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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-1085**

State of Minnesota,  
Respondent,

vs.

Sergio Alejandro Zapata,  
Appellant

**Filed June 25, 2018  
Affirmed in part, reversed in part, and remanded  
Worke, Judge**

Otter Tail County District Court  
File No. 56-CR-16-1956

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Smith, John, 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## UNPUBLISHED OPINION

**WORKE**, Judge

Appellant argues that there was insufficient evidence to convict him of first-degree criminal sexual conduct and that the district court erred by convicting him on all counts. We affirm in part, reverse in part, and remand.

### FACTS

In June 2016, appellant Sergio Alejandro Zapata resided with his fiancée, D.C., D.C.'s parents, and D.C.'s two younger brothers and younger sister. D.C.'s sister, J.A., was nine or ten years old at the time.

D.C. shared a smartphone with Zapata and noticed a file in the “deleted” folder of Google Drive, an application on the phone. D.C. downloaded and played the video. The video depicted somebody's hands pulling down J.A.'s pants and touching her vagina. D.C. immediately recognized the hands in the video as Zapata's and recognized J.A. from her pajamas. J.C. also recognized the shoes worn by the person touching J.A. as belonging to Zapata. J.C. recognized Zapata's voice in the video as well.

J.A. participated in a Cornerhouse interview with a social worker. J.A. reported that Zapata touched her vagina with his hand. The social worker explained that “there's different parts of the vagina, there's like a outside part and a inside part and something else . . . you know?” The social worker asked, “Um where did he touch you on your vagina, was it on the outside or the inside or both?” J.A. replied, “inside.”

A nurse also examined J.A. The nurse attempted to “clarify with [J.A.] was it touching on, in or something else.” J.A. “clarified . . . that it was inside.” The hospital

record for the examination indicates that “[J.A.] disclosed digital-vaginal penetration by . . . Sergio ‘Alex’ Zapata on multiple occasions with the last time on June 2, 2016.”

The state charged Zapata with three counts each of first- and second-degree criminal sexual conduct as well as one count of use of minors in sexual performance/pornographic work. At trial, J.A. testified that Zapata touched her with his hand inside of her more than once. The jury found Zapata guilty as charged. The district court convicted Zapata of count 3, first-degree criminal sexual conduct, and sentenced him to 144 months in prison. The district court stated that “our file and records will reflect the jury verdicts of guilty on all counts. There will be no further sentencing other than as to that sentence just announced for Count 3.” Nonetheless, Zapata was convicted of all seven counts. This appeal followed.

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

### ***Sufficiency of the evidence***

Zapata argues that there was insufficient evidence to prove that he sexually penetrated J.A. Zapata does not contest that the state presented sufficient evidence as to the other elements of first-degree criminal sexual conduct.

In reviewing a sufficiency-of-the-evidence claim, this court must determine whether, “given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged.” *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). We assume the jury believed the state’s witnesses and disbelieved evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). To find Zapata guilty of first-degree criminal sexual conduct, the

jury had to find beyond a reasonable doubt that: (1) Zapata sexually penetrated J.A.; (2) Zapata had a significant relationship with J.A.; (3) J.A. was under 16 years old at the time of the sexual penetration; and (4) the sexual abuse involved multiple acts committed over an extended period of time. See Minn. Stat. § 609.342, subd. 1(h)(iii) (2014). Minnesota law defines “sexual penetration” as “any intrusion however slight into the genital or anal openings . . . of the complainant’s body by any part of the actor’s body.” Minn. Stat. § 609.341, subd. 12(2)(i) (2014).

Here, J.A. testified that Zapata touched her with his hand inside of her. J.A.’s Cornerhouse interview was also admitted into evidence. During that interview, J.A. clarified that Zapata touched her on the “inside” of her vagina. Finally, a nurse testified that, during a medical examination, J.A. clarified that Zapata touched her on the inside of her vagina.

Admittedly, the nurse testified as follows:

“Inside” to a child can mean a lot of different things. . . . A lot of children, if something goes inside of the labia minora, they believe that that is inside of their vagina because they don’t know necessarily that there’s somewhere else to go, because to them, it is inside of their body.

Zapata argues that this testimony demonstrates that J.A.’s statements that he touched her “inside” are insufficient to support the verdict. However, in *State v. Shamp*, this court concluded that there was sufficient evidence of sexual penetration when the victim testified that “when [the defendant] touched her genital area, he would rub his fingers between the folds of skin over her vagina, but not insert his fingers ‘all the way.’” 422 N.W.2d 520, 526 (Minn. App. 1988), *review denied* (Minn. June 10, 1988). Even if the jury interpreted

J.A.’s statements to mean that Zapata’s hand went inside the folds of skin over her vagina, that evidence would still be sufficient to sustain his conviction. *See* Minn. Stat. § 609.341, subd. 12(2)(i) (defining “sexual penetration” as “any intrusion however slight into the genital or anal openings . . . of the complainant’s body by any part of the actor’s body.”). A jury could reasonably conclude that Zapata sexually penetrated J.A.

### ***Lesser-included offenses***

Zapata argues that the district court erred by convicting him of multiple counts of first- and second-degree criminal sexual conduct because each count 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 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 (2014). 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 (2014).

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.*

Here, because the warrant of commitment indicates that Zapata was convicted of all counts, we conclude that he was formally convicted of each count. *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.”). We therefore reverse 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.

**Affirmed in part, reversed in part, and remanded.**