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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0149**

State of Minnesota,
Respondent,

vs.

David Robert Davidson,
Appellant.

**Filed March 19, 2018
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge**

Anoka County District Court
File No. 02-CR-15-1866

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

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Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and
Smith, Tracy M., Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant David Robert Davidson appeals from his convictions of and sentence for
first-, second-, and fourth-degree criminal sexual conduct. He argues that the district court

denied his constitutional right to present a complete defense by excluding expert testimony and evidence of prior sexual conduct of one of the victims, that the district court erred by imposing a lifetime rather than ten-year conditional-release term for count three, and that the district court improperly entered judgments of conviction for both first- and second-degree criminal sexual conduct involving the same victim. We see no error in the district court's evidentiary rulings at trial. But, because the district court improperly entered judgments of conviction for both first- and second-degree criminal sexual conduct involving a single victim and erred by imposing a lifetime rather than ten-year conditional-release term on count three, we reverse in part and remand with instructions that the district court vacate the second-degree criminal sexual conduct conviction and resentence appellant to a ten-year conditional-release term for count three.

FACTS

Appellant was charged with criminal sexual conduct in the first, second, and fourth degrees under Minn. Stat. §§ 609.342, subd. 1(h)(iii), 609.343, subd. 1(h)(iii), and 609.345, subd. 1(g)(iii), based on alleged sex offenses against two minors, A.R.H. and B.M.H., with both of whom appellant has a significant relationship, over a period of multiple years.

In February 2017, B.M.H.'s stepmother discovered on B.M.H.'s phone nude photographs, which B.M.H. had sent to a classmate through Facebook. B.M.H. was 18 at the time, but has cognitive deficiencies. She functions at a much younger level than her chronological age. B.M.H.'s stepmother reported the Facebook exchange to law enforcement. Approximately a month later, while reviewing other messages sent through B.M.H.'s Facebook account, B.M.H.'s stepmother found an exchange of messages dating

from November 2013 to February 2014, between B.M.H. and A.R.H., in which A.R.H. told B.M.H. to tell an adult about how “Dave” had touched B.M.H. sexually. After finding these messages, B.M.H.’s stepmother and father spoke to B.M.H. in the company of her church youth group leaders about whether appellant had been sexually abusing her. During that conversation, B.M.H. disclosed appellant’s sexual conduct against her.

B.M.H.’s stepmother and father contacted law enforcement regarding appellant’s alleged abuse. A.R.H. and B.M.H. both gave videotaped statements to law enforcement regarding appellant’s sexual conduct. Appellant was charged with three counts of criminal sexual conduct. Count one charged criminal sexual conduct in the first degree; the complaint alleged that, from September 25, 2003 to September 24, 2011, appellant engaged in multiple acts of sexual penetration with a person with whom he had a “significant relationship” and who was “under 16 years of age at the time of the sexual penetration.” Count two charged criminal sexual conduct in the second degree; the complaint alleged that, during the same extended time period, appellant engaged in sexual contact with a person with whom he had a “significant relationship” and who was “under 16 years of age at the time of the sexual contact.” Count three charged criminal sexual conduct in the fourth degree; the complaint alleged that, from November 19, 2012 to November 18, 2014, appellant engaged in multiple acts of sexual contact with a person with whom he had a “significant relationship” and who was “at least 16 but under 18 years of age at the time of the sexual contact.”

In the complaint’s statement of probable cause, the state identified counts one and two as related to appellant’s alleged sexual abuse of A.R.H. while she was between the

ages of eight and sixteen. It identified count three as related to appellant's alleged sexual abuse of B.M.H., which began when she was "around sixteen" in 2012.

