STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1880

State of Minnesota,
Respondent,

vs.

Anton Jermaine Brown,
Appellant.

Filed December 2, 2019
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Hennepin County District Court
File No. 27-CR-17-21380

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Smith, Tracy M., Judge; and Peterson, Judge.*

S Y L L A B U S

When an offender is convicted simultaneously of multiple sex offenses in the same hearing, the offender does not have a prior sex-offense conviction under Minn. Stat.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

§ 609.3455, subd. 1(g) (2016), and is not subject to lifetime conditional release under Minn. Stat. § 609.3455, subd. 7(b) (2016), absent another qualifying conviction.

O P I N I O N

REYES, Judge

In this direct appeal from his convictions of first- and second-degree criminal sexual conduct following a jury trial, appellant Anton Jermaine Brown argues that the district court (1) denied his right to a speedy trial; (2) erred in imposing a lifetime conditional-release term; and (3) improperly included two Iowa drug convictions in his criminal-history score as felonies. Appellant raises numerous additional issues in his pro se supplemental brief. We affirm in part, reverse in part, and remand for resentencing.

FACTS

Afraid to go home after returning to their apartment complex after their curfews on June 2, 2017, victims 11-year-old E.C. and 12-year-old K.V. decided to sleep in an apartment-building hallway. E.C.'s mother called the police at approximately 10:00 p.m. to report E.C. missing. Appellant, then 45 years old and whose wife lived in this same apartment complex, encountered the girls sleeping in the hallway at approximately 2:00 a.m. on June 3, 2017. Upon waking, E.C. and K.V. recognized appellant as a relative of one of their friends and told him that a man with a gun had chased them earlier that evening while outside, but they were afraid to go home because it was past their curfew. Appellant offered to take the girls to a hotel with him and get them their own room so they could sleep safely. E.C. and K.V. agreed.

Appellant brought them to a single hotel room in a hotel several miles away and gave them alcohol and marijuana. He touched the girls' breasts and vaginas under their clothes, and digitally penetrated E.C. When appellant appeared to fall asleep, the girls got up, broke off a bathroom towel bar for protection, and fled the hotel. The girls found a ride back to K.V.'s apartment.

Police found the girls later that morning at K.V.'s apartment. Concerned with E.C.'s appearance, E.C.'s mother took her to the hospital, where E.C. reported the sexual assault to a nurse who conducted a sexual-assault examination. K.V. disclosed the sexual assault to her mother that day as well and recounted it to a detective on June 7, 2017.

Respondent State of Minnesota filed a complaint against appellant and issued an arrest warrant for him on August 28, 2017. Police arrested him on January 28, 2018. The state charged appellant with one count of first-degree criminal sexual conduct (victim under 13), in violation of Minn. Stat. § 609.342, subd. 1(a) (2016), and one count of second-degree criminal sexual conduct (victim under 13), in violation of Minn. Stat. § 609.343, subd. 1(a) (2016), for sexually assaulting E.C. and K.V., respectively.

The jury found appellant guilty on both counts of criminal sexual conduct. The district court sentenced him to concurrent 216-month and 140-month prison terms and to a lifetime conditional-release term. This appeal follows.

ISSUES

I. Did the district court violate appellant's right to a speedy trial?

II. Did the district court improperly sentence appellant to a lifetime conditional-release term?

III. Did the state provide sufficient evidence to establish that two of appellant's out-of-state convictions should be included in his criminal-history score?

ANALYSIS

I. The district court did not violate appellant's right to a speedy trial.

Appellant argues that the district court denied his right to a speedy trial by holding his trial 104 days after his demand for a speedy trial. We disagree.

Both the U.S. and Minnesota constitutions provide the right to "a speedy and public trial" in all criminal prosecutions. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The state bears the burden of ensuring a speedy trial. *State v. Windish*, 590 N.W.2d 311, 316 (Minn. 1999). We review a speedy-trial challenge de novo. *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017). A trial must begin within 60 days of the defendant's demand, unless the district court finds good cause for a later trial date. Minn. R. Crim. P. 11.09(b). Delays beyond this 60-day mark are a presumptive violation. *Windish*, 590 N.W.2d at 315-16.

