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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0391**

State of Minnesota,
Respondent,

vs.

Guy Robert Franklin Rabold,
Appellant.

**Filed January 22, 2018
Affirmed in part, reversed in part, and remanded
Ross, Judge**

St. Louis County District Court
File No. 69DU-CR-15-1864

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

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

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

Guy Rabold faced trial for two counts of second-degree criminal sexual conduct for
fondling his 11-year-old stepsister's buttocks and chest while she was asleep on the floor.

Rabold asked the district court to replace his public defender, whom he accused of providing him ineffective assistance of counsel in a previous case. He also argues that the state did not present sufficient circumstantial evidence to convict him because the evidence doesn't rule out the possibility that what appeared to be fondling might have been just inadvertent hand movements in his sleep. He argues also that the district court miscalculated his sentence by failing to credit him for all the time he spent in custody before sentencing. Because the district court did not abuse its discretion by denying Rabold's substitute-attorney request and because the trial evidence was sufficient to prove that Rabold intentionally touched his stepsister, we affirm in part. But because the district court miscalculated Rabold's time-served credit, we reverse in part.

FACTS

Police arrested Guy Rabold in June 2015 for an incident that produced charges of robbery, burglary, illegal-firearm possession, and auto theft, and three days later the state also charged Rabold with two counts of second-degree criminal sexual conduct for his behavior two months earlier. The two incidents were unrelated, but in both cases Rabold was assigned the same public defender, Keith Shaw. The robbery-burglary-weapon-theft case proceeded first: Rabold pleaded guilty, and the district court ordered a 240-month prison sentence.

During a pretrial conference for the sex-offense charge, attorney Shaw stated that Rabold planned to appeal his sentence in the earlier case and that one of Rabold's arguments would be that Shaw had provided him ineffective assistance of counsel. A month later Rabold wrote to the district court saying that he believed Shaw had

ineffectively represented him and asking the district court to substitute Shaw with a different public defender. The district court denied Rabold's request, explaining that his claim of ineffective assistance was too vague and that the court saw nothing to justify ordering substitute counsel after the court conducted a "searching inquiry" of the record.

The sex-offense case went to trial, and the jury heard the following account.

Rabold lived in one of two apartments directly above his father's auto-body business in Duluth. His father, R.R., occupied the other apartment. Every other weekend, R.R.'s three other children—including Rabold's 11-year-old stepsister, S.R.—would stay with R.R. Sometimes the three children would sleep over at Rabold's apartment.

Rabold came home at 1:30 a.m. one night in April 2015 and found the three children sleeping on his living-room floor. According to Rabold, he was so tired that he fell asleep beside S.R. After a few hours, S.R. woke up feeling someone squeezing her buttocks. It was Rabold. She pushed his hand away. Rabold moved his hand to her stomach. Then he moved it up to her chest. S.R. pushed it away again, and Rabold slid it back to her chest. S.R. got up and went to the bathroom and began to cry. Then fearing that Rabold might begin to touch her younger sister, S.R. ran to the living room, woke her, and took her into the bathroom. S.R.'s sister cried, and the two of them left for R.R.'s apartment.

Later that morning S.R. told her mother what had happened, and she in turn told R.R. and called the police. Rabold denied intentionally touching S.R., saying that he had been sleeping but that he might have inadvertently touched S.R.

During the trial, the district court asked Rabold whether he was satisfied with Shaw's performance, and Rabold said yes. The jury found Rabold guilty of both counts.

Eighteen days after the jury found Rabold guilty for fondling his stepsister, he filed a pro se supplemental brief in his appeal in the other case, arguing that Shaw had provided him ineffective assistance of counsel. The district court rejected the claim and we affirmed, because, among other things, “Rabold fail[ed] to assert . . . that his attorney’s performance fell below an objective standard of reasonableness.” *State v. Rabold*, 2017 WL 957715, at *4 (Minn. App. Mar. 13, 2017), *review denied* (Minn. May 16, 2017). The district court sentenced Rabold to 171 months in prison and 10 years of conditional release, crediting 320 days for time already served. Rabold appeals.

DECISION

Rabold offers three arguments in this appeal. He argues first that the district court improperly denied his request for a substitute attorney. He argues second that the state’s circumstantial evidence failed to exclude the possibility that his touching was inadvertent rather than intentional. Rabold argues third that the district court’s sentence miscalculated his credit for time served. Only Rabold’s last argument merits a correction.

I

Rabold argues that the district court improperly denied his request for a substitute public defender because the district court did not really conduct a “searching inquiry.” We review a district court’s decision to deny a defendant’s request for a substitute public defender for an abuse of discretion. *State v. Munt*, 831 N.W.2d 569, 586 (Minn. 2013). To honor a defendant’s Sixth Amendment right to effective assistance of counsel, the district court must substitute a public defender when a defendant’s timely and reasonable complaints about the effectiveness of his appointed counsel establish exceptional

circumstances warranting substitution. *Id.* “Exceptional circumstances are those that affect appointed counsel’s ability or competence to represent the client.” *Id.* (internal quotations omitted).

