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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0598**

State of Minnesota,
Respondent,

vs.

Reginald Oranz Calhoun,
Appellant.

**Filed March 6, 2017
Affirmed in part, reversed in part, and remanded
Kirk, Judge**

Hennepin County District Court
File No. 27-CR-15-15651

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Reilly, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

KIRK, Judge

A jury found appellant guilty of attempted third-degree criminal sexual conduct, fourth-degree criminal sexual conduct, and fifth-degree criminal sexual conduct.

Appellant requests a new trial, arguing that the district court erred by: (1) denying his two *Batson* challenges; (2) allowing the state to present impeachment evidence; and (3) allowing the state to present rebuttal evidence. Appellant also asks this court to correct his sentence because the district court erred by entering multiple convictions and by imposing a lifetime term of conditional release. Because the district court did not err in its trial rulings, but did err at sentencing, we affirm in part, reverse in part, and remand.

FACTS

On October 27, 2015, appellant Reginald Oranz Calhoun was charged with attempted third-degree criminal sexual conduct by force or coercion, fourth-degree criminal sexual conduct by force or coercion, and fifth-degree criminal sexual conduct—nonconsensual sexual contact, alleged to have occurred on June 10. The state moved to impeach appellant with four of his prior felony convictions if he testified at trial. Appellant opposed the motion.

A jury was impaneled. Following voir dire, appellant raised *Batson* challenges in response to two of the state's peremptory strikes. The district court allowed the state to strike both jurors. Appellant testified at the three-day trial, and the district court allowed the state to use two of appellant's prior felony convictions to impeach him. Appellant testified that he had a previous sexual encounter with the victim in 2014. In response, the state presented rebuttal evidence over appellant's objection. The jury found appellant guilty of all three counts.

The district court entered convictions on all three counts and sentenced appellant to 90 months in prison and a lifetime term of conditional release on the attempted third-degree-criminal-sexual-conduct conviction.

This appeal follows.

D E C I S I O N

I. The district court did not err in denying appellant’s *Batson* challenges.

When analyzing a *Batson* challenge, the district court applies a three-part test: (1) “the opponent of a peremptory challenge [must make] out a prima facie case of racial discrimination”; (2) “the proponent of the strike [must] come forward with a race-neutral explanation” for the peremptory challenge; and (3) the district court must then decide “whether the opponent of the strike has proved purposeful racial discrimination.” *State v. Reiners*, 664 N.W.2d 826, 830 (Minn. 2003) (quoting *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 1770-71 (1995)); see also *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). The district court is in “the unique position . . . to determine, based on all relevant factors, whether the circumstances of the case raise an inference that the challenge was based upon race.” *State v. White*, 684 N.W.2d 500, 506 (Minn. 2004). Appellate courts give deference to the district court’s rulings on *Batson* challenges, recognizing that the record on appeal may not accurately reflect all of the relevant circumstances that may properly be considered. *Id.* If a peremptory strike is determined to have been racially motivated, the appellant is entitled to a new trial. *State v. Greenleaf*, 591 N.W.2d 488, 500-01 (Minn. 1999).

“[U]pon review of a district court’s determination under step one of the *Batson* process[,] that a prima facie showing of discrimination has not been established, we will reverse only in the face of clear error.” *White*, 684 N.W.2d at 507. The mere fact that a member of a jury panel is a racial minority does not establish a prima facie case of discrimination. *Angus v. State*, 695 N.W.2d 109, 117 (Minn. 2005). “Whether the circumstances of the case raise an inference of discrimination depends in part on the races of the defendant and the victim.” *Id.* A district court’s determination of the genuineness of the prosecutor’s response to a peremptory challenge is entitled to great deference on review. *State v. James*, 520 N.W.2d 399, 404 (Minn. 1994). Appellate courts give “considerable deference” to the district court’s findings because whether a peremptory challenge was motivated by prohibited discriminatory intent is an issue that typically requires an evaluation of the prosecutor’s credibility. *State v. Johnson*, 616 N.W.2d 720, 725 (Minn. 2000); *James*, 520 N.W.2d at 403-04. Appellate courts must determine whether the district court “abused its considerable discretion” in determining that a “prosecutor did not engage in purposeful discrimination.” *Johnson*, 616 N.W.2d at 725.

