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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2003

State of Minnesota,
Respondent,

vs.

Francisco Perez-Martinez,
Appellant.

Filed November 13, 2012
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27CR1051471

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Elizabeth Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Stauber, Judge; and Cleary, Judge.

U N P U B L I S H E D   O P I N I O N

STAUBER, Judge

On appeal from his conviction on six counts of first- and second-degree criminal sexual conduct, appellant argues that the district court (1) abused its discretion by

admitting testimony that he sexually abused a different child as *Spreigl* or relationship evidence; (2) abused its discretion by denying his motion for a continuance; and (3) committed reversible error by locking the doors to the courtroom during the jury instructions. Appellant also raises a number of arguments in a pro se supplemental brief. We affirm.

FACTS

Appellant Francisco Perez-Martinez was involved in a romantic relationship with M.Q. M.Q. had six children, three of whom were fathered by appellant. M.Q.'s oldest child, M.R.Q., is not appellant's biological child and lived with his grandparents in Mexico before moving to Minnesota in 2003 to live with his mother, siblings, and appellant.

In October 2010, when he was 19-years old, M.R.Q. went to a Minneapolis social-service agency and reported that appellant began sexually abusing him approximately six months after M.R.Q. had moved to Minnesota from Mexico. Appellant was charged by complaint with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(b) (2006) (complainant 13-to-16-years old at time of sexual penetration, actor more than 48 months older and in position of authority over complainant); first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2006) (actor has significant relationship with complainant who is under the age of 16 at the time of sexual penetration), and second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(b) (2006) (complainant 13-to-16-years old at time of sexual contact, actor more than 48 months older and in position of authority over complainant).

Prior to trial, the complaint was amended to add first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2006) (actor having significant relationship with complainant, complainant under the age of 16 at the time of sexual penetration, and sexual abuse involving multiple acts committed over an extended period of time); second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(g) (2006) (actor has significant relationship with complainant who is under the age of 16 at the time of sexual contact); and second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2006) (actor having significant relationship with complainant, complainant under the age of 16 at the time of sexual contact, and sexual abuse involving multiple acts committed over an extended period of time).

On May 12, 2011, shortly before trial was to begin, the state provided notice of intent to prove that appellant committed first-degree criminal sexual conduct against his step-daughter S.A.R. According to the notice, "[Minn. R. Evid.] 404(b) and caselaw make[] this incident relevant to establish [appellant's] common scheme or plan, identity, intent and modus operandi." Appellant objected, moving for the exclusion of all evidence offered under Minn. R. Evid. 404(b) because the evidence was neither relevant nor admissible under the rule; the required notice under Minn. R. Crim. P. 7.03 was not timely given; and the evidence was more prejudicial than probative and therefore inadmissible under Minn. R. Evid. 403. In addition, appellant requested a continuance to review the evidence related to the alleged abuse of S.A.R. The district court found that the evidence was admissible under both *Spreigl* and as relationship evidence under Minn.

Stat. § 634.20 (2006). Appellant's request for a continuance was not specifically addressed by the district court, but no continuance was granted.

The matter proceeded to a jury trial beginning on May 23. At the close of the evidence, the district court ordered the doors to the courtroom to be locked for the duration of the jury instructions. Appellant did not object to the doors being locked, and nobody was removed from the courtroom. The record also does not indicate whether anyone attempted to enter the courtroom after the doors were locked. After deliberations, the jury found appellant guilty on all six counts of criminal sexual conduct. The district court imposed a 144-month sentence for the first-degree-criminal-sexual-conduct conviction in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (actor having significant relationship with complainant, complainant under the age of 16 at the time of sexual penetration, and sexual abuse involving multiple acts committed over an extended period of time). This appeal follows.

D E C I S I O N

I. Evidence of appellant's alleged abuse of S.A.R.

Evidentiary rulings generally rest within the sound discretion of the district court. *State v. Palubicki*, 700 N.W.2d 476, 485 (Minn. 2005); *see also State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996) (discussing *Spreigl* evidence). As such, a reviewing court will not reverse a district court's evidentiary ruling absent a clear abuse of that discretion. *Palubicki*, 700 N.W.2d at 485.

