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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0932**

State of Minnesota,
Respondent,

vs.

Fidel Leon Castro,
Appellant.

**Filed June 17, 2019
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Hennepin County District Court
File No. 27-CR-16-29232

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

ROSS, Judge

Fidel Castro's 17-year-old stepdaughter awoke in pain as Castro forced his penis into her anus. The district court convicted him of third- and fourth-degree criminal sexual

conduct after a jury found him guilty. Castro appeals from his convictions, arguing that the district court erroneously admitted the victim's CornerHouse interview at his trial, failed to review privileged therapeutic records that would allegedly have impeached a prosecution witness's testimony, and improperly convicted him of a lesser-included offense. We affirm Castro's third-degree criminal sexual conduct conviction because the victim's CornerHouse interview was admissible as a prior consistent statement and the district court did not abuse its discretion by failing to review records that the therapist's records custodian said did not exist. But we reverse Castro's fourth-degree criminal sexual conduct conviction because it is a lesser-included offense, and we remand for a corrected judgment.

FACTS

Fidel Castro's son, 8-year-old J.C.M., told his school therapist that he saw his father masturbate in front of him and his half-sister, 17-year-old E.L.M., and that he saw a picture Castro had taken of E.L.M.'s partially naked buttocks while she slept. The school therapist relayed this report to the Brooklyn Park Police Department. Police spoke with E.L.M., Castro's stepdaughter. E.L.M. told police that, in addition to what J.C.M. reported, she had been awakened in pain one night to find that Castro had forced his penis into her anus.

The state charged Castro with third- and fourth-degree criminal sexual conduct against a 17-year-old with whom he shared a significant relationship. A CornerHouse interviewer spoke with E.L.M. about her report. E.L.M. told the interviewer that Castro put his penis in her anus while she was clothed.

Before trial, Castro moved the district court to review *in camera* confidential records of J.C.M.'s school therapy sessions and other school-behavior records to determine if they

contained any evidence relevant to his defense. Castro asserted that the records would reveal that J.C.M. had made other allegations of sexual misconduct and had a history of inappropriate behavior at school. The district court denied the motion, explaining that it would order disclosure only if Castro made a plausible showing that J.C.M. had previously made a false allegation of abuse.

Castro amended the motion to compel disclosure, alleging that J.C.M. had made but recanted sexual abuse allegations against a classmate and against Castro. The district court found good cause to order J.C.M.'s therapist to produce copies of any notes "in which [J.C.M.] discusses sexual assault or inappropriate touching." The district court received no documents but instead a note from Mike Turpin, general counsel for the custodian of J.C.M.'s school records, who stated that he had reviewed the therapist's notes and found none referring to sexual abuse or inappropriate touching.

Castro filed another motion for *in camera* review, arguing that the district court, not the custodian, should have reviewed the therapy records. The court rejected the argument, finding that there was nothing for the court to review in light of the statement from the therapist's counsel that no qualifying documents existed. The morning before trial, however, Castro's attorney informed the district court that Turpin had discovered at least one reference to inappropriate touching in J.C.M.'s records. The attorney said that his investigator had sent Turpin an e-mail telling him to "send that information and anything else he finds as he reviews the file" to the district court. The district court announced that it would review the documents when Turpin provided them. The record does not indicate what, if any, records were provided to and reviewed by the district court.

At trial, E.L.M.'s testimony was similar to her CornerHouse interview in saying that Castro put his penis into her anus and that she was clothed at the time. Castro moved the district court to exclude the recording of the CornerHouse interview from trial, asserting that it was inconsistent with E.L.M.'s testimony. The district court admitted the recording.

The jury found Castro guilty of third- and fourth-degree criminal sexual conduct, and it found that Castro knew that E.L.M. was cognitively delayed. The district court convicted Castro of both offenses. It sentenced him to prison for 48 months on the third-degree count and 27 months on the fourth-degree count. The district court stayed execution of the sentence except to order Castro to serve 365 days in jail on each count and be subject to lifetime registration as a predatory offender.

Castro appeals.