A. The district court did not err in denying appellant’s *Batson* challenge to the state’s peremptory strike of juror W.F.

W.F., an African-American male, noted on his juror questionnaire that he believes the Hennepin County jury system is unfair, but that he does not know why he holds that belief. W.F. was first questioned separately from the rest of the panel and he stated that two years ago, he was falsely accused of theft from a drug store, and that he was searched by an employee. W.F. said that law enforcement was not involved and that this was not

the first time that he had been falsely accused of something. W.F. stated that he could be a fair and impartial juror.

When W.F. was later questioned with the rest of the panel, he stated that he does not believe that the criminal justice system is fair because people are prosecuted differently based on their background and religion. He stated that whether African-Americans are treated fairly “depends on the situation.” W.F. also said that he believed he could judge a case without regard to the defendant’s race, but that he was not sure other people could and that “everything isn’t equal even though at times they try to make it seem like it is.”

The prosecutor exercised one of his peremptory strikes to remove W.F. from the jury panel. Appellant’s counsel made a *Batson* challenge, asserting that the prosecutor struck W.F. from the panel based on W.F.’s race. The district court concluded that because W.F. was potentially the only African-American who would be seated on the jury, appellant had made a prima facie showing that the strike was discriminatory. The prosecutor gave a race-neutral explanation for the strike, stating that W.F. had expressed concerns that the criminal justice system is unfair and that African-Americans were treated unfairly, but he could not explain why he had those concerns. The district court accepted the prosecutor’s explanation as race-neutral. Appellant’s counsel then asserted that the prosecutor’s explanation was pretextual because other white panelists, specifically K.A., had expressed similar concerns. The prosecutor noted that W.F.’s responses were more evasive than those of other jurors, including K.A., who was able to articulate her concerns about the fairness of the criminal justice system. The district court agreed with the

prosecutor and concluded that his race-neutral explanation was not pretextual. W.F. was struck from the jury.

On appeal, appellant argues that the prosecutor's peremptory strike of W.F. was racially motivated, and he asks this court to order a new trial. Appellant asserts that the prosecutor's race-neutral explanation for striking W.F. was pretextual and evidenced implicit bias. The state argues that the district court erred when it concluded that appellant's counsel made a prima facie case of racial discrimination regarding the strike. The state asserts that appellant's counsel failed to prove purposeful racial discrimination in the prosecutor's strike of W.F. The state notes that Minnesota law does not require an analysis of possible implicit bias on the part of the prosecutor in a *Batson* challenge. *State v. Martin*, 773 N.W.2d 89, 102-03 (Minn. 2009) ("Our case law under *Batson* is well established We see no reason to extend existing law to include 'implicit bias.'").

When a stricken juror is the only member of a racial group on a jury panel, that fact is sufficient to establish a prima facie case that the juror was struck on the basis of his race. *See State v. Moore*, 438 N.W.2d 101, 107 (Minn. 1989) (The "inference of discrimination can be drawn by proof of disproportionate impact upon the racial group," such as the total exclusion of that racial group from the jury). Here, because W.F. was the only African-American on the jury panel, the district court did not err in finding that appellant's counsel established a prima facie case of racial discrimination.

In support of his claim that W.F. was stricken from the jury due to race, appellant argues that the only difference between W.F. and K.A. was race. But K.A. did not state that she had ever been falsely accused of criminal activity, and the district court found that

W.F.'s responses to follow-up questions were evasive, while K.A.'s were not. The district court's finding of the prosecutor's explanation as race-neutral was not clear error. See *James*, 520 N.W.2d at 404.

The district court also implicitly found that the prosecutor's race-neutral explanation for striking W.F. was credible when it noted that it had made similar observations of W.F.'s evasiveness. We give great deference to the district court's conclusion that a peremptory strike was not motivated by discriminatory intent, and there is no evidence that the court abused its discretion when it found the prosecutor's explanation to be credible. *Johnson*, 616 N.W.2d at 725; *James*, 520 N.W.2d at 403-04. Additionally, as noted above, neither the district court nor this court is required to attempt to analyze whether the prosecutor acted out of implicit bias when he struck W.F. *Martin*, 773 N.W.2d at 102-03. The district court's determination that the strike of W.F. was not discriminatory was not erroneous, and appellant is not entitled to a new trial. *Greenleaf*, 591 N.W.2d at 500-01.