Here, the district court admitted testimony regarding appellant's alleged sexual abuse of his step-daughter, S.A.R. S.A.R. testified that she told her pastor—her uncle

and appellant's brother—that appellant had abused her. She stated that she was later interviewed at CornerHouse about the abuse. According to S.A.R.'s testimony, appellant would touch her "butt" and "front private" with his "dick" when she was six- or seven-years old.

A. Spreigl

Generally, evidence showing that the accused has committed another crime independent of the one for which he is on trial is inadmissible. *State v. Wofford*, 262 Minn. 112, 117, 114 N.W.2d 267, 271 (1962). Evidence of other crimes or misconduct is not admissible if introduced to prove a person's character to show that he acted in conformity with his character. Minn. R. Evid. 404(b). Such evidence is commonly referred to as *Spreigl* evidence. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (citing *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965)).

The admission of *Spreigl* evidence is governed by special procedural rules. Under Minn. R. Evid. 404(b), *Spreigl* evidence is only admissible for such limited purposes as "motive, intent, knowledge, identity, absence of mistake or accident, or a common scheme or plan." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). In order for *Spreigl* evidence to 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 686. Here, appellant challenges the admission of the evidence of the alleged abuse of S.A.R. on all five grounds.

Subject to certain exceptions not applicable here, the state must provide the defendant or defense counsel in writing of any crime, wrong, or act that may be offered at the trial under Minn. R. Evid. 404(b) at or before the Omnibus Hearing "or as soon after that hearing as the other crime, wrong, act, or specific instance of conduct becomes known to the prosecutor." Minn. R. Crim. P. 7.02, subds. 1 (defining notice required), 4(a) (establishing deadline for notice in felony and gross-misdemeanor cases). Here, the Omnibus Hearing was held in mid-March 2011; S.A.R. disclosed the alleged abuse around April 17; and the state was notified that a CornerHouse interview would take place on April 20; the state received police reports and a summary of the CornerHouse interview on May 5. However, the *Spreigl* notice was not filed until May 12, at least a full week after the conduct became known to the state. Appellant argues that as a result of this delay, the district court abused its discretion by admitting the evidence.

The district court noted that notice was submitted after the omnibus hearing, but concluded that "given all the facts and circumstances as [the prosecutor] has acquired herself in terms of the offers of proof, the timing, et cetera, . . . I think it was reasonable under the circumstances." We recognize that the notice was provided the week after the state received the CornerHouse summary, but we agree with the district court that the notice was reasonable under the circumstances. While the better practice would have been to provide the notice earlier, we nonetheless conclude that the notice was sufficient under Minn. R. Crim. P. 7.02, subd. 4(a) (requiring notice "as soon after [the omnibus]

hearing as the other crime, wrong, act, or specific instance of conduct becomes known to the prosecutor").

Second, *Spreigl* evidence requires that the state clearly categorize what the evidence is offered to prove, such as a common plan or scheme. *Ness*, 707 N.W.2d at 686-87. Appellant argues that the evidence of appellant's alleged abuse of S.A.R. is not evidence of a common plan or scheme because the S.A.R. incidents were not markedly similar to his alleged abuse of M.R.Q. But *Spreigl* evidence need not be identical to the charged offense. *Id.* at 688. Here, the alleged abuse of S.A.R. and the abuse of M.R.Q. both involved appellant engaging in inappropriate sexual contact with his stepchildren spanning overlapping time periods. Moreover, appellant denied any sexual contact with M.R.Q., which rendered the incidents involving S.A.R. more relevant than they might have been otherwise. *See State v. Rucker*, 752 N.W.2d 538, 549-50 (Minn. App. 2008) (holding that district court may admit *Spreigl* evidence when defendant denies any sexual conduct occurred if the court is satisfied that the earlier crime is "sufficiently relevant to the charged crime"), *review denied* (Minn. Sept. 23, 2008); *see also State v. Wermerskirchen*, 497 N.W.2d 235, 242 (Minn. 1993) (holding that in cases where corpus delicti is disputed, *Spreigl* evidence may be admitted to disprove the defense that the complainant is fabricating or imagining the occurrence of sexual contact).

