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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A16-1902**

State of Minnesota,  
Respondent,

vs.

Martin Kwaze Gbor,  
Appellant.

**Filed September 18, 2017  
Affirmed in part and remanded  
Schellhas, Judge**

Hennepin County District Court  
File No. 27-CR-16-5440

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, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and  
Kalitowski, Judge.\*

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his convictions of criminal sexual conduct, arguing that the district court committed reversible error by (1) excluding certain evidence in violation of his constitutional right to present a complete defense, and (2) entering multiple convictions in violation of Minn. Stat. § 609.04 (2016). We affirm in part and remand.

### FACTS

On an evening in February 2016, 12-year-old M.G.-B. was at home with her father, appellant Martin Kwaze Gbor; her mother, T.G.; and her 9-year-old sibling, N.G. Gbor found M.G.-B. in bed exchanging messages with her boyfriend on her cell phone. Gbor became angry and took the phone from M.G.-B., and they argued. Within a few minutes, M.G.-B. spoke with T.G. privately and disclosed that Gbor had sexually abused her. T.G. then called 911 and reported a domestic dispute. Two police officers arrived at the home and intervened in the dispute. After M.G.-B. told one of the officers that she did not feel safe with Gbor, that officer spoke with T.G. privately, and T.G. reported M.G.-B.'s disclosure of sexual abuse by Gbor. The officer forwarded the sexual-abuse report for investigation. Later that month, CornerHouse staff interviewed M.G.-B., who disclosed multiple, escalating incidents of sexual contact and penetration by Gbor.<sup>1</sup>

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<sup>1</sup> “CornerHouse is a child-advocacy center that, among other things, conducts forensic interviews of children who allegedly have been sexually abused.” *State v. Wembley*, 712 N.W.2d 783, 790 (Minn. App. 2006), *aff’d*, 728 N.W.2d 243 (Minn. 2007).

Respondent State of Minnesota charged Gbor with one count of first-degree criminal sexual conduct (sexual penetration with complainant under 13 years old and more than 36 months younger than actor), one count of first-degree criminal sexual conduct (genital-to-genital sexual contact with complainant under 13 years old and more than 36 months younger than actor), one count of second-degree criminal sexual conduct (sexual contact with complainant under 13 years old and more than 36 months younger than actor), and one count of second-degree criminal sexual conduct (multiple incidents of sexual contact with complainant under 16 years old with whom actor has significant relationship). After a lengthy trial, a jury found Gbor guilty as charged, and the district court sentenced Gbor to 172 months in prison on one count of first-degree criminal sexual conduct. This appeal follows.

## **D E C I S I O N**

### **I.**

Gbor testified at trial in his own defense and repeatedly denied having had any sexual contact with M.G.-B. To support the defense theory that M.G.-B. was fabricating the sexual-abuse allegations, Gbor testified as follows:

DEFENSE COUNSEL: Did anything happen when you went to [M.G.-B.'s] room?

GBOR: Yes.

DEFENSE COUNSEL: What happened?

GBOR: The text messages on [M.G.-B.'s] phone was bad words. Your Honor, is it okay I say them?

THE COURT: If that helps your testimony, you can proceed.

GBOR: It was chocolate clit, lick, put Kool-Aid on my dick.

PROSECUTOR: Objection, Your Honor.

THE COURT: Basis?

PROSECUTOR: Hearsay.

THE COURT: Overruled.

GBOR: "Lick my pussy. I will lick your dick. Oh, you like my titties. I will suck on your titties."

PROSECUTOR: Objection. May we approach, Your Honor?

THE COURT: You may.

(A discussion was held outside the hearing of the jury members.)

THE COURT: Objection overruled.

....

DEFENSE COUNSEL: So when you saw these series of words, did it raise any concern to you?

GBOR: Yes. . . . I say, "I need the phone from you because I don't like what I'm seeing. I need to show this to your mom." So she said, "No." She would not give me the phone. But she end up giving me the phone. . . .

....

DEFENSE COUNSEL: What . . . did you do?

GBOR: I decided . . . to go show it to [T.G.]

DEFENSE COUNSEL: And what did [M.G.-B.] do?

GBOR: Screaming through the whole wall.