Rabold does not point to any “exceptional circumstances” warranting a substitute attorney. He argues instead that the district court failed to conduct a sufficient “searching inquiry” into whether exceptional circumstances existed. It is true that when a defendant’s complaint raises “serious allegations of inadequate representation,” the district court should conduct a “searching inquiry” before declining a request to appoint substitute counsel. *Id.* But the supreme court has held that a defendant’s statements evincing only his “general dissatisfaction” with his attorney did not require a searching inquiry. *Id.* at 586–87. Rabold did not raise any serious allegation of inadequate representation. He instead merely generally characterized his attorney’s representation as “inadequate.” We observe that the district court did open the door for an inquiry, responding to Rabold’s request for a substitute attorney by inviting him to present any arguments on the record supporting his request. Rabold never acted on that invitation. In fact, the only other time this issue was in front of the district court was when it asked Rabold at trial if he was satisfied with Shaw’s performance in the case, and Rabold said “Yes.” Rabold did not raise any “serious allegations of inadequate representation” warranting a “searching inquiry” into the issues. Although our decision does not depend on it, we add that it was not until four months after he asked the district court for substitute counsel that Rabold formally alleged ineffective assistance of counsel in his brief to this court—an allegation that we found to be “without merit.” *Rabold*, 2017 WL 957715, at *4.

Rabold asks this court to adopt a per se rule that a district court must appoint substitute counsel anytime a defendant challenges his current counsel's performance as ineffective in a previous case because of an apparent conflict of interest between the defendant and the attorney. No. This is inconsistent with the standard in Minnesota. Here, to justify a substitution a defendant must point to "exceptional circumstances" warranting a substitute attorney, and being dissatisfied with one's attorney—even *really* dissatisfied to the point of previously *claiming* that the attorney's performance was constitutionally deficient—is not exceptional. And while an actual conflict of interest is sufficient evidence of prejudice in an ineffective-assistance-of-counsel claim, *see Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984), it does not follow that a mere claim of ineffective assistance is an actual conflict of interest. Other jurisdictions have rejected Rabold's argument, and so must we. *See Neal v. State*, 379 S.W.3d 209, 222 (Mo. Ct. App. 2012) ("This tension does not require us to conclude, however, that *every* assertion of a claim of ineffective assistance of counsel creates an actual conflict of interest"); *State v. Tauscher*, 175 Wash. App. 1019 (2013) ("A mere allegation of ineffective assistance of counsel does not create an inherent, conflict of interest requiring substitute counsel."); *State v. Drisco*, 355 N.J. Super 283, 293, 810 A.2d 81, 86 (App. Div. 2002) (rejecting argument that "because defendant had previously charged trial counsel with ineffectiveness" the court should apply a per se rule that establishes a conflict of interest); *State v. Harris*, 388 P.3d 627 (Kan. Ct. App. 2017) (rejecting defendant's argument that "because alleging ineffective assistance of counsel may create a possible conflict of interest between the defendant and his attorney, the district court has an obligation to inquire further about

allegations of ineffectiveness”); *Hester v. State*, 27 A.3d 551 (Del. 2011) (affirming district court’s denial of defendant’s argument that allegation of ineffective assistance of counsel creates a per se conflict of interest); *State v. Terry*, 173 Wash. App. 1004 (2013) (“But, a claim of ineffective assistance of counsel does not necessarily create an unconstitutional conflict of interest requiring substitution of counsel.”). These cases are consistent with the standard in Minnesota, where a defendant with a serious—rather than specious—claim of ineffective assistance is well protected; he need merely raise the allegation with the district court, which in turn must inquire further and, being then fully informed, can decide whether substitution is necessary to vindicate the defendant’s constitutional right to effective counsel.

II

Rabold argues that the state’s evidence was insufficient to convict him of second-degree criminal sexual conduct because it did not eliminate the rational hypothesis that he inadvertently touched S.R. while he was sleeping. To convict Rabold of the charges against him, the state had to prove that S.R. was “under 13 years of age” and at least 36 months younger than Rabold, that he had a “significant relationship” with S.R., and that he intentionally touched S.R.’s intimate parts. Minn. Stat. §§ 609.341, subd. 11, .343, subds. 1(a) and 1(g) (2016). We will reverse a conviction for lack of evidence if the record does not contain evidence sufficient to support the jury’s verdict, giving due regard for the burden of proof beyond a reasonable doubt. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004). When an element was proved entirely by circumstantial evidence, our review of the evidence’s sufficiency is broken into two steps. *State v. Silvernail*, 831 N.W.2d 594,