D E C I S I O N

Castro appeals from his third- and fourth-degree criminal sexual conduct convictions, raising three issues. He argues first that the district court improperly admitted a recording of the CornerHouse interview under the prior-consistent-statement exception to the hearsay rule. He argues second that the district court improperly refused to review J.C.M.'s confidential therapy records. He argues third that the district court wrongly convicted him of fourth-degree criminal sexual conduct because it is a lesser-included offense of the third-degree conviction. Only the last argument identifies an error.

I

Castro argues that the district court should not have admitted E.L.M.'s CornerHouse interview. We review a district court's decision to admit evidence for a clear abuse of

discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The district court admitted E.L.M.’s CornerHouse interview under the prior-consistent-statement exception to the hearsay rule. A statement is not hearsay when the declarant is subject to cross-examination and the statement is consistent with her trial testimony and helpful to the jury in evaluating her credibility. Minn. R. Evid. 801(d)(1)(b). The issue here is whether the alleged hearsay statement and trial testimony are “consistent.”

Castro argues that E.L.M.’s CornerHouse interview was not sufficiently consistent with her trial testimony for admission under the rule. Trial testimony need not be verbatim with a prior statement to be admissibly consistent. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). Minor discrepancies do not disqualify the evidence, while inconsistencies that “directly affect the elements of the criminal charge” do. *Id.* at 109–10. E.L.M.’s CornerHouse interview and trial testimony alike depicted an event during which Castro anally penetrated her. The details of neither account were precise. At trial, she said that Castro put his penis “in” her anus, but because she was sleeping, she was unsure if it was underneath or on top of her clothes. She said, “I think it was on my clothes and on my skin,” and she was unsure if it happened “inside or outside” of her anus because she was wearing shorts. But she was certain that Castro’s penis hurt her and woke her up. In her CornerHouse interview, E.L.M. said that Castro “put something in [her].” But she also said that Castro put his penis “on” her butt and that, because she was wearing clothes during the incident, she thinks Castro’s penis contacted her clothing. As she later said at trial, E.L.M. told the interviewer that Castro’s penis hurt her.

E.L.M.'s equivocal statements about the penetration might have given the jurors reason to question the nature of Castro's contact. That the statements were equivocal, however, does not make them inconsistent. They were tentative in the same way, consistently describing the detail of the penetration equivocally. This distinguishes this case from our decision in *Bakken*, on which Castro principally relies. In *Bakken*, we held that a victim's trial testimony was inconsistent with his prior statement because the prior statement described the criminal conduct in a manner that was substantially more serious than his trial testimony. 604 N.W.2d at 110. The victim testified at Bakken's trial that Bakken touched his anus with his penis and put his penis in the victim's mouth. *Id.* at 108. In the victim's prior statement, he described a much more violent attack. He had claimed that Bakken had also ripped his clothes, threatened to kill him with a knife, and cut him on the arm. *Id.* We reasoned that the prior statement was inconsistent because of the substantially different details, which, if accepted as true, would elevate the offense from third- to first-degree criminal sexual conduct. *Id.* at 110. Unlike the *Bakken* disparity, E.L.M.'s accusations about Castro's conduct are substantively the same in both accounts.

Castro also contends that E.L.M.'s CornerHouse statement was inconsistent with her testimony regarding the time of the incident and the terms she used to refer to Castro's penis. At trial, she did not say when the incident occurred and she referred to Castro's penis as a "private," while in her interview she had said the incident occurred around the time of a wedding and she referred to Castro's "pipi rin." The timing omission in one account is not an inconsistency about what happened, and it does not render the statements inconsistent with each other. The difference in anatomical terminology is not an

inconsistency because the context leaves no room to question that E.L.M. was, in both accounts, referring to Castro's penis. The district court did not abuse its discretion by admitting E.L.M.'s CornerHouse interview as a prior consistent statement.

II

Castro argues next that the district court improperly refused to consider J.C.M.'s confidential therapy records *in camera*. We review the district court's use of records protected by a statutory privilege for an abuse of discretion. *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012). The privilege applicable here generally prohibits a therapist from disclosing any information obtained in the professional assessment or treatment of a client without the client's consent. Minn. Stat. § 595.02, subd. 1(g) (2018). Castro argues that the district court should have viewed J.C.M.'s therapy and behavioral records *in camera* to determine if they contained information that might help his defense. The argument fails.