Shortly thereafter, the court excused the jury and stated:

[U]pon the statements of the witness, Mr. Martin Gbor, with regard to the reason why he went to secure the cell phone, there was an objection and the parties asked to approach. The objection was based off of the rape shield. The Court overruled the objection because the testimony was describing the reason why the person was taking this action. . . .

[U]pon further reflection, I think this is a reference to the conduct of [M.G.-B.], so I'm going to sustain the objection. . . .

....

Mr. Gbor, what you can do, is if you feel like you need to reference back, you can just say that they were inappropriate text messages or you can say they were text messages that you didn't approve or something like that without actually saying what they were.

And just before the close of evidence, the court gave the following curative instruction: “Members of the jury, I have an instruction for you. You are to disregard the defendant’s testimony concerning the specific content of the messages that he said he saw on [M.G.-B.]’s cell phone.” The court rejected Gbor’s request to reconsider its ruling on this matter.

On appeal, Gbor argues that the district court committed reversible error because (1) the rape-shield law does not apply to the excluded evidence; (2) even if the rape-shield law applies to the excluded evidence, admission of that evidence was necessary to vindicate Gbor’s constitutional right to present a complete defense; and (3) a reasonable possibility exists that the verdict would have been different but for the erroneous exclusion of the evidence. The state counters that the evidence was properly excluded and that any error in its exclusion did not affect the verdict.

“Evidentiary rulings are reviewed for an abuse of discretion, even when a constitutional violation is alleged.” *State v. Wenthe*, 865 N.W.2d 293, 306 (Minn. 2015). “A violation of a criminal defendant’s constitutional rights necessitates a new trial unless the violation was harmless beyond a reasonable doubt.” *Id.* For an evidentiary error “[t]o be harmless beyond a reasonable doubt, the jury’s verdict must be surely unattributable to the error.” *State v. Lilienthal*, 889 N.W.2d 780, 787 (Minn. 2017) (quotation omitted).

The rape-shield statute provides that, in prosecutions for criminal sexual conduct, “evidence of the victim’s previous sexual conduct shall not be admitted” unless the evidence is relevant to a consent or alternative-actor defense and “the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature.” Minn. Stat. § 609.347, subd. 3 (2016); *see also* Minn. R. Evid. 412 (same). The statute and

rule also provide procedural requirements for admission of evidence of the victim's previous sexual conduct. Minn. Stat. § 609.347, subd. 4 (2016); Minn. R. Evid. 412. "The rape-shield law serves to emphasize the general irrelevance of a victim's sexual history, not to remove relevant evidence from the jury's consideration." *Wenthe*, 865 N.W.2d at 306 (quotation omitted). The rape-shield law therefore allows sexual-history evidence "when admission is constitutionally required by the defendant's right to due process, his right to confront his accusers, or his right to offer evidence in his own defense." *Id.* (quotation omitted).

Here, with little analysis evident in the record, the district court concluded that Gbor's testimony regarding the content of the messages between M.G.-B. and her boyfriend constituted evidence of M.G.-B.'s previous sexual conduct. The court did not expressly consider whether the evidence nevertheless was admissible under the rape-shield law or as necessary to vindicate Gbor's constitutional right to present a complete defense. On appeal, Gbor insists that "[t]he content of M.G.-B.'s text-message exchange was not just relevant and admissible, it was critical to the success of Gbor's defense," because "[e]vidence that M.G.-B.'s privacy had been invaded and Gbor was about to reveal to [T.G.] M.G.-B.'s sexually-explicit interaction with her boyfriend . . . explained M.G.-B.'s motive to falsely accuse Gbor to divert attention from her own misconduct."

We need not decide whether the district court abused its discretion in excluding Gbor's testimony regarding the content of the cell-phone messages between M.G.-B. and her boyfriend because we conclude that the jury's verdict is surely unattributable to any error in the exclusion of that testimony. The court gave Gbor great latitude in presenting

his defense theory of fabrication, which he claimed was motivated in part by the cell-phone dispute with M.G.-B. The jury heard testimony about that dispute from Gbor, T.G., N.G., and M.G.-B., who admitted that she made her initial disclosure of sexual abuse by Gbor during a dispute with him about her nighttime cell-phone use. M.G.-B. testified about the dispute as follows:

DEFENSE COUNSEL: Now, what led to the 2016 incident was because your daddy came into your room and you were still awake; is that correct?