B. The district court did not err in denying appellant's *Batson* challenge to the state's peremptory strike of juror H.X.

H.X., an Asian-American male, was first questioned separately from the rest of the panel. H.X. stated that his brother was falsely accused of shooting and killing his cousin, and he spent two years in jail waiting for trial. This was very hard on H.X.'s family and all of his cousins now "hate" his side of the family. H.X. stated that he could be a fair and impartial juror. When H.X. was questioned further with the rest of the panel, he again indicated that his brother's prosecution created tension in his family. H.X.'s brother was

prosecuted by the Hennepin County Attorney's Office in 2003 or 2004. H.X. again stated that he believed he could be a fair and impartial juror.

The prosecutor exercised one of his peremptory strikes to remove H.X. from the jury panel. Appellant's counsel made a *Batson* challenge, asserting that H.X. was stricken from the panel based on his race. The district court concluded appellant had made a prima facie showing that the strike was discriminatory because H.X. is a racial minority. As a race-neutral explanation for the strike, the prosecutor stated that H.X. was biased against the state based on his brother's prosecution by the Hennepin County Attorney's Office and his two-year pretrial incarceration. The district court accepted the prosecutor's explanation as race-neutral. Appellant's counsel then asserted that the prosecutor's explanation was pretextual. But the district court rejected this argument, citing H.X.'s demeanor and emotion regarding the effect that his brother's prosecution had upon his family as supporting the conclusion that the prosecutor's explanation was not pretextual. H.X. was struck from the jury.

On appeal, appellant argues that the prosecutor's peremptory strike of H.X. was racially motivated and he asks this court to order a new trial. Appellant asserts that the prosecutor's race-neutral explanation for striking H.X. was pretextual and evidenced implicit bias. Appellant also argues that H.X. was not the only panelist who expressed concerns about fairness in the criminal justice system. Appellant notes that his case did not include allegations of racism by law enforcement.

The state argues that appellant's counsel failed to prove purposeful racial discrimination in the prosecutor's strike of H.X., and that an analysis of possible implicit

bias on the part of the prosecutor is not required. Additionally, the prosecutor's concern was that H.X.'s perceived bias was directed against the Hennepin County Attorney's Office for its prosecution of his brother, not against law enforcement.

Appellant's focus on H.X.'s comments about unfairness in the criminal justice system does not address the race-neutral explanation tendered by the prosecutor that was accepted by the district court. H.X. became emotional when discussing his brother's prosecution and the prosecutor believed H.X. harbored bias against the state. The district court agreed that H.X. was still emotionally affected by what had occurred to his brother and its continuing impact on his family. The district court's acceptance of the prosecutor's race-neutral explanation was not clear error. *See Johnson*, 616 N.W.2d at 725; *James*, 520 N.W.2d at 403-04. Additionally, as noted above, neither the district court nor this court is required to attempt to analyze whether the prosecutor acted out of implicit bias. *Martin*, 773 N.W.2d at 102-03. The district court did not err in determining that the prosecutor's strike of H.X. was not discriminatory.

Although the district court's analysis of steps two and three under *Batson* are sound, we note that the analysis was not necessary because H.X.'s race alone was insufficient to establish a prima facie case of discrimination. Neither appellant nor the victim in this case, who is Latina, were of the same race as H.X., and the only support appellant offered to establish a prima facie case of discrimination was that H.X. was the only person of color on the panel. As noted above, the fact that a member of the jury panel is a racial minority does not establish a prima facie case of discrimination absent additional circumstances

supporting an inference of discrimination. *Angus*, 695 N.W.2d at 117. Accordingly, we conclude that appellant is not entitled to a new trial. *Greenleaf*, 591 N.W.2d at 500-01.

II. The district court did not err in allowing the state to impeach appellant with his prior felony convictions.

A district court's ruling on the impeachment of a witness by prior conviction is reviewed, as are other evidentiary rulings, under an abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). The state may impeach a defendant testifying in his own defense with evidence of a prior felony conviction if no more than ten years have elapsed since the date of conviction or since the defendant was released from confinement for that conviction, and if the district court determines that the probative value of admitting the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1), (b); *State v. Zornes*, 831 N.W.2d 609, 626-27 (Minn. 2013) (citing Minn. R. Evid. 609(a)(1), (b)).

