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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0582**

State of Minnesota,
Respondent,

vs.

Shane Anthony Spicer,
Appellant

**Filed April 30, 2018
Affirmed in part, reversed in part, and remanded
Worke, Judge**

St. Louis County District Court
File No. 69DU-CR-14-1701

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

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

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

Considered and decided by Worke, Presiding Judge; Peterson, Judge; and Ross, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the evidence supporting his first-degree criminal-sexual-conduct convictions was insufficient and he was denied a fair trial when the district court

admitted evidence of prior domestic abuse and infidelity. Appellant also argues that the district court erred by convicting him of multiple crimes arising from a single behavioral incident. We affirm in part, reverse in part, and remand.

FACTS

Appellant Shane Anthony Spicer and his wife, A.S., had three children. The youngest child, T.S., was born in May 2000. The Spicer family lived in Alborn for most of T.S.'s childhood. Spicer and A.S. divorced in 2012; Spicer moved out and the children lived with A.S.

In early 2014, T.S. was unable to concentrate in school, was “crying all the time,” and had anxiety attacks. T.S. told her ex-boyfriend that Spicer had raped her. She then told the school nurse the same thing. The nurse told A.S. and social services. A.S. asked her nephews if Spicer had ever touched them inappropriately, to which both answered affirmatively.

In February 2014, Melissa Lehr, a county child-protection investigator, conducted a video-recorded interview with T.S. During the interview, T.S. stated that when she was seven or eight, she was lying in bed with Spicer in her parents' bedroom when he raped her. T.S. explained that she was cuddling with Spicer when he pulled down her pants and started touching her vagina, which she identified as her “no-no spot,” with his fingers. She said that Spicer then took off his pants and put his penis, which she identified as his “no-no spot,” inside her “no-no spot.” T.S. said that she started crying and Spicer stopped. She told Lehr that Spicer rolled over and tried to fall asleep. T.S. told Lehr that she went to the living room and watched television until she fell asleep.

Spicer was charged with two counts of first-degree criminal sexual conduct involving T.S., one count of first-degree criminal sexual conduct involving one nephew, and four counts of second-degree criminal sexual conduct involving both nephews. In his pretrial motions, Spicer moved for an order prohibiting: (1) the state from eliciting testimony regarding or referencing Spicer's prior convictions or other instances of domestic abuse; (2) testimony about or reference to Spicer hitting A.S. or chasing her "down the road and dragging her back by her hair"; and (3) testimony about or reference to "[Spicer] thinking that [A.S.] was cheating on him." The district court granted the motions, albeit reserving a ruling on the last motion for trial.

At trial, T.S. testified consistently with her report to Lehr. T.S. testified that when she began crying during the assault and Spicer stopped, he "told [her] it was okay and . . . he said, Daddy never tried to hurt you, and he told [her] that he loved [her]."

When asked how she felt about her parents getting divorced, T.S. testified that she thought it was for the best because "they fought all the time, both screaming and actually physically fighting all the time." Spicer did not object to this testimony. One of Spicer's nephews testified that Spicer was no longer his uncle because A.S. could not "take any more of him cheating [and] lying, so they have to be divorced."

A.S. testified that her marriage to Spicer deteriorated and "got abusive and cheating started and basically [they] just started hating each other." A.S. testified that she decided that she did not want to stay with Spicer "because of a certain affair he had." She also testified that the marriage was "physically violent" and that Spicer "did get accused by

people in Alborn of doing things and . . . you have to ask your kids.” Spicer did not object to these statements.

The jury found Spicer guilty of two counts of first-degree criminal sexual conduct involving T.S. and not guilty of the remaining counts. The district court sentenced Spicer to 154 months in prison on one count, but did not impose a sentence on the other. The warrant of commitment, however, indicated that Spicer was convicted of two counts of first-degree criminal sexual conduct. This appeal followed.

D E C I S I O N

Sufficiency of the evidence

Spicer argues that the evidence was insufficient to support his convictions because the state’s case rested entirely on T.S.’s uncorroborated testimony. In reviewing a claim of insufficient evidence, this court reviews the record to determine whether the evidence, when viewed in the light most favorable to the verdict, is sufficient to allow the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). The reviewing court assumes that the jury “believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Under Minnesota law, “the testimony of a [sexual assault] victim need not be corroborated.” Minn. Stat. § 609.347, subd. 1 (2016). Spicer acknowledges that T.S.’s

testimony need not be corroborated to sustain his convictions, arguing instead that in the absence of corroborating evidence, T.S.'s testimony was too contradictory and suspect to sustain his convictions. Spicer relies on *State v. Huss*, 506 N.W.2d 290 (Minn. 1993), and *State v. Foreman*, 680 N.W.2d 536 (Minn. 2004) for support.