Third, *Spreigl* evidence requires clear-and-convincing evidence that the defendant participated in the prior act. *Ness*, 707 N.W.2d at 686. Appellant argues that appellant's involvement in the alleged abuse of S.A.R. was not established by clear-and-convincing evidence because S.A.R.'s allegations were not corroborated, she had not previously

disclosed the alleged abuse during an earlier interview, she had been diagnosed with mental-health problems, and her testimony differed from her statements during the CornerHouse interview on whether penetration had occurred. Appellant's argument to the contrary notwithstanding, S.A.R.'s testimony of the alleged abuse was consistent, complete, and detailed. The testimony therefore constitutes clear-and-convincing evidence that appellant had participated in sexual contact with her. *See Kennedy*, 585 N.W.2d at 389 ("[T]his court has on numerous occasions admitted *Spreigl* evidence supported only by the testimony of the victim in the *Spreigl* offense.").

In determining the relevance and materiality of *Spreigl* evidence, "the [district] court should consider the issues in the case, the reasons and need for the evidence, and whether there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in time, place, or modus operandi." *State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984). Appellant argues that the *Spreigl* evidence was not relevant and material because it did not help to establish a common scheme, plan, identity, intent, or modus operandi. But, just as discussed above, the supreme court has repeatedly upheld the use of *Spreigl* evidence on the issue of whether the alleged abuse occurred when the defense's theory is fabrication. *See, e.g., State v. Shuffler*, 254 N.W.2d 75, 76 (Minn. 1977) (stating that the *Spreigl* evidence "was directly relevant to the jury's resolution of the key factual issue, which was whether defendant had taken indecent liberties with the victim, as she testified, or whether [the testimony was a fabrication] as defendant testified"). Just as in *Shuffler*, the *Spreigl* evidence here was relevant and material to M.R.Q.'s credibility.

Finally, the probative value of *Spreigl* evidence must not be outweighed by its potential for unfair prejudice. *Ness*, 707 N.W.2d at 686. Appellant argues that the testimony of his alleged sexual abuse of S.A.R. was inadmissible "because it was additional evidence of appellant's sexual abuse of a child." But appellant completely denied M.R.Q.'s account of the occurrences and his defense at trial was that the testimony that the assaults occurred lacked credibility. Testimony from S.A.R. that appellant had also sexually assaulted her was relevant to M.R.Q.'s credibility, and the testimony therefore had significant probative value.

Appellant also argues that the alleged wrongfully admitted *Spreigl* evidence affected the verdict, thus entitling him to a new trial. *See State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009) ("To warrant a new trial, the erroneous admission of *Spreigl* evidence must create a reasonable possibility that the wrongfully admitted evidence affected the verdict." (quotation omitted)). Before S.A.R. testified, the jury was told that the evidence about acts involving S.A.R. was "being offered for the limited purpose of assisting [it] in determining whether [appellant] committed those acts with which [he was] charged," and the jury was "not to convict [appellant] on the basis of occurrances described by [S.A.R.]." This instruction was reiterated at the end of the trial, when the jury was told "not to convict [appellant] on the basis of occurrences regarding [S.A.R.]" Jurors are presumed to follow a district court's instructions. *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998). Having twice been instructed that appellant was not to be convicted on the basis of the *Spreigl* testimony, the jury was unlikely to use the testimony in an improper manner. The district court therefore did not abuse its discretion in

allowing the evidence of appellant's alleged abuse of S.A.R. as *Spreigl* evidence. *See Spaeth*, 552 N.W.2d at 193 (Minn. 1996) (stating that admission of *Spreigl* evidence is reviewed for abuse of discretion).

B. Relationship evidence

The district court also admitted the evidence as relationship evidence. The legislature has provided that:

> Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Minn. Stat. § 634.20 (2006). "Domestic abuse," as it is used in the statute, includes "criminal sexual conduct, within the meaning of section 609.342, 609.343, 609.344, 609.345, or 609.3451." Minn. Stat. § 518B.01, subd. 2(a)(3) (2006) (defining "domestic abuse"); *see also* Minn. Stat. § 634.20 (incorporating Domestic Abuse Act's definitions).