The state moved pretrial to exclude evidence of any prior sexual conduct of B.M.H. or A.R.H. under Minn. R. Evid. 412 and Minn. Stat. § 609.347. Appellant argued that the admission of nude pictures and correlated Facebook messages by B.M.H. were important evidence for the jury, because appellant's defense theory was that B.M.H. fabricated the abuse by appellant in order to avoid trouble for "sexting." The district court excluded this evidence. In granting the state's motion, the district court relied on its reading of *State v. Roberts*, 393 N.W.2d 385 (Minn. App. 1986), Minn. R. Evid. 412, and other case law. It reasoned on the record:

The parties went back and forth trying to make arguments with regard to the sequence of time, et cetera. I'm not going to do that. I'm going to read it as broad as possible, and [412] says . . . "In a prosecution for acts of criminal sexual conduct, including attempts or any act of criminal sexual predatory [conduct,] evidence of the victim's previous sexual conduct shall not be admitted, nor shall any reference to such conduct be made in the presence of the jury." And then it goes on to two exceptions that don't apply. Because of the [*Roberts*] case, and because of my broad rule, review, and interpretation of [412], I am going to grant the State's motion and exclude that as well.

The district court, on the state's motion, excluded testimony from Dr. Reitman regarding his psychosexual evaluation of appellant, and sustained the state's objections at trial to three questions directed to Dr. Reitman regarding the taped interviews of A.R.H. and B.M.H.

In granting the state's motion to exclude Dr. Reitman's testimony about his assessment that appellant "does not present any symptoms of being an incestuous pedophile, or any other type of sexual disorder," the district court determined that the opinion would not be helpful to the jury in reaching a decision and would unfairly prejudice the prosecution.

After the state's case in chief, appellant called Dr. Reitman as his first witness. There was discussion outside of the hearing of the jury regarding the scope of Dr. Reitman's testimony. The district court asked appellant's counsel for a description of the anticipated testimony. Appellant's counsel explained that Dr. Reitman was going to testify concerning how the interviews of A.R.H. and B.M.H. were conducted, his observations of the demeanor of A.R.H. and B.M.H. during that questioning, and about forensic interviewing generally. The district court permitted Dr. Reitman to take the stand for voir dire. The state objected to Dr. Reitman's expert testimony, arguing that it was improper testimony concerning the credibility of other witnesses, and that his testimony about how he would conduct a clinical interview differently than a law enforcement interview would not be helpful to the jury and would be unfairly prejudicial to the state. The district court ruled that it would not allow Dr. Reitman to "compare and contrast a clinical and forensic interview." It went on to state that, "if he wants to talk about the interview that was done in this case, that . . . seems to be more fair game, but [a] general comparison and contrast of the types of interviews I don't believe is relevant nor is it helpful to the jury." The district court also reasoned:

It's a close call, but I'm going to not exclude Dr. Reitman. I believe he is qualified as an expert generally. . . . From what he said in voir dire, he doesn't have fault with the County's investigation to that, with regard [to what] he reviewed. . . . I am willing to give the defendant an opportunity to call the expert . . . if Dr. Reitman veers much at all from what was put in his disclosure with regards to talking about interview techniques employed by police and others . . . I may sustain an objection with regard to relevance.

The state asked the district court whether its ruling included Dr. Reitman's observations of the demeanor of A.R.H. and B.M.H. Appellant's counsel announced an intention to ask about the demeanors of each. The district court replied that it could not "rule in the abstract on that."

Dr. Reitman began his testimony before the jury, and appellant's counsel asked him to "explain the difference between the way you would conduct an interview and [how] the police would conduct an interview." The district court sustained the state's relevance objection. Appellant's counsel then asked Dr. Reitman questions about whether he had watched the taped interviews of A.R.H. and B.M.H. He had. When appellant asked Dr. Reitman separately "what his observations" of each taped interview were, the state objected to each question based on relevance, and the district court sustained the objections. No further questions were asked of Dr. Reitman.

The jury found appellant guilty of all three counts, and he was sentenced to 144 months in prison on counts one and two, and a concurrent 60-month sentence on count three. The district court also sentenced appellant to a lifetime conditional-release term.

This appeal followed.

DECISION

I. The district court's evidentiary rulings were within its discretion.

Appellant argues that the district court erred in three evidentiary rulings. He argues that the district court should not have excluded Dr. Reitman's expert testimony regarding his psychosexual evaluation of appellant; he also argues that the district court erred in excluding testimony from Dr. Reitman regarding law-enforcement interview techniques and the demeanors of A.R.H. and B.M.H. during the interviews. Finally, he argues that the district court erred by excluding particular evidence of B.M.H.'s prior sexual conduct at trial.