Whether the probative value of a prior conviction outweighs its prejudicial effect is a matter left to the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985). "Five factors guide the exercise of a district court's discretion under Rule 609(a)." *State v. Hill*, 801 N.W.2d 646, 653 (Minn. 2011) (citing *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)). These factors are:

(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

Jones, 271 N.W.2d at 538.

Prior convictions derive their impeachment value from their ability to assist the jury in seeing the “whole person” and in evaluating his testimony for truthfulness. *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). “[T]he mere fact that a witness is a convicted felon holds impeachment value.” *Hill*, 801 N.W.2d at 652. Courts review the date of conviction and the defendant’s subsequent history in order to determine whether the prior convictions have lost relevance over time. *State v. Vanhouse*, 634 N.W.2d 715, 719 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). However, “[c]onvictions that have occurred within the ten-year period are presumptively not stale.” *State v. Williams*, 757 N.W.2d 504, 509 (Minn. App. 2008), *aff’d*, 771 N.W.2d 514 (Minn. 2009).

“[I]f a prior conviction is similar to the crime a defendant is charged with, then the prejudicial effect of admitting the prior conviction increases.” *Zornes*, 831 N.W.2d at 627. “The danger when the past crime is similar to the charged crime is that the likelihood is increased that the jury will use the evidence substantively rather than merely for impeachment purposes.” *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980).

“If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions.” *Swanson*, 707 N.W.2d at 655. There may be a greater need for the admission of impeachment evidence in situations that require the jury to decide the narrow issue of the defendant’s credibility versus the credibility of one other person. *Bettin*, 295 N.W.2d at 546.

Appellant opposed the state’s motion for a court order allowing it to impeach him with four of his felony convictions if he chose to testify at trial. After reviewing the parties’

arguments, the district court analyzed the *Jones* factors and concluded that the first two *Jones* factors favored admission of appellant's prior felony convictions because it was important that appellant's "whole person" be presented to the jury, and that the convictions, which had occurred within 10 years, had impeachment value. The court also concluded that the third *Jones* factor favored admission because all four convictions were for offenses dissimilar to the current criminal-sexual-conduct charges. The court noted that the fourth and fifth *Jones* factors also favored admissibility because credibility was a central issue in this case.

The district court went on to note its concern about the cumulative prejudicial effect that all four convictions could have on the jury. It concluded that it would allow the state to impeach appellant with two of his four convictions. The court allowed appellant's second (third-degree sale of a controlled substance) and third (simple robbery) convictions to be presented to the jury. The district court noted that it was "balancing between the right of the [s]tate to present the whole person" and "the potential chilling effect on testimony that would arise from allowing all four convictions to be admitted." Appellant testified at trial and answered questions about his convictions during direct- and cross-examination.

Appellant argues that when the district court balanced the state's right to present the whole person against the potential chilling effect on appellant's testimony from admission of all four convictions, it departed from consideration of all of the *Jones* factors and it failed to properly evaluate each conviction's admissibility. The state asserts that the district court properly applied the *Jones* factors and it did not abuse its discretion.

The record reflects that the district court first determined that each conviction was admissible under *Jones* before it concluded that the cumulative effect of all four convictions could be prejudicial. This was not an abuse of discretion. See *Ihnot*, 575 N.W.2d at 584.

III. The district court did not err in allowing the state to present rebuttal testimony regarding whether the victim had a large tattoo on her back.

“Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). “The prosecutor may rebut the defense evidence.” Minn. R. Crim. P. 26.03, subd. 12(g). “In general, rebuttal evidence consists of that which explains, contradicts, or refutes the defendant’s evidence.” *State v. Swaney*, 787 N.W.2d 541, 563 (Minn. 2010) (quotation omitted). “The determination of what constitutes proper rebuttal evidence rests almost wholly in the discretion of the trial court.” *State v. Williams*, 586 N.W.2d 123, 126 (Minn. 1998) (quotation omitted).