"[T]he stringent procedural requirements of rule 404(b) do not apply to section 634.20 evidence." *State v. Meyer*, 749 N.W.2d 844, 849 (Minn. App. 2008). The state is not required to provide notice of the evidence nor required to prove the evidence by clear-and-convincing evidence. *Id.* Evidence is admissible under Minn. Stat. § 634.20 so long as "(1) it is similar conduct by the accused, (2) it is perpetuated against the victim of domestic abuse or against another family or household member, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Id.* When balancing probative value against potential prejudice, unfair prejudice "is not

merely damaging evidence . . . ; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

As discussed above, when reviewing the admissibility of the evidence under Minn. R. Evid. 404(b), appellant's alleged abuse of S.A.R. is similar to his abuse of M.R.Q. Because S.A.R. is a family or household member, the second element of admissibility is satisfied. And the probative value of the evidence is not outweighed by the danger of unfair prejudice. Even if the evidence were not admissible under *Spreigl*, therefore, it was admissible under Minn. Stat. § 634.20, and the district court did not abuse its discretion in admitting the evidence.

II. Continuance

After receiving the *Spreigl* notice, appellant requested a continuance "to allow time for the defense to review [the *Spreigl*] materials and to make such preparations for trial as necessary based upon review and analysis of such material." In light of the *Spreigl* notice, appellant served a subpoena requesting child-protection records, resulting in the receipt of approximately 600 pages of documents. The district court held an in-camera review of the documents, and defense counsel asked for "at least some time to consider" the materials. The materials were delivered to the district court in the afternoon of May 24, 2011. The district court reviewed the documents and disclosed a packet of child-protection documents to the parties, which the court estimated would take about 2.5 hours to read. The district court then stated that "it's the Court's opinion that [defense counsel has] had sufficient time to review all the records that were disclosed to

him and to all potentially exculpatory evidence and . . . he's prepared to cross examine [M.R.Q.] and or S.A.R. on these issues," effectively denying appellant's motion for a continuance.

"The decision to grant a continuance is vested in the sound discretion of the [district] court." *State v. Miller*, 488 N.W.2d 235, 239 (Minn. 1992). On review of a denial of a continuance request, an appellate court must examine "the circumstances surrounding the requested continuance and whether the denial was so prejudicial in the preparation of an adequate defense as to materially affect the outcome of the trial." *Id.* (quotation omitted). "A defendant must show prejudice to justify reversal." *State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987).

In *Rainer*, the supreme court held that a defendant failed to establish an abuse of discretion for denying a continuance motion when he received a report thirteen days before trial and argued that he did not have time to review the evidence because he was busy with a pre-trial *Spreigl* hearing and trial preparation. *Id.* *Rainer* compels a similar result here. Appellant received notice of the *Spreigl* evidence on May 12. The venire panel was sworn on May 23. The jury was sworn and the state gave its opening statement on May 27. That same day, the district court disclosed evidence it had reviewed in-camera obtained by way of appellant's subpoena. On May 31 the court ruled that the evidence regarding the alleged abuse of S.A.R. was admissible, and S.A.R. testified about the alleged abuse on June 1. Appellant's counsel received the *Spreigl* notice eleven days before jury selection began, fifteen days before opening statements, and twenty days before S.A.R.'s testimony. This is more time than the "impossibly tight"

time schedule in which the supreme court has granted reversal for denial of a continuance. *See Rainer*, 411 N.W.2d at 495 (discussing *In re Welfare of T.D.F.*, 258 N.W.2d 774, 775 (Minn. 1977).

While the better practice may have been to grant appellant's request for a continuance to review the evidence, especially given the absence of any prejudice to the government, we cannot say on this record that the district court abused its discretion in denying the continuance.

III. Courtroom closure

After closing argument, the district court ordered that the doors to the courtroom were to be locked: "We'll now cause the courtroom doors to be locked, which is a tradition of long standing. Anyone wishing to leave the courtroom now before the Court delivers the instructions is welcome to do so." Appellant argues that by doing so, the district court violated his Sixth Amendment right to a public trial, and reversal is therefore required.

The Sixth Amendment protects an accused's right to an open, public trial. U.S. Const. amend VI; *see also* Minn. Const. art. I, § 6 (same); *Waller v. Georgia*, 467 U.S. 39, 44-50, 104 S. Ct. 2210, 2214-17 (1984) (considering extent of right to public trial).

> [T]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

State v. Mahkuk, 736 N.W.2d 675, 684 (Minn. 2007) (quoting *Waller*, 467 U.S. at 46, 104 S. Ct. at 2215 (quotation omitted)).