"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). When the district court's evidentiary ruling "results in the erroneous exclusion of defense evidence in violation of the defendant's constitutional rights, the verdict must be reversed if "there is a reasonable possibility that the verdict might have been different if the 'evidence had been admitted.'" *State v. Graham*, 764 N.W.2d 340, 351 (Minn. 2009) (quoting *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994)). Both the United States and Minnesota Constitutions provide criminal defendants the right to present a meaningful defense; however, such defendants must still "establish the relevance and admissibility of the evidence." *State v. Svoboda*, 331 N.W.2d 772, 775 (Minn. 1983).

Minn. R. Evid. 702 guides the district court in determining the admissibility of expert testimony. “The basic consideration in admitting expert testimony under Minn. R. Evid. 702 is whether it will assist the jury in resolving the factual questions presented.” *State v. Meyers*, 359 N.W.2d 604, 609 (Minn. 1984). If the substance of offered expert testimony “is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury’s ability to reach conclusions about that subject which is within that experience, then the testimony does not meet the helpfulness test.” *Id.* However, even relevant evidence may be excluded under Minn. R. Evid. 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

A. The district court acted within its discretion when it excluded Dr. Reitman’s testimony regarding his psychosexual evaluation of appellant.

Appellant argues that the district court abused its discretion by excluding Dr. Reitman’s testimony about his psychosexual evaluation of appellant. We have previously held that expert testimony to the effect that a particular defendant’s “personality profile was not similar to that of a [sexual offender]” was properly excluded when it “would not assist the jury in reaching a decision and would unfairly prejudice the prosecution.” *Roberts*, 393 N.W.2d at 388; *see also State v. Fitzgerald*, 382 N.W.2d 892, 894 (Minn. App. 1986) (affirming a district court when it excluded expert witness testimony regarding “typical traits of pedophiles”), *review denied* (Minn. Apr. 24, 1986). Appellant argues that Dr. Reitman’s testimony would have assisted the jury and would have provided relevant information to assist in resolving conflicts in the testimony.

Appellant argues that the Minnesota Supreme Court’s decisions in *State v. Obeta*, 796 N.W.2d 282 (Minn. 2011) and *State v. Hennum*, 441 N.W.2d 793 (Minn. 1989) permit expert-opinion testimony “on typical characteristics of and behaviors of certain witnesses” as helpful to the jury. However, the expert-opinion testimony excluded by the district court here is distinguishable from the expert-opinion testimony considered in *Obeta* and *Hennum*. *Obeta* involved expert-opinion evidence regarding typical behavior of sexual-assault victims. 796 N.W.2d at 294. *Hennum* addressed evidence of the typical characteristics of an individual with battered-woman syndrome, and was limited to that sort of evidence. 441 N.W.2d at 798-99.

Appellant’s proffered expert-opinion testimony—regarding a psychosexual evaluation by Dr. Reitman determining that appellant does not exhibit symptoms of sexual deviancy—is comparable to the evidence prohibited in *Fitzgerald*. There, the district court excluded expert-opinion testimony “regarding pedophilia to bolster [a defendant’s] credibility,” which discussed “typical traits of pedophiles and that abnormalities are apparent in aspects of pedophiles’ lives other than their sexuality.” *Fitzgerald*, 382 N.W.2d at 894. In affirming the district court, we emphasized the “general rule that admission of expert testimony is within the trial court’s discretion” and that no Minnesota case law “identifie[d] appellant’s proffered testimony as a type which the trial court has no discretion to exclude.” *Id.* at 895.

We are aware of no authority for the proposition that a district court must admit a psychological or psychosexual evaluator’s testimony that purports to opine that the defendant is not the sort of person who would do the sort of thing as the state charges, or

testimony that outlines “the typical behaviors and characteristics of an incestuous pedophile” and compares them to those of a defendant. These are precisely the sort of determinations entrusted to the district court’s discretion. “The basic consideration in admitting expert testimony under Minn. R. Evid. 702 is whether it will assist the jury in resolving the factual questions presented.” *Meyers*, 359 N.W.2d at 609. The district court reasoned that Dr. Reitman’s proffered expert-opinion testimony would not have been helpful to the jury and would have been unfairly prejudicial to the state. We see no abuse of the district court’s discretion concerning this proffered testimony.