On March 6, 2018, appellant asserted his right to a speedy trial. On April 2, 2018, the district court granted the state a continuance due to witness unavailability and rescheduled the trial for May 21, 2018. On May 18, 2018, the district court granted the state a second continuance due to pending DNA-testing results. The district court rescheduled trial to June 18, 2018, 104 days after appellant's demand for a speedy trial.

The Supreme Court established four factors to weigh in determining whether a district court violated a defendant's right to a speedy trial: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and

(4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972). No single factor is either necessary or sufficient to find a violation. *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015). Rather, the factors are related and considered together. *Id.* The only remedy for a violation of the right to a speedy trial is reversal and dismissal. *Barker*, 407 U.S. at 522, 92 S. Ct. at 2188. Appellant and the state agree that factors one through three weigh in favor of appellant. They differ in the weight they place on the prejudice factor and on how it affects the outcome of the *Barker* analysis. We examine each factor individually and together.

A. Length of the delay

A delay beyond the 60-day period is a presumptive violation that triggers analysis of the remaining *Barker* factors. *Windish*, 590 N.W.2d at 315-16 (citing *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192). Here, the second continuance pushed appellant's trial date to June 18, 2018, 44 days beyond the 60-day period that ended May 5, 2018. This delay therefore requires analysis of the remaining *Barker* factors. *Id.* at 316.

B. Reasons for the delay

We must next determine whether the state or appellant is more responsible for the delay. *Taylor*, 869 N.W.2d at 19-20 (citing *Vermont v. Brillon*, 556 U.S. 81, 90, 129 S. Ct. 1283, 173 (2009)). Deliberate delays "to hamper the defense" weigh heavily against the state, "neutral reasons" such as negligence weigh less heavily, and "valid reason[s], such as a missing witness . . . justify appropriate delay." *Barker*, 407 U.S. at 531, 92 S. Ct. at 219. A lack of diligence in making witnesses available also weighs against the state. *Windish*, 590 N.W.2d at 317. The state's prompt requests for DNA-testing results and

reasonable requests for continuances to obtain test results may constitute good cause for trial delay. *State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990).

Here, the district court found good cause to grant each of the state's requests for continuances. The record does not indicate the cause of the witness unavailability that led to the first continuance. For the second continuance, the state submitted a letter to the district court describing the steps it took to obtain the DNA-testing results. The state did not receive the initial October 2017 DNA report from the Hennepin County Sheriff's Department, indicating the need for follow-up testing, until May 11, 2018. However, the state sent its first request for this report on March 14, 2018, and a second request on May 4, 2018. There is no indication that the state deliberately delayed in requesting the necessary DNA report. Nonetheless, the state bears more responsibility for the delay than does appellant. Therefore, this factor weighs against the state.

C. Appellant's assertion of the right to a speedy trial

We give the third factor strong weight in determining whether a violation has occurred, as the strength of a defendant's efforts to assert his right to a speedy trial will be affected by the nature of the delay and prejudice he experiences. *Barker*, 407 U.S. at 531-32, 92 S. Ct. at 2192-93. The third factor allows courts "to weigh the frequency and force of the [defendant's] objections as opposed to attaching significant weight to a purely pro forma objection." *Id.* at 529, 92 S. Ct. at 2191. After making his formal demand for a speedy trial on March 6, 2018, appellant opposed each of the state's requests for continuances, reasserted his demand for a speedy trial, and requested conditional release if the district court approved the continuances. The district court denied appellant's requests.

Appellant appears to argue in the alternative that we should view the length of the delay before his trial began as ten months, based on the date the state filed the complaint against him. However, when a defendant knows of a warrant for his arrest, as appellant did here, but does not assert his right to a speedy trial, this third factor weighs strongly against that defendant. *Osorio*, 891 N.W.2d at 629. Instead, we review appellant's claim and this factor using the 44 days after the 60-day period following his assertion, and we conclude that appellant's consistent assertions weigh in his favor.