Appellant testified that he had a consensual sexual encounter with the victim in 2014, about a year before the sexual assault. Appellant claimed that he saw the victim naked, that her “ab area wasn’t great,” that she did not have any distinguishing marks on her body, and that he did not recall her having any tattoos. He testified that, during his 2014 encounter with the victim, she was nude while she took a shower, but that he did not notice any tattoos and that she “may have been wearing a shirt.” Appellant then testified

that she was wearing at least a shirt in order “to cover [her] ab area that she maybe wasn’t too proud of.”

After the defense rested, the district court allowed the state to recall the victim as a rebuttal witness over appellant’s objection. The victim reiterated her previous testimony, stating that she had not met appellant before the night of the assault. The victim also testified that she has four tattoos on her back and shoulders, and that one of them is a large tattoo of Jesus that is located about one-third of the way down her back. A photograph of the tattoo was admitted into evidence. The victim testified that she got the large tattoo in 2008.

After the victim testified, appellant’s counsel made a record related to the objection, asserting that: (1) the rebuttal evidence was not relevant because appellant testified that he did not know whether the victim had a tattoo, but he did not deny that she had one; (2) the state committed discovery violations when it contacted the victim without disclosing a summary of that contact and any photographs taken to appellant’s counsel; and (3) the state committed a *Brady* violation by failing to disclose the contact and the photographs of the victim’s tattoos. The state argued that the information regarding the victim’s tattoos was impeachment evidence, not exculpatory evidence, and it was not required to be disclosed prior to trial. The district court did not alter its ruling admitting the rebuttal evidence. Later, appellant’s counsel renewed her objection to the admission of the rebuttal evidence in a motion to dismiss or for the court to declare a mistrial. The district court denied appellant’s motions.

Appellant asserts that the district court abused its discretion when it allowed the state to present its rebuttal evidence and requests a new trial.¹ Appellant argues that because he never admitted that he had ever seen the victim's back or claim that she did not have a tattoo on her back, the victim's rebuttal testimony did not directly refute his claims and should not have been admitted. Appellant characterizes his alleged 2014 sexual encounter with the victim as a "brief sexual encounter" that did not "involve an examination of [her] physical features, especially on [her] back."

The state points out that appellant initially testified that during his encounter with the victim in 2014, she showered and then they had sex and that he did not recall her having any distinguishing marks or tattoos on her body. The state also notes that, during cross-examination, appellant changed his testimony to assert that he had not seen the victim naked and that she may have partially redressed after her shower and before they had sex. This testimony appears to be inconsistent because appellant initially testified that the victim's "ab area" was not great, but he later claimed that he had never seen her shirtless.

Rebuttal evidence may be admitted to show that the defense's version of events is untrue. *See, e.g., Williams*, 586 N.W.2d at 127. At trial, appellant claimed he had a lengthy and intimate sexual encounter with the victim in 2014, despite the victim's testimony that she met appellant for the first time on the night of the sexual assault in 2015. Based on this conflicting testimony, as well as inconsistencies in appellant's testimony, the district court

¹ Appellant noted in his appellate brief that at trial he made a motion for a mistrial because the state failed to disclose its rebuttal evidence prior to trial. Appellant does not present any legal argument or analysis related to this issue on appeal, and it is not properly before the panel. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002).

did not abuse its discretion in allowing the state to present its rebuttal evidence, and appellant is not entitled to a new trial. *Amos*, 658 N.W.2d at 203.

IV. The district court erred in sentencing appellant.

The jury found appellant guilty of all three counts. The district court also entered convictions on all three counts. At sentencing, the parties agreed that appellant should only be sentenced on one count. The prosecutor argued that appellant should be sentenced on the fourth-degree criminal-sexual-conduct conviction, asserting that this conviction was the most severe offense appellant was convicted of because it was a completed offense rather than an attempt. Appellant argued that the district court was required to sentence on the attempted third-degree criminal-sexual-conduct conviction because it carried the highest severity level. In choosing to impose sentence on the third-degree criminal-sexual-conduct conviction, the district court noted that appellant would have a shorter prison sentence, but he would be subject to a lifetime term of conditional release. The district court sentenced appellant to 90 months in prison and a lifetime term of conditional release, and the court did not sentence appellant on any other count.