B. The district court acted within its discretion in sustaining the state’s objections to questions to Dr. Reitman about law-enforcement interview techniques and his observations of A.R.H. and B.M.H. during their taped interviews.

Appellant argues that the district court abused its discretion in excluding Dr. Reitman’s testimony about law-enforcement interview techniques and the demeanor of A.R.H. and B.M.H. during their law-enforcement interviews. The district court sustained the state’s relevance objections to the questions of how Dr. Reitman would conduct an interview differently than law enforcement and about his “observations” of the law-enforcement video recordings of A.R.H. and B.M.H. Appellant asked no further or more-targeted questions about the demeanor of A.R.H. and B.M.H or about how their interviews were conducted.

On appeal, appellant now appears to argue that the district court erred by excluding testimony from Dr. Reitman regarding “his observations of the use of leading questions, the demeanor of the girls during the interview process, and a different method of

interviewing cognitively-deficient people such as [B.M.H.].” But, appellant’s counsel asked no questions of Dr. Reitman about how the interviews were conducted beyond what he would have done differently. No questions were asked about the demeanor of A.R.H. and B.M.H. during their interviews. Because the rulings appellant purports to challenge on appeal were never made by the district court, the proposed testimony was not excluded by the district court. It wasn’t offered.

As to the three relevance objections sustained by the district court, the questions concerned how Dr. Reitman’s interviews are different than law enforcement interviews, and asked for his broad “observations” of the taped interviews. “Generally, evidence is relevant if in some degree it advances the inquiry and thus has probative value.” *State v. Harris*, 521 N.W.2d 348, 352 (Minn. 1994) (quotation omitted). Appellant fails to identify why the jury needed to know the difference between a law enforcement interview and one of Dr. Reitman’s clinical interviews; and we cannot see how knowing that would have helped the jury. To our view of the record, the district court acted within its discretion.

C. The district court acted within its discretion when it excluded evidence purporting to address B.M.H.’s prior sexual conduct.

Appellant also contends that the district court abused its discretion by excluding evidence that B.M.H. was caught by her stepmother sending nude pictures and related messages to a male classmate via Facebook. Appellant claims that this evidence was crucial to his defense, because it supported his theory that B.M.H. had falsely accused appellant of sexual assault to “divert attention from her own misconduct.” He argues that under the plain language of the Minn. R. Evid. 412, this was not evidence of “previous”

sexual conduct; instead, that it was conduct that occurred after the charged offense, not before it.

Neither Minn. R. Evid. 412 nor Minn. Stat. § 609.347 (2016) supports appellant's argument. Under rule 412, evidence of previous sexual conduct "can be admissible *only* if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and *only* in the following circumstances:" (a) when consent of the victim is a defense or (b) "to show the source of . . . semen, pregnancy or disease." Minn. R. Evid. 412(1) (emphasis added). Concerning the meaning of "previous," case law establishes that "previous" includes sexual conduct occurring after the actual offense. *See State v. Olsen*, 824 N.W.2d 334, 340-41 (Minn. App. 2012) (holding that evidence that a victim went to a medical center for an STD test was not admissible under rule 412), *review denied* (Minn. Feb. 27, 2013). Section 609.347 is to the same effect. The rule and statute apply to the proffered sexting evidence.

And neither exception to Minn. R. Evid. 412 applies here. Consent is no issue here. And the state's case does not include semen, pregnancy or disease. Accordingly, the district court did not abuse its discretion when it excluded B.M.H.'s Facebook messages as prior sexual conduct under Minn. R. Evid. 412 and Minn. Stat. § 609.347.

Appellant further argues that, even if this evidence is inadmissible prior sexual conduct of B.M.H. under Minn. R. Evid. 412, his constitutional "right to present a full and complete defense" required that the district court admit the evidence.