D. Prejudice to the defendant

For the fourth factor, we consider whether the delay resulted in (1) oppressive pretrial incarceration; (2) heightened, rather than ordinary, levels of anxiety and concern in the defendant; and (3) an impaired defense. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. A failure to show any of these forms of prejudice weighs against the defendant. *State v. Strobel*, 921 N.W.2d 563, 572 (Minn. App. 2018), *review granted on other grounds* (Jan. 29, 2019), *aff'd* (Minn. Aug. 14, 2019). Impairment of defense is the most serious form of prejudice. *Doggett v. U.S.*, 505 U.S. 647, 654, 112 S. Ct. 2686, 2692 (1992). It may involve an "affirmative showing that the delay weakened [the defendant's] ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence," *id.* at 655, 112 S. Ct. at 2692, but such an affirmative showing is not necessary. *Moore v. Arizona*, 414 U.S. 25, 26, 94 S. Ct. 188, 189 (1973). We presume that pretrial delay prejudices the accused and that such prejudice "intensifies over time." *Doggett*, 505 U.S. at 652, 112 S. Ct. at 2691.

First, appellant argues that his "repeated assertion of his speedy trial right and his motions for release pending trial demonstrates the oppressiveness of his incarceration." But this argument relates to the third *Barker* factor. *See Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. Second, relying on a competency evaluation he completed in February 2018, appellant contends that his mental health suffered while he was incarcerated. But this relates to appellant's pretrial detention before his original trial date of April 2, 2018, not to the delay thereafter. Third, appellant argues in his pro se supplemental brief that the district court's denials of his requests for conditional release impaired his ability to mount a defense because he could not pay an attorney or do his own research. But appellant does not claim that any favorable witnesses became unavailable due to the delay or that any witnesses had lapses of memory that affected the outcome of the trial. *See id.* at 2194 (discussing minimal prejudice from delay of more than four years, looking in part to indications of witness unavailability and material memory lapses during witness testimony). This factor therefore weighs in favor of the state. *See Strobel*, 921 N.W.2d at 572.

E. Weighing of the factors

Although the first three factors weigh against the state, we are not required to find a speedy-trial violation if the fourth factor weighs in favor of the state. *See, e.g.*, *State v. Jones*, 392 N.W.2d 224, 234-36 (Minn. 1986) (concluding no speedy-trial violation after seven-month delay when first three *Barker* factors weighed against state but no unfair prejudice shown); *Strobel*, 921 N.W.2d at 573 (concluding no violation when first three factors weighed against state but appellant showed no prejudice from 15-day delay

following 60-day period). Here, even if the state was responsible for the delay due to not securing witnesses and obtaining DNA testing results promptly, these reasons, coupled with the lack of particularized prejudice and the relatively short 44-day delay following the 60-day period, weigh against appellant. *See Doggett*, 505 U.S. at 657, 112 S. Ct. at 2693-94 (concluding lack of demonstrable prejudice does not render state's negligence "automatically tolerable," but delays caused by "negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice"). We conclude that the delay did not violate appellant's right to a speedy trial.

II. The district court should have imposed a ten-year conditional-release term instead of a lifetime term.

Appellant argues that the district court erred by imposing a lifetime rather than a ten-year conditional-release term because he did not have a "prior sex offense conviction" under Minn. Stat. § 609.3455 (2016), and the two charges did not arise out of separate behavioral incidents.[1] Because we agree with appellant's first argument, we need not address his second argument.[2]

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[1] Appellant argues correctly, and the state agrees, that although appellant did not raise the issue of his conditional-release term at sentencing, "[t]he court may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9.

[2] There is a lack of caselaw applying the "separate behavioral incidents" requirement in section 609.3455's definition of "prior sex offense conviction." The state argues that this definition is subject to the same multiple-victim rule carved out of the prohibition in section 609.035 (2016) against multiple sentences for offenses that result from the same "conduct," which courts have interpreted to mean a "single behavioral incident." We do not decide this issue here, but we note that the language of sections 609.035 and 609.3455 differs in important ways, such that the multiple-victim exception for sentencing offenses that stem from a "single behavioral incident" may be inapplicable to the definition in section

Minn. Stat. § 609.3455, subd. 6, provides for a mandatory ten-year conditional-release term for criminal sexual conduct in violation of Minn. Stat. §§ 609.342(a)-(b) or 609.343(a)-(b). However, an offender may be sentenced to a lifetime conditional-release term if he has a prior sex-offense conviction. Minn. Stat. § 609.3455, subds. 3-4, 7. An offender has a "prior sex offense conviction" "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) (emphases added).