In *Huss*, the supreme court overturned the appellant's conviction based on the alleged victim's uncorroborated testimony. 506 N.W.2d at 292-93. The only direct evidence that a three-year-old child had been abused by her father came from the child's testimony, but her testimony was "particularly troublesome." *Id.* at 292. The child testified for nearly an hour before making any accusation of abuse; she accused both of her parents of inappropriate touching; she denied having "yucky secrets"; she testified that six people had touched her private parts; she included a touch to her hair and a hug as "bad touches"; she had not seen her father for a year before trial, but testified that she had taken a shower at his house on the day she testified; she was unable to identify her father in the courtroom; and she described her father as bald and blind, although he was neither. *Id.* at 292. In addition, the child was repeatedly exposed to a highly suggestive book on sexual abuse. *Id.* at 292-93. Based on the "unusual facts" of the case, the supreme court determined that the uncorroborated testimony was insufficient to support a criminal-sexual-conduct conviction. *Id.* at 293.

In *Foreman*, the supreme court rejected the appellant's argument that the victim's uncorroborated testimony was insufficient to support the conviction. 680 N.W.2d at 539. The supreme court noted that it had previously affirmed a conviction based on a single witness's testimony even though the witness had previously stated that he would testify

against the defendant because of personal dislike. *Id.* (citing *State v. Hill*, 285 Minn. 518, 518, 172 N.W.2d 406, 407 (1969)). The supreme court also discussed *State v. Reichenberger*, in which it affirmed “a conviction of having sexual intercourse with a minor, even though the victim made conflicting statements at various times prior to trial, because at trial she testified positively that intercourse had occurred.” *Id.* (citing 289 Minn. 75, 78, 182 N.W.2d 692, 694 (1970)). The supreme court noted that it was significant in *Reichenberger* that the jury was apprised of the prior inconsistent statements. *Id.* (citing 289 Minn. at 79, 182 N.W.2d at 695). The supreme court further noted that in the cases when it determined that the uncorroborated testimony of a victim was insufficient alone to sustain a conviction, there were “additional reasons to question the victim’s credibility.” *Id.* These include expert testimony that the victim was exposed to highly suggestive materials, actions by the victim that were unexplained or questionable, or errors in the lineup process. *Id.*

Here, Spicer points to inconsistencies between T.S.’s statement to Lehr and her trial testimony. In particular: T.S. told Lehr that Spicer said nothing to her after the incident, but T.S. testified that he said he loved her and that he never tried to hurt her; T.S. told Lehr that Spicer was wearing pajama pants and a black shirt prior to the sexual contact, but T.S. testified that Spicer was wearing boxer shorts; T.S. told Lehr that the incident took place between fall and winter, but T.S. testified that it occurred in February; and T.S. told Lehr that Spicer touched her vagina with his fingers before penetration, but T.S. did not mention this touching at trial.

These inconsistencies do not rise to the level of those in *Huss*. Furthermore, T.S.'s testimony was mostly consistent with her statement to Lehr, including that Spicer penetrated her with his penis. See *Reichenberger*, 289 Minn. at 78, 182 N.W.2d at 694 (affirming conviction despite the victim's inconsistent statements when the victim testified at trial that intercourse occurred). Additionally, defense counsel cross-examined T.S. about these inconsistencies and discussed them during closing argument. See *id.* at 79, 182 N.W.2d at 695 (affirming conviction when the jury was apprised of the victim's inconsistent statements). Based on this record, we conclude that there was sufficient evidence to convict Spicer of first-degree criminal sexual conduct.

Prejudicial testimony

Spicer argues that the district court denied him a fair trial by allowing testimony repeatedly referring to matters it had already excluded. Whether a criminal defendant was denied a fair trial is a constitutional question that this court reviews de novo. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005).

Spicer relies on *State v. Hogetvedt* for the proposition that he is entitled to a new trial because the jury was exposed to prejudicial material, thus depriving him of a fair trial. 623 N.W.2d 909 (Minn. App. 2001), *review denied* (Minn. May 29, 2001). In *Hogetvedt*, a police officer testified that he believed that the defendant was guilty of assault despite the district court's ruling that such testimony was inadmissible. *Id.* at 914. This court stated that "[j]ury exposure 'to potentially prejudicial material creates a problem of constitutional magnitude, because it deprives a defendant of the right to an impartial jury.'"

Id. (quoting *State v. Cox*, 322 N.W.2d 555, 558 (Minn. 1982)). We concluded that the defendant was denied a fair trial as a result of the officer's testimony. *Id.* at 916.