We considered whether a defendant's constitutional right to offer evidence in his own defense demands the admission of prior-sexual-conduct evidence in *Olsen*. 824

N.W.2d at 340. We stated that Minnesota courts have recognized that prior sexual conduct is admissible “in all cases in which 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). However, we also recognized “[t]he right to present a defense is not unlimited; the admission of evidence of a witness’s prior sexual conduct is highly prejudicial and will not survive a rule 403 balancing test unless a special exception applies.” *Id.* “One such exception permits admission of any evidence tending to establish a predisposition to fabricate a charge of rape . . . unless its potential for unfair prejudice outweighs its probative value.” *Id.* (quotation omitted).

In *Olsen*, the victim visited a medical clinic after she was sexually assaulted, allegedly to find out if an ex-partner gave her a sexually transmitted disease (STD). *Id.* at 336. The evidence was offered to show that the victim “had a motive to make false accusations of sexual abuse to make her appear more sympathetic, thereby deflecting the criticism, negative comments, shame and embarrassment that could result from her admitting she may have contracted an STD.” *Id.* at 340. We concluded that the proffered evidence in *Olsen* did not show a “motive to fabricate” and “[a]ppellant’s theory is purely speculative and demonstrates no propensity for [the victim] to lie or be biased or prejudiced, or harbor ulterior motives.” *Id.* at 341 (quotation omitted).

Appellant’s theory that B.M.H. had a motive to fabricate, like the theory presented in *Olsen*, appears speculative. Evidence that A.R.H. and B.M.H. had been discussing appellant’s sexual conduct toward B.M.H. was provided in the form of Facebook messages that had been exchanged in 2013 and 2014, before B.M.H. was confronted about the nude

pictures she sent a classmate. B.M.H.'s stepmother and father brought up the alleged abuse with B.M.H. while she was at church with her youth leaders and not as part of a confrontation about the nude pictures. In her interview with law enforcement, B.M.H. stated that, when she was told by her father and stepmother that they needed to talk to her youth leader, she "had no idea what it was about. I didn't know if I did something wrong in youth group that I wasn't supposed to or whatever, and it turned out that they found out that [appellant] was sexually harassing me." B.M.H. made no mention of appellant's abusing her until after her stepmother told her that she had heard about the abuse from A.R.H., and that her stepmother wanted them to be safe.

Nothing more than speculation supports appellant's argument that the disclosure of appellant's behavior was related to B.M.H.'s sexting with a classmate. Moreover, B.M.H. is cognitively-impaired, which, to our view, makes it all the more unlikely that she quickly fabricated the alleged abuse to avoid responsibility for sexting. We see nothing in this record to support application of a constitutional exception to the rules of evidence because of some predisposition of B.M.H. to fabricate abuse allegations. The district court acted within its discretion in excluding evidence of B.M.H.'s sexting.

II. The district court erred when it entered convictions for both first- and second-degree criminal sexual conduct for the same criminal behavior.

Appellant argues that the district court erred by improperly entering convictions for both first- and second-degree criminal sexual conduct based on the same conduct during the same time period, because second-degree criminal sexual conduct is a lesser-included

offense of first-degree criminal sexual conduct. The state agrees. We nonetheless carefully examine the record to determine if the district court erred.

Minn. Stat. § 609.04, subd. 1 (2016) provides that a defendant may not be convicted of the crime charged in addition to an included offense. The statute defines an “included offense” as “a lesser degree of the same crime.” *Id.* Pursuant to the terms of Minn. Stat. § 609.04, the district court erroneously entered a conviction for second-degree criminal sexual conduct, a lesser-included offense of the first-degree criminal sexual conduct. *State v. Kobow*, 466 N.W.2d 747, 752 (Minn. 1991). The district court must vacate that conviction. *State v. French*, 400 N.W.2d 111, 114-15 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987).

III. The district court erred in imposing lifetime conditional release under Minn. Stat. § 609.3455, subd. 7, and should instead have ordered a ten-year conditional-release term under Minn. Stat. § 609.3455, subd. 6.