The parties agree that appellant's two convictions were adjudicated simultaneously, and we conclude that the record supports this. The district court stated,

> [Y]ou were convicted on June 22, 2018, of the crimes of criminal sexual conduct in the [first and second degree]. *And standing convicted of those crimes, so you're going to be convicted today on both counts*, it is the sentence of law and the judgment of this court that as punishment, therefore, you shall be committed to the Commissioner of Corrections of this state for a period of 216 months on Count 1 and 140 months on Count 2. Count 2 will run concurrently with Count 1.

(Emphasis added.) Resolving the issue of whether convictions that are adjudicated simultaneously can result in a prior conviction and a present offense is a matter of statutory

609.3455, subdivision 1(g), of prior convictions as resulting from "separate behavioral incidents." The cases establishing the multiple-victim-rule exception to section 609.035 do not describe it as converting a single behavioral incident into separate behavioral incidents.

interpretation, which is an issue of law that we review de novo. *See State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012).

The first step of statutory interpretation is to determine whether the language of the statute is ambiguous. *Larson v. State*, 790 N.W.2d 700, 703 (Minn. 2010). A statute is ambiguous only when it is subject to more than one reasonable interpretation. *State v. Fleck*, 810 N.W.2d 303, 307 (Minn. 2012). If the statute is not ambiguous, we enforce its plain meaning. *Dupey v. State*, 868 N.W.2d 36, 39 (Minn. 2015).

A. "Prior sex offense conviction" in section 609.3455, subdivision 1(g), is unambiguous.

In *State v. Nodes*, the supreme court held that the meaning of "prior sex offense conviction," in section 609.3455, subdivision 1(g), is unambiguous. 863 N.W.2d 77, 80, 82 (Minn. 2015). To analyze the plain meaning of the statute, the supreme court considered the meanings of "convicted," "before," and "present offense." *Id.* at 80. A conviction occurs when the district court accepts and records "a verdict of guilty by a jury or a finding of guilty by the court." Minn. Stat. § 609.02, subd. 5 (2016); *Nodes*, 863 N.W.2d at 80. Next, it concluded that "before" meant "earlier than," which required that the first conviction be adjudicated only "at an earlier time than the second." *Nodes*, 863 N.W.2d at 82 (citation omitted). Finally, it concluded that the "present offense" must be "now existing or in progress" and that once the district court convicts the defendant, the offense "in the next instant [is] no longer a present offense, but [is] now a past conviction." *Id.* (citation omitted).

The state does not argue that the statute is ambiguous. Instead, it asks that we follow the purported intent of the district court, which it argues was to impose a lifetime conditional-release term, rather than the plain meaning of the statute. But the state cites to no authority in support of this argument, and it is not the role of this court to ignore the plain text of an unambiguous statute, such as section 609.3455, subdivision 1(g). *See Reiter v. Kiffmeyer*, 721 N.W.2d 908, 910-11 (Minn. 2006).

B. Under the plain meaning of section 609.3455, subdivision 1(g), simultaneous adjudication of convictions does not result in lifetime conditional release.

The *Nodes* court did not consider the issue of simultaneous convictions. It held that when two convictions are entered in the same hearing, one before the other, the first-entered conviction constitutes a "prior sex offense conviction" with respect to the later-entered conviction. *Nodes*, 863 N.W.2d at 80, 82. This court has interpreted the reasoning in *Nodes* in a number of unpublished opinions to conclude that convictions adjudicated simultaneously cannot constitute both a prior conviction and a present offense under section 609.3455, subdivision 1(g).[3] These cases are not precedential, but we find their analysis to be persuasive.