M.G.-B.: Yes.

DEFENSE COUNSEL: And you testify that the light in that room was turned off; is that correct?

M.G.-B.: Yes.

DEFENSE COUNSEL: The light was off but you were awake and you were messing with your phone; is that correct?

M.G.-B.: Yes, sir.

DEFENSE COUNSEL: And your dad took your phone; is that correct?

M.G.-B.: Yes, sir.

DEFENSE COUNSEL: And you testified that you got mad; is that correct?

M.G.-B.: Yes, sir.

DEFENSE COUNSEL: And when you got mad, you called your mommy to come in; is that correct?

M.G.-B.: Yes, sir.

DEFENSE COUNSEL: That you want to tell her something; is that correct?

M.G.-B.: Yes, sir.

....

DEFENSE COUNSEL: Were you mad?

M.G.-B.: Yes.

DEFENSE COUNSEL: Were you angry?

M.G.-B.: Yes.

....

DEFENSE COUNSEL: [Y]ou were exchanging messages with [your boyfriend] on your cell phone [that night]; is that correct?

M.G.-B.: Yes, sir.

DEFENSE COUNSEL: And that was why you did not want your father to take your cell phone; is that correct?

M.G.-B.: Yes, sir.

DEFENSE COUNSEL: And that was why you were very mad at [sic]; is that correct?

M.G.-B.: Yes, sir.

DEFENSE COUNSEL: And you called your mom because you wanted revenge; is that correct?

PROSECUTOR: Objection, Your Honor. This is argumentative.

THE COURT: Overruled.

M.G.-B.: Yes, sir.

Gbor did not proffer any evidence, such as photographs of the messages or cell-phone records, to corroborate his testimony that the messages he saw on M.G.-B.'s cell phone were sexually explicit. And a police investigator testified that she found no "inappropriate [messages] or messages of a sexual nature" when she examined M.G.-B.'s cell phone. On these facts, we conclude that any error in the district court's exclusion of evidence of the content of the messages between M.G.-B. and her boyfriend did not reasonably impact the jury's decision to credit M.G.-B.'s allegations of sexual abuse by Gbor. *See Lilienthal*, 889 N.W.2d at 787 ("In evaluating whether an [evidentiary] error was harmless, [appellate courts] . . . look to whether the error reasonably . . . impacted upon the jury's decision." (quotations omitted)).

## II.

Although the district court imposed sentence on only one count of first-degree criminal sexual conduct, the court's sentencing order and warrant of commitment reflects that the court convicted Gbor on each of the four counts of criminal sexual conduct. Gbor argues that the court violated Minn. Stat. § 609.04 by entering multiple convictions against him; the state concedes such violation; and we agree with Gbor and the state.

The date ranges for both counts of first-degree criminal sexual conduct are identical, and the jury made no special findings as to the dates of those offenses. The district court erred by entering convictions on both counts of first-degree criminal sexual conduct. *See* Minn. Stat. § 609.04, subd. 1(4) (prohibiting convictions of both the crime charged and “[a] crime necessarily proved if the crime charged were proved”). Similarly, the date ranges for both counts of second-degree criminal sexual conduct are identical, and the jury made no special findings as to the dates of those offenses. The court therefore erred by entering convictions on both counts of second-degree criminal sexual conduct. *See State v. Mitchell*, 881 N.W.2d 558, 563 (Minn. App. 2016) (“Section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” (footnote omitted) (quotation omitted)), *review denied* (Minn. Aug. 23, 2016).

And the date ranges for the first-degree criminal sexual conduct counts overlap with the date ranges for the second-degree criminal sexual conduct counts. The court erred by entering convictions on both first-degree criminal sexual conduct and second-degree criminal sexual conduct. *See* Minn. Stat. § 609.04, subd. 1(1) (prohibiting convictions of both the crime charged and “[a] lesser degree of the same crime”). We therefore remand with instructions to vacate the formal adjudication of guilt on three of the four counts of criminal sexual conduct while leaving all of the guilty verdicts in place. *See Loving v. State*, 891 N.W.2d 638, 649–50 (Minn. 2017) (remanding with instructions to vacate convictions of unsentenced, duplicative offenses while leaving jury’s guilty verdicts intact).

**Affirmed in part and remanded.**