Appellant also argues that the district court erred by sentencing him to a lifetime conditional-release period for his fourth-degree sexual conduct conviction, because he did not have a previous sex offense to trigger the lifetime conditional-release period under Minn. Stat. § 609.3455 (2016); he was simultaneously convicted of both counts. The state does not dispute appellant’s argument on this issue, but we still carefully review the district court’s determination below for error. Statutory interpretation is a question of law that is subject to de novo review. *State v. Leathers*, 799 N.W.2d 606, 608 (Minn. 2011).

Minn. Stat. § 609.3455 provides for conditional-release terms for dangerous sex offenders. Subdivision 6 provides for a mandatory ten-year conditional-release term for first- and fourth-degree criminal sexual conduct. *Id.* Subdivision 7 provides for a

mandatory lifetime conditional-release term for offenders who have a prior sex conviction. *Id.* The statute defines “prior sex conviction” as occurring “if the offender was convicted of committing a sex offense before the offender has been convicted of the present offense, regardless of whether the offender was convicted for the first offense before the commission of the present offense, and the convictions involved separate behavioral incidents.” *Id.*, subd. 1(g). In *State v. Nodes*, 863 N.W.2d 77 (Minn. 2015), the supreme court interpreted the meaning of a prior sex offense conviction under Minn. Stat. § 609.3455 when a defendant was convicted of two sex offenses in the same hearing. The supreme court held that, when a defendant is convicted of two offenses, one after the other, at a sentencing hearing, the offender has a prior sex offense conviction for the purpose of sentencing the second conviction and no “particular temporal gap” is required, so long as “one conviction is entered before the second.” *Id.* at 82.

We have interpreted the supreme court’s reasoning in *Nodes* in a number of unpublished opinions to conclude that, where a district court accepts two guilty pleas “simultaneously,” it is error for the district court to impose a lifetime conditional-release on the defendant under Minn. Stat. § 609.3455. See *State v. Ingalls*, No. A16-1803, 2017 WL 5560033 (Minn. App. Nov. 20, 2017); *State v. Klanderud*, No. A15-1897, 2016 WL 6395252 (Minn. App. Oct. 31, 2016), *review denied* (Minn. Jan. 17, 2017); *State v. Rekdal*, No. A14-1364, 2015 WL 7199866 (Minn. App. Nov. 16, 2015).¹ The district court entered

¹ The supreme court’s decision in *Nodes* did not explicitly hold that entering two convictions at the same time could never result in a lifetime conditional release. Instead, it held that when convictions are entered separately, even if by only seconds, Minn. Stat. § 609.3455, subd. 7, applies. However, the legislature has not amended Minn. Stat.

appellant's convictions simultaneously in the same statement on the record. Therefore, appellant had no "prior sex convictions" when he was sentenced on count three. Accordingly, we conclude that the district court erred by sentencing appellant to a lifetime conditional-release term rather than a ten-year conditional release.

Appellant raises a number of other issues in his pro se brief. Many of these claims are addressed by the primary briefs in this appeal. Others are claims of error unaccompanied by reasoned legal argument. "An assignment of error in a brief based on 'mere assertion' and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection." *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006). Appellant asserts errors in his pro se brief, but fails to provide any argument or support for them. Further, some of appellant's allegations are simply incorrect based on the record.

In sum, we affirm appellant's convictions for first- and fourth-degree criminal sexual conduct. Because appellant was improperly convicted of second-degree criminal sexual conduct and because the district court erred by imposing a lifetime rather than ten-year conditional release term on count three, we reverse and remand to the district court

§ 609.3455 in light of *Nodes* and our several unpublished opinions interpreting *Nodes* as we do here. Because the state makes no argument that *Nodes* does not preclude the application of Minn. Stat. § 609.3455, subd. 7, in the present circumstances, we do not reach this question. However, we remain troubled at the notion that the duration of a convicted sex offender's release period can be, or should be, determined by the words chosen by the district court in a setting where other important considerations, such as prison sentence, right to appeal, and other issues, are also being addressed.

with instructions to vacate the second-degree criminal sexual conduct conviction and to resentence appellant to a ten-year conditional release term for count three.

Affirmed in part, reversed in part, and remanded.