In *Cox*, the supreme court considered whether the district court abused its discretion in determining that the appellant could still obtain a fair trial despite a remark by a sheriff acting as bailiff that he believed the prosecution had proved its case. 322 N.W.2d at 557-58. The supreme court noted that "the proper procedure for reviewing a jury verdict is to determine from juror testimony what *outside influences* were improperly brought to bear upon the jury and then estimate their probable effect on a hypothetical average jury." *Id.* at 559 (emphasis added). The supreme court stated that, to determine whether a defendant has been deprived of the right to an impartial jury due to potentially prejudicial matters, courts should consider "the nature and source of the prejudicial matters, the number of jurors exposed to the influence, the weight of evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice." *Id.*

We read *Cox* as instructing courts to apply those factors to circumstances in which the jury was exposed to an outside influence, rather than trial testimony. This reading is consistent with the supreme court's analysis in *State v. Erickson*, in which the court stated that "*Cox* instructs courts to determine from juror testimony what outside influences were improperly brought to bear upon the jury and then estimate their probable effect on a hypothetical average jury." 610 N.W.2d 335, 339 (Minn. 2000) (quotation omitted). Admittedly, in *Hogetvedt*, we applied the *Cox* factors to prejudicial trial testimony. 623 N.W.2d at 914. However, in that case, we emphasized that the police officer's testimony was "egregious" because, "[i]n essence, he told the jury he believed [the] appellant was

guilty.” *Id.* at 915. Furthermore, before trial, the district court stated that opinion testimony of this nature would be “totally improper.” *Id.* Finally, this court noted that given the witness’s “status as a police officer, he may have unduly influenced the jury.” *Id.*

Here, Spicer argues that portions of witnesses’ testimony were similarly prejudicial to the testimony in *Hogetvedt*. In particular, T.S. testified that her parents frequently fought, A.S. testified that her marriage to Spicer was abusive, physically violent, and involved infidelity by Spicer, and Spicer’s nephew testified that Spicer and A.S. divorced because of Spicer’s infidelity. A.S. also testified that Spicer had been accused by people in Alborn of “doing things.” However, unlike *Cox*, Spicer does not argue that there was any outside influence on the jury. Furthermore, even applying the *Cox* factors in this case, this testimony does not rise to the same “egregious” level as in *Hogetvedt*. None of these witnesses are police officers and none of them invaded the province of the jury by testifying that the state had met its burden of proof. We conclude that the district court’s admission of this testimony did not deprive Spicer of a fair trial.¹

Sentencing

The parties agree that this court should vacate the conviction on count two because counts one and two arose out of a single behavioral incident. Whether multiple offenses form part of a single behavioral act is a question of fact, “[b]ut where the facts are

¹ Although the state addressed in its brief whether the district court plainly erred or abused its discretion by admitting prejudicial testimony, Spicer does not advance those arguments or cite supporting caselaw. We decline to address those arguments because they are not properly before this court. See *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating that issues not briefed on appeal are not properly before this court), *review denied* (Minn. Aug. 5, 1997).

established, the determination is a question of law subject to de novo review.” *State v. Grampre*, 766 N.W.2d 347, 353-54 (Minn. App. 2009) (quotation omitted), *review denied* (Minn. Aug. 26, 2009).

“Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2006). The supreme court has interpreted this statute to mean that “a defendant may not be convicted of two counts of criminal sexual conduct . . . on the basis of the same act or unitary course of conduct.” *State v. Folley*, 438 N.W.2d 372, 373 (Minn. 1989). A “[c]onviction” refers to either a guilty plea or “[a] verdict of guilty by a jury” that is “accepted and recorded by the court.” Minn. Stat. § 609.02, subd. 5 (2006).

When a defendant is found guilty on multiple charges for the same act, the district court should formally adjudicate and impose sentence on only one count. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). The other guilty verdicts should not be formally adjudicated at that time. *Id.* “If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated [guilty verdicts], one of [them] can then be formally adjudicated and sentence imposed” *Id.*

There is no dispute that the jury found Spicer guilty of two counts of first-degree criminal sexual conduct arising out of a single incident. Because the warrant of commitment indicates that Spicer was convicted of two counts of first-degree criminal sexual conduct, we conclude that Spicer was formally convicted of both counts. *See State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999) (“[W]e typically look to the official judgment of conviction . . . as conclusive evidence of whether an offense has been formally

adjudicated.”). Therefore, we reverse in part and remand to the district court with instructions to correct the warrant of commitment to reflect judgment of conviction of only one count of first-degree criminal sexual conduct.

Pro se issues

In his pro se supplemental brief, Spicer argues that he is entitled to a new trial because: (1) a biased juror was impaneled; (2) his attorney was ineffective for failing to strike that juror; (3) he was denied his constitutional right to confront his accuser; (4) his attorney was ineffective for failing to raise objections at trial; (5) his attorney was biased against him; and (6) the district court abused its discretion by limiting expert testimony. We have carefully reviewed the substance of each pro se claim and relevant caselaw, and conclude that the claims are without merit. *See Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (rejecting pro se claims without articulating reasoning for each claim).

Affirmed in part, reversed in part, and remanded.