Balancing the witness patient's privilege to keep private his therapy records against a criminal defendant's right to present a defense, "the district court may screen the confidential records *in camera*." *Hokanson*, 821 N.W.2d at 349. If the district court discovers information helpful to the defense, the district court must disclose it to the defendant. *See id.* But the district court is not required to examine documents in every case because the "*in camera* review is not a right." *Id.* Before the district court undertakes the review, "the defendant must first establish a plausible showing that the information sought would be both material and favorable to his defense." *Id.* (quotation omitted).

Castro initially failed to make this requisite showing. He made two requests for the district court to review J.C.M.'s confidential records. The initial request sought review of

records describing J.C.M.'s history of inappropriate behavior. This sort of noncriminal bad-behavior evidence is generally inadmissible to impeach a witness's testimony. See Minn. R. Evid. 608.

Castro's amended request sought evidence that J.C.M. had made prior sex-abuse allegations but then recanted, and it therefore described potentially admissible evidence. The district court ordered the production of any confidential record "in which [J.C.M.] discusses sexual assault or inappropriate touching," for the court's *in camera* review. We are not persuaded by Castro's argument that this process inappropriately delegated the court's duty. He cites no authority suggesting, let alone requiring, that the district court must collect a patient witness's entire therapeutic record and sift each document for a statement relevant to the defense before the therapist previews the documents based on the court's categorizing directive. See *State v. Evans*, 756 N.W.2d 854, 871–73 (Minn. 2008) (affirming district court's decision to review only a portion of a medical record based on the date of the record). We see no merit to Castro's delegation argument, because the district court's order for production never delegated to the therapist's records custodian the task of reviewing the documents to determine their legal relevancy. The district court instead merely described the content of the documents it wanted the custodian to present so that the court could conduct the relevancy review from among the full body of only potentially relevant documents.

In the context of the amended request, Castro announced that the therapist's records custodian had apparently missed one or more documents meeting the district court's description. But the custodian's mistake is not an error attributable to the substance or

procedure of the district court's directive, and it caused no harm. The district court judge emphasized its disappointment with the custodian's oversight, announcing, "I guess it's something I will take up with him when he appears because it was a court order. It was his business . . . to make sure it's correct." And the court said that it would review all the identified potentially relevant documents after the oversight was cured, promising, "I'll see what it is when it gets here."

Castro has not identified any action or omission by the district court that constitutes an abuse of discretion.

III

Castro persuasively argues that the district court erred by entering judgment of conviction for fourth-degree criminal sexual conduct because the conviction rests on the same conduct as his third-degree conviction. The state reasonably concedes the point. The district court may not enter a conviction for both a crime and a lesser degree of the same crime occurring in a single behavioral incident. Minn. Stat. § 609.04, subd. 1(1) (2018). Whether multiple convictions rest on a single behavioral incident is a question of law that we review de novo. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522–23 (Minn. 2013). The single act of sexual penetration is the only incident described in the probable-cause statement of the criminal complaint charging both counts. Third-degree criminal sexual conduct includes "penetration" under specified circumstances, while fourth-degree criminal sexual conduct includes "contact" under specified circumstances. *Compare* Minn. Stat. § 609.344, subd. 1 (2014) *with* § 609.345, subd. 1 (2014). When the act of penetrating that establishes a third-degree charge is the same act of "contact" that establishes the

fourth-degree charge, the fourth-degree conduct constitutes a lesser-included offense of the third-degree charge. We therefore reverse Castro's conviction of the lesser-included, fourth-degree offense, and we remand for the district court to vacate the judgment and sentence. And because the district court's finding that Castro is subject to lifetime registration as a predatory offender apparently rests on his having been convicted of both counts, *see* Minn. Stat. § 243.166, subd. 6(d)(1) (2018), on remand the district court should also address that finding in light of our decision.

Affirmed in part, reversed in part, and remanded.