[3] *See, e.g.*, *Studanski v. State*, No. A17-0999, 2018 WL 1569955, at *4 (Minn. App. Apr. 2, 2018), *review denied* (Minn. June 19, 2018) (simultaneous conviction of two offenses following guilty pleas); *State v. Davidson*, No. A17-0149, 2018 WL 1370569, at *7 (Minn. App. Mar. 19, 2018) (simultaneous conviction of three offenses following jury verdict); *State v. Ingalls*, No. A16-1803, 2017 WL 5560033, at *1, 7-8 (Minn. App. Nov. 20, 2017) (simultaneous conviction of two offenses following jury verdict); *State v. Broehl*, No. A16-0966, 2017 WL 2535681, at *1, 3 (Minn. App. June 12, 2017) (simultaneous conviction of eight offenses following guilty pleas); *State v. Klanderud*, No. A15-1897, 2016 WL 6395252, at *1, 4-6 (Minn. App. Oct. 31, 2016) (simultaneous conviction of two offenses

With no temporal gap whatsoever between a district court's adjudication of offenses, no conviction is entered "before" the other, and no conviction can be prior to the other. Therefore, we hold that, under the plain meaning of Minn. Stat. § 609.3455, subd. 1(g), when a district court convicts an offender simultaneously of multiple sex offenses in the same hearing, the offender does not have a prior sex-offense conviction and is not subject to a lifetime conditional-release term under Minn. Stat. § 609.3455, subd. 7(b), absent another qualifying conviction.

Here, the district court convicted appellant simultaneously of multiple sex offenses in the same hearing and imposed concurrent sentences for appellant's two counts and a lifetime conditional-release term. Appellant had no other convictions at the time of his adjudication that would subject him to lifetime conditional release under section 609.3455. The district court therefore improperly imposed a lifetime conditional-release term, and we remand to the district court to vacate this term for resentencing consistent with this opinion.

III. The current record does not support the determination that two of appellant's out-of-state convictions should be included in his criminal-history score.

Appellant argues that the district court abused its discretion by assigning criminal-history points for two Iowa drug convictions. We agree.

The state agrees with appellant's argument. However, this court has an obligation to "decide cases in accordance with [the] law" even when the parties agree on an issue. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

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following guilty pleas); *State v. Rekdal*, No. A14-1364, 2015 WL 7199866, at *1-3 (Minn. App. Nov. 16, 2015) (simultaneous conviction of two offenses following guilty pleas).

We review the district court's determination of a defendant's criminal-history score for an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). A sentence based on an incorrect criminal-history score "is an illegal sentence" that may be corrected at any time. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). In classifying "out-of-state prior offenses . . . '[a]n offense may be counted as a felony only if it would both be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence.'" *State v. Scovel*, 916 N.W.2d 550, 555, 559 (Minn. 2018) (citing Minn. Sent. Guidelines 2.B.7.a (2015)). The state bears the burden of establishing by a fair preponderance of the evidence that an out-of-state conviction constitutes a felony in Minnesota. *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983).

The district court assigned two one-half points for two convictions appellant received in Iowa: (1) possession of a controlled substance in February 2000 and (2) possession of marijuana, third offense, in June 2001. The record does not contain any facts that establish whether these convictions were felonies under Minnesota law. Further, the record does not indicate the controlled substance at issue in the first conviction or the amount of marijuana in possession in the second conviction. Appellant correctly notes that, at the time of the present offenses, possession of 42.5 grams or less of marijuana was not a felony in Minnesota. Minn. Stat. §§ 152.01, subd. 16, .027, subd. 4 (2016). We therefore remand to the district court to determine whether appellant's Iowa possession convictions constituted felonies in Minnesota at the time of appellant's present offenses.

See State v. Outlaw, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008).

IV. Appellant's pro se arguments

Appellant raises several additional issues in his pro se supplemental brief. None of appellant's pro se claims entitles him to relief.

A. Insufficient and inconsistent evidence

Appellant argues that the state presented insufficient evidence for the jury to find him guilty of each offense. At trial, appellant moved for a directed verdict based on inconsistencies between the two victims' statements. The district court denied the motion. When an appellant challenges the sufficiency of evidence, we view the evidence in the light most favorable to the verdict, and "must [] assume[] that the fact-finder disbelieved any evidence that conflicted with the verdict." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). While there were some minor inconsistencies in witness testimony at appellant's trial, credibility is a question for the fact finder, and after a careful review of the record, we conclude that sufficient evidence supports the verdict.