Before closing the courtroom to the public, a district court must apply the four-part test articulated in *Waller*. *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009). Under this test, a courtroom closure may be justified only if (1) "the party seeking to close the hearing . . . advance[s] an overriding interest that is likely to be prejudiced"; (2) the closure is "no broader than necessary to protect that interest"; (3) the district court considers "reasonable alternatives to closing the proceeding"; and (4) the district court makes "findings adequate to support the closure." *State v. Fageroos*, 531 N.W.2d 199, 201-03 (Minn. 1995) (quotation omitted) (applying *Waller* test).

An appellate court considers de novo whether a defendant's right to a public trial has been violated. *Bobo*, 770 N.W.2d at 139. "The threshold question in analyzing whether a criminal defendant has been deprived of the right to a public trial is [therefore] whether there has been a 'closure' of the courtroom." *State v. Cross*, 771 N.W.2d 879, 882 (Minn. App. 2009).

While this appeal was pending, the supreme court addressed this exact question in *State v. Brown*, 815 N.W.2d 609 (Minn. 2012). In *Brown*, while the district court locked the courtroom doors during the jury instructions, the courtroom was not cleared of spectators and the district court told the people in the courtroom that they were "welcome to stay." 815 N.W.2d at 617-18. "The trial remained open to the public and press already in the courtroom and the [district] court never ordered the removal of any member of the public, the press, or the defendant's family." *Id.* at 618. Based on these facts and that the jury instructions did not comprise a proportionately large portion of the

trial proceedings, the supreme court held that the district court's actions did not implicate the defendant's Sixth Amendment public-trial right. *Id.*

The supreme court's holding in *Brown* compels a similar result here. *See State v. Allinder*, 746 N.W.2d 923, 925 (Minn. App. 2008) (stating this court is bound to follow supreme court precedent). Just as in *Brown*, the district court locked the courtroom doors after closing argument for the duration of the jury instructions without making any of the *Waller* findings. While the district court did not explicitly state that trial spectators were welcome to remain in the courtroom, its statement indicates that the only persons not welcome to stay were those "wishing to leave . . . before the Court deliver[ed] the instructions." Furthermore, nobody was actually removed from the courtroom. And the jury instructions did not comprise a large portion of the trial proceedings. Accordingly, under the precedent established by the supreme court in *Brown*, the district court's actions did not implicate appellant's Sixth Amendment right to a public trial, and analysis of the *Waller* factors is therefore unnecessary. *See Cross*, 771 N.W.2d at 883 (concluding that "the district court's finding that no one was excluded from the courtroom obviated the need for a *Waller* analysis").

We are nonetheless compelled to again echo the sentiment expressed by the supreme court that while locking the doors to a courtroom without any findings justifying such a closure may in some narrow fashion survive a challenge under a criminal defendant's Sixth Amendment right to a public trial, "the better practice is for the [district] court to expressly state on the record why the court is locking the courtroom doors." *Brown*, 815 N.W.2d at 618. We recognize that the district court here did not

have the benefit of the supreme court's recommendation in *Brown*, but we are confident that future district courts will follow the supreme court's clear guidance and provide an explanation justifying its actions when locking doors to a courtroom anytime during a trial, as required under *Waller* and its progeny. The amorphous concept of "tradition" is insufficient to justify a courtroom closure.

IV. Issues raised in appellant's pro se supplemental brief

Appellant's pro se supplemental brief also raises a number of challenges—specifically challenging the sufficiency of the evidence and arguing that the district court limited certain testimony. Neither is availing.

Appellant's primary argument is that the evidence is insufficient. When considering a sufficiency-of-the-evidence argument, an appellate court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in [the] light most favorable to the conviction, [is] sufficient" to sustain the jury's verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). An appellate court "must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude the defendant was guilty of the offense charged." *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). Appellant's argument is, in essence, that the state's witnesses were not credible and someone else committed the acts of which appellant was charged and convicted. But a witness's credibility is not for this court to consider on appeal. *State v. Garrett*, 479 N.W.2d 745, 747 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992). Appellant's argument on the sufficiency of the evidence is therefore without merit.

Appellant also appears to argue that the district court impermissibly limited certain questioning. But appellant does not cite to the record or provide any legal analysis to support the argument, and it is therefore not properly before this court and we do not consider it. *See State v. Tomassoni*, 778 N.W.2d 327, 335 (Minn. 2010) (declining to consider pro se claims on appeal that are not supported by argument or citation to legal authority).

Affirmed.