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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0608**

State of Minnesota,
Respondent,

vs.

Joseph Gassoway,
Appellant.

**Filed May 12, 2014
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-12-22947

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that the district court erred by admitting unfairly prejudicial *Spreigl* evidence. We affirm.

FACTS

Nine-year-old T.J. lived with her grandmother, R.D., and three siblings in an apartment in Bloomington. Her grandmother's good friend, F.H., and F.H.'s boyfriend, appellant Joseph Gassoway, lived across the hallway. When T.J.'s grandmother had to work nights, T.J. and her siblings would stay at F.H.'s apartment, together with some of F.H.'s grandchildren.

In January 2012, R.D. took T.J. to the doctor for a possible bladder infection and because T.J. told her that Gassoway had sexually assaulted her during the past summer. Because the alleged assault had occurred months before T.J. saw the doctor, no sexual assault exam was performed and no evidence was collected, although the doctor testified that he observed a "healed abrasion or a healed scar" next to T.J.'s labia. T.J. was also interviewed by Bloomington police and by a social worker at Cornerhouse.

During the Cornerhouse interview, T.J. told the examiner that Gassoway had penetrated her vagina with his penis. T.J. said that both she and Gassoway were naked, they were in her room, and it hurt. At trial, T.J. added more details and changed some details. She could not remember the names of F.H.'s grandchildren. She stated that the

assault took place at F.H.'s apartment, in the bedroom, while F.H. and the other children were in the front room. T.J. was not an articulate witness, both during the Cornerhouse interview and at trial.

The state moved for admission of *Spreigl* evidence.¹ The evidence consisted of two separate incidents involving F.H.'s granddaughter, E.D., which occurred after the charged incident. E.D., who was eight or nine years old, was at her grandmother's apartment when Gassoway led her into a bedroom and lay down on top of her, moving back and forth. Both E.D. and Gassoway were fully clothed. Gassoway said to E.D. that he wanted to show her what "[he] and grannie do," and told her not to tell anyone. On another occasion, Gassoway was in the kitchen with E.D. He acted as though he was trying to reach something on top of the refrigerator and kept bumping against E.D. with "[h]is privates." Then he took E.D.'s hand and placed it on his penis through his clothing.

After Gassoway's attorney objected to the *Spreigl* evidence, arguing that it was too prejudicial and the incidents were too dissimilar, the district court took the state's motion under advisement. The district court gave a preliminary ruling the next day that the testimony would be admissible, although it deferred a final ruling until after T.J. testified. After T.J.'s testimony, the district court ruled that E.D.'s testimony would be admissible, and E.D. was permitted to testify.

¹ *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965) (permitting admission of evidence of other bad acts for limited purposes). The *Spreigl* holding is now codified in Minn. R. Evid. 404.

The jury convicted Gassoway of first-degree criminal sexual conduct. This appeal followed.

DECISION

We review the district court's admission of evidence, including *Spreigl* evidence, for an abuse of discretion. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). The opponent of the *Spreigl* evidence bears the burden of showing both an abuse of discretion and prejudice because of it. *Id.*

Generally, evidence of a defendant's prior bad acts, or *Spreigl* evidence, is not admissible to show a defendant's character or that he acted in conformity with his character. Minn. R. Evid. 404(a). But such evidence may be admissible for the limited purpose of showing "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). *Spreigl* evidence is not admissible to show a defendant's propensity to commit a particular crime or that he deserves to be punished. *Ness*, 707 N.W.2d at 685.

Before a court admits *Spreigl* evidence, it must consider whether the following five steps have been taken: (1) the state must give notice of its intent to offer the evidence; (2) the state must indicate the purpose for offering the evidence; (3) the evidence of the prior act must be clear and convincing; (4) the evidence must be relevant and material to the state's case; and (5) the court must weigh the probative value of the evidence against its potentially prejudicial effect. *Id.* at 686. The court "must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *Id.* (quotation omitted). If the evidence is used to demonstrate a common scheme or plan, the conduct

of the *Spreigl* act and the charged act must be substantially similar. *Id.* at 688; *see also State v. Wermerskirchen*, 497 N.W.2d 235, 241-42 (Minn. 1993) (stating that similarity of conduct tends to disprove that the victim fabricated or imagined the occurrence of sexual contact).

Here, the district court carefully went through all five steps of the analysis in its preliminary ruling. The court found that the purpose of using the *Spreigl* evidence was to show a common scheme or plan to refute allegations of fabrication or mistake, and that the *Spreigl* conduct was markedly similar to the charged offense, because Gassoway had access to both victims through his girlfriend, the girls were of similar age, and the location was the same. The district court identified the precise disputed fact as whether or not the sexual conduct took place, a fact that depended on the credibility of the victim, complicated by “secrecy, vulnerability, [and] lack of physical proof.” The district court also concluded that the probative value of the *Spreigl* testimony outweighed its potential for unfair prejudice. The district court revisited its ruling after T.J.’s testimony and came to the same conclusion, stating that, although the jury could find T.J. credible, “she clearly has some deficiencies, including, for example, that she cannot spell her last name and cannot recall the name of the school that she goes to.”

Finally, the district court gave cautionary instructions before the evidence was introduced and instructed the jury again before deliberations that E.D.’s testimony was offered for a limited purpose. *See State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008) (stating that “a cautionary instruction lessens the probability of undue weight being given

by the jury to the evidence” and holding that “any potential unfair prejudice was mitigated by the cautionary instructions”) (quotation and citation omitted).

Given the district court’s thoughtful analysis, clear identification of purpose, and the similarity between the offenses, the district court did not abuse its discretion by admitting the *Spreigl* evidence.

Affirmed.