A. The district court erred when it entered convictions on all three counts.

Minn. Stat. § 609.04, subd. 1 (2014), provides that a person “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1(4), defines “[a]n included offense” as “[a] crime necessarily proved if the crime charged were proved.” Additionally, “[w]hen the defendant is convicted on more than one charge for the same act the court is to adjudicate formally and impose sentence on one count only.” *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (alterations omitted) (quotation

omitted); *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). Whether the district court erred by formally adjudicating multiple convictions is a question of law, which this court reviews de novo. See *State v. Ferguson*, 729 N.W.2d 604, 618 (Minn. App. 2007), review denied (Minn. June 19, 2007).

Appellant argues that the fourth-degree criminal-sexual-conduct conviction and the fifth-degree criminal-sexual-conduct conviction, are lesser-included offenses to attempted third-degree criminal sexual conduct. Appellant asserts that because those counts are lesser-included offenses, the district court erred when it entered convictions on those two offenses. Appellant asks this court to vacate those convictions. The state argues that all three counts stem from the same behavioral incident and that the district court should only have entered a conviction on one of the three counts. The state asks this court to remand to the district court to vacate whichever two counts the court does not intend to sentence on.

The parties correctly note that the district court erred when it entered conviction on all three counts. Minn. Stat. § 609.04, subd. 1; *Spann*, 740 N.W.2d at 573. It is not necessary here to determine whether any of these offenses are lesser-included offenses because all three stem from the same act and the district court should therefore have only entered conviction on one count. *Spann*, 740 N.W.2d at 573. We remand to the district court so the adjudications of guilt, but not the jury's findings of guilt, can be vacated on two of the three counts. *LaTourelle*, 343 N.W.2d at 284.

B. The district court erred when it sentenced appellant to a lifetime term of conditional release on the attempted third-degree criminal-sexual-conduct conviction.

“Interpreting a sentencing statute is a question of law, which we review de novo.” *State v. Noggle*, 881 N.W.2d 545, 547 (Minn. 2016). This court may correct a sentence not authorized by law at any time. Minn. R. Crim. P. 27.03, subd. 9. An attempted offense is not subject to a lifetime term of conditional release. Minn. Stat. § 609.3455, subd. 7(b) (2014); *see also Noggle*, 881 N.W.2d at 547.

Appellant argues that the district court erred when it imposed a lifetime conditional-release term when it sentenced him on his attempted third-degree criminal-sexual-conduct conviction. He asks this court to vacate the term of his conditional release. The state agrees that the imposition of a lifetime term of conditional release for an attempted offense was improper, but requests that this court remand to the district court for resentencing on the fourth-degree criminal-sexual-conduct conviction because it is a more severe offense.

In determining which of the multiple offenses is the most severe, it is appropriate for the district court to consider the length of each associated sentence, the severity level of each offense according to the sentencing guidelines, the maximum potential sentence of each offense, the nature of each offense, and to conduct an analysis of which offense formed the “essence” of the behavioral incident. *State v. Kebaso*, 713 N.W.2d 317, 322-23 (Minn. 2006). Here, after improperly entering conviction on all three counts, the district court decided that a shorter sentence was appropriate for appellant in part because he would be subject to a lifetime term of conditional release.

The district court must vacate two of appellant's convictions on remand, and it is also appropriate for the court to consider the factors set out above before choosing which offense to resentence on. Regardless of which conviction the district court ultimately leaves in place and sentences on, the court cannot impose a longer period of confinement than the original 90 months in prison. Minn. R. Crim. P. 27.03, subd. 9.

V. Appellant's pro se arguments are not properly before this court.

Issues not briefed on appeal are not properly before the appellate court. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997).

Appellant raises the following issues in his pro se supplemental brief: ineffective assistance of trial counsel, unfair trial management, insufficient evidence, newly discovered evidence, and prosecutorial misconduct. In support of these claims, appellant makes mostly factual and credibility assertions. Although he occasionally cites to caselaw, the relevance of those citations is not readily apparent and he fails to conduct any legal analysis. Because appellant failed to adequately brief these issues, we deem them forfeited and decline to reach them on appeal. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) ("The brief contains no argument or citation to legal authority in support of the allegations and we therefore deem them waived.").

Affirmed in part, reversed in part, and remanded.