598 (Minn. 2013). We first identify the circumstances proved at trial and “disregard evidence that is inconsistent with the jury’s verdict.” *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). We then determine if those circumstances are consistent only with guilt—inconsistent with any other rational hypothesis. *Silvernail*, 831 N.W.2d at 599. If they are, we affirm. *See id.*

The state offered only circumstantial evidence to prove that Rabold’s reason for touching S.R. was sexual. So we apply our circumstantial-evidence standard to the *mens rea* element. We know that the following relevant circumstances were proved at trial based on the testimony and the jury’s verdict:

1. Rabold was not under the influence of any substance that would have caused him to fall asleep on the floor instead of walking to his bedroom, and at 1:30 a.m. he intentionally lay down on his living room floor immediately beside S.R. instead of in his bedroom on his bed.
2. Rabold’s hand extended from his body and squeezed S.R.’s buttocks.
3. After S.R. pushed Rabold’s hand from her buttocks, Rabold’s hand extended to S.R.’s abdomen beneath her clothing, and then it moved up and settled on her chest.
4. After S.R. pushed Rabold’s hand away a second time, Rabold’s hand returned again to settle on her chest.

On these circumstances, Rabold’s argument that his touching was merely inadvertent rather than sexually motivated is unconvincing. We look for any *reasonable* inferences other than guilt, not merely *possible* inferences other than guilt. *See State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). And we consider all the circumstances in their totality, not each circumstance in isolation. *Silvernail*, 831 N.W.2d at 599. Rabold’s argument cannot survive that standard.

We might *possibly* infer that Rabold's touching was inadvertent and unintentional; but we could not *reasonably* so infer from these circumstances. What is the reasonable explanation for Rabold's decision to lie down on the floor immediately beside his 11-year-old stepsister in the middle of the night rather than go to his own bed? His trial counsel tried to persuade the jury that "it doesn't . . . make a lot of sense" to conclude that Rabold lay down intending to touch S.R., since he said he came home at 1:30 and the touching did not occur until about four hours later. That some time passed between the point that Rabold lay down and the point when he began touching S.R. does not render nonsensical the idea that he was sexually motivated to be near S.R. Rabold offers no innocent explanation for the coincidence that, in all three supposedly inadvertent touches, his hand happened eventually to find an intimate area. He similarly does not attempt to reconcile the evidence that he squeezed (rather than merely touched) S.R.'s buttocks with his inadvertent-touch theory. The circumstances proved support only the guilty verdict.

Rabold cites various parts of S.R.'s trial testimony and recorded statement attempting to demonstrate that Rabold could have been sleeping. But this testimony only establishes that Rabold appeared to be sleeping, not that he actually was sleeping. And when the statements are viewed in the context of all of S.R.'s trial testimony, it is unreasonable to infer that Rabold was in fact asleep at the time he touched S.R., even if he was asleep at some point or that he effectively feigned being asleep. The jury did not believe that Rabold was actually sleeping when he touched S.R., and the circumstances as a whole confirm that this implied finding is the only reasonable one.

III

Rabold argues finally that the district court miscalculated his sentence by failing to credit time he served from June 5 to January 24, 2016. When the facts are undisputed, we review an alleged improper sentence-credit determination de novo. *See State v. Doyle*, 386 N.W.2d 352, 354 (Minn. App. 1986). The state concedes that Rabold's sentence should have included the credit. The concession is well founded. A district court must deduct from an executed sentence time served "in connection with the offense or behavioral incident being sentenced." Minn. R. Crim. P. 27.03, subd. 4(B) (2016). This remains the rule even when the time served is in connection to two concurrent sentences, but it is not the rule for consecutive sentences. *State v. Clarkin*, 817 N.W.2d 678, 685–86 (Minn. 2012). A defendant bears the burden of proving his entitlement to jail credit for a specific period. *State v. Willis*, 376 N.W.2d 427, 428 n.1 (Minn. 1985). Rabold committed this crime while he was serving the supervised-release portion of an executed sentence for a previous felon-in-possession conviction. Police took him into custody for this case beginning June 5, 2015, and he remained incarcerated until he was sentenced on December 8, 2016. The district court sentenced Rabold based on the presentence investigation report, which recommended that Rabold receive credit for time served between January 24, 2016, and December 8, 2016. The problem is that the district court overlooked the fact that, if a defendant is sentenced on a new conviction while he is incarcerated for a prior conviction, he gets jail credit on his new sentence if his new sentence runs concurrent with the sentence he is already serving. *Clarkin*, 817 N.W.2d at 685. Although the district court did not state that Rabold's sentence was to be served concurrent with his felon-in-possession sentence, when

a district court is silent as to the nature of a sentence, concurrent rather than consecutive sentencing is presumed. *State v. Rasinski*, 527 N.W.2d 593, 595 (Minn. App. 1995). Because of this, the district court inappropriately excluded some of the jail credit that Rabold was entitled to receive. We remand and instruct the district court to recalculate Rabold's sentence.

Affirmed in part, reversed in part, and remanded.