if Hortiz testified and lied about the incident cannot fairly be characterized as a ruling. It is properly read as only a cautionary statement or warning. *See, e.g.*, *State v. Robledo-Kinney*, 615 N.W.2d 25, 29-31 (Minn. 2000) (holding a comment by the court that a defendant's statement "[a]t best . . . may be used to impeach [him] should he testify at trial inconsistently" is not "a definitive statement of what the district court *would actually do*.").

As in *Robledo-Kinney*, the district court here never categorically ruled that the evidence would be admitted for any purpose; the only definitive ruling issued by the district court was that the evidence was inadmissible as *Spreigl* evidence in the state's case in chief. *See id.* at 31. The statement is properly read as a warning that if Hortiz were to testify and open the door on the issue during his testimony, the state "may" be permitted to ask questions in response. "A party 'opens the door' when it introduces evidence that creates a right in the opposing party to respond with evidence that would otherwise be inadmissible." *State v. Fraga*, 898 N.W.2d 263, 272 (Minn. 2017). Thus, the district court's comment is appropriately characterized as a caution and not a ruling.

Second, independent of how the district court's statement is characterized, Hortiz's argument that the district court's comment induced him to waive his right to testify because he feared that the prior incident would come into evidence is not sufficient to render his waiver invalid. A full and careful record was made of Hortiz's waiver. During questioning from his counsel, Hortiz acknowledged that he had the opportunity to discuss the waiver with his counsel "numerous times" during preparation for trial and that "last week and this

week, while . . . in trial" Hortiz met with his counsel "a couple of times to specifically discuss whether or not [he] wanted to testify." Hortiz also agreed that he had discussed with his counsel "the pros and cons of testifying," that he had "enough time to think about [the] decision," and that he did not need "any more time to discuss [his] options and whether or not [he's] testifying." After stating that his decision was not to testify, he was questioned on the record by the district court and Hortiz again confirmed that this was his decision and that he had enough time to consider whether to testify.

Hortiz relies on the case of *State v. Gassler,* 505 N.W.2d 62 (Minn. 1993), in support of his argument. That reliance is misplaced. In *Gassler,* the district court admitted evidence of prior convictions for the purpose of impeachment. 505 N.W.2d at 66. The defendant argued on appeal that the court's ruling violated his right to testify in his own defense. *Id.* The Minnesota Supreme Court rejected this argument, noting that "[t]he mere fact that a trial court would allow impeachment evidence if a defendant chooses to testify does not necessarily implicate his constitutional right to testify in his own defense." *Id.* at 68. The supreme court concluded that "it is only when a trial court has abused its discretion . . . that a defendant's right to testify may be infringed by the threat of impeachment evidence." *Id.* Here, with the district court's comment that there "may be . . . some questioning" about the prior criminal charge, we would be left to speculate about the circumstances in which the district court might have allowed the questioning. We cannot conclude that the court abused its discretion based on such speculation.

In light of this record, we conclude that Hortiz has failed to satisfy his burden of proving that he did not voluntarily and knowingly waive his right to testify. *Berkovitz,* 705

N.W.2d at 405. Hortiz indicated that he made the decision to waive the right to testify after multiple discussions with counsel and that he did not need more time to make the decision. The district court appropriately ruled that evidence of the California allegation was inadmissible in the state's case-in-chief. The district court's speculation that "it may be that there's some questioning on cross-examination of the defendant or in rebuttal," did not render invalid Hortiz's knowing and voluntary waiver of his right to testify.

II. The district court did not abuse its discretion by summarily denying the petition for postconviction relief.

Hortiz next argues that the district court abused its discretion by denying his petition for postconviction relief without a hearing. Hortiz petitioned for postconviction relief based on his assertion that "the district court's *Spreigl* ruling was erroneous and prejudicial" and that "the sole reason [he] did not testify" was his fear that if he chose to testify then the jury would learn of the California allegation. In the affidavit he submitted in support of his petition, he asserted that he "very much wanted to testify" but waived his right because he did not want to have to "defend [himself] against allegations from 19 years ago," in addition to K.N.'s allegations. He argues that, given the requirement that the district court view the evidence in the light most favorable to him and the low standard for obtaining an evidentiary hearing, it was an abuse of discretion to deny the petition without first holding a hearing.

"Upon filing a petition for postconviction relief, an evidentiary hearing must be held unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018)

(quotation omitted). "In determining whether an evidentiary hearing is required, a postconviction court considers the facts alleged in the petition as true and construes them in the light most favorable to the petitioner." *Brown v. State*, 895 N.W.2d 612, 618 (Minn. 2017). We review the "summary denial of a petition for postconviction relief for an abuse of discretion." *Andersen*, 913 N.W.2d at 422.

In denying the postconviction petition, the district court issued a thorough nine-page order that set out its reasoning for denying the petition without an evidentiary hearing. At the outset of its analysis in the order, the court specifically noted, contrary to Hortiz's argument, that "[f]or purposes of this Order, the court will consider [Hortiz's] fear to be true" that, if he exercised his right to testify, evidence about the California allegation would be admitted. The district court therefore properly viewed the evidence in the light most favorable to Hortiz by accepting his assertion as true for purposes of ruling on the petition.

In its order, the district court reviewed Hortiz's thorough waiver of his right to testify, noting that not only counsel, but the court questioned Hortiz to ensure that the waiver decision was his voluntary decision after having adequate time to consider and discuss the matter with his counsel. The order also notes that the court's actual *Spreigl* ruling was to deny the state's motion to admit the evidence. The district court concluded, as do we, that the court's comment amounted to no more than a warning. For these reasons, the district court concluded that Hortiz failed to establish that he would be entitled to relief, even treating the assertions in his affidavit as true.

We conclude that the district court applied the correct legal standard and did not abuse its discretion by summarily denying the petition for postconviction relief.

III. The district court abused its discretion by issuing a reimbursement order without first holding a hearing.

Finally, Hortiz argues that the district court erred by issuing an order requiring him to reimburse the public defender's office without first holding a hearing. "We review an order to reimburse the costs expended by a public defender for abuse of discretion." *State v. Alexander*, 855 N.W.2d 340, 345 (Minn. App. 2014).

After trial, the district court ordered Hortiz to reimburse the public defender's office in the amount of $10,000.[3] Hortiz argues that the district court was required to hold a hearing prior to issuing the reimbursement order, and therefore the order must be reversed and the issue remanded for a hearing. The state agrees, and so do we. "The proper procedure for obtaining reimbursement for public defender services *requires* the court to conduct a hearing on the defendant's financial ability to pay." *Foster v. State*, 416 N.W.2d 835, 837 (Minn. App. 1987) (emphasis added). "The purpose of the hearing is to determine the cost of the public defender's services and whether the defendant has the ability to pay the fee." *Alexander*, 855 N.W.2d at 345. The district court abuses its discretion when it issues a reimbursement order without first holding "the requisite hearing." *Id.* Because the district court ordered Hortiz to reimburse the public defender's office without first

[3] The district court ordered the reimbursement to the public defender's office based on evidence that persuaded the court that Hortiz was not truthful in disclosing his assets in his affidavit when he applied for the appointment of a public defender. The district court concluded that Hortiz likely would not have qualified for a public defender if he had made an accurate disclosure.

holding a hearing, we reverse the reimbursement order and remand to the district court for a hearing on the matter.

Affirmed in part, reversed in part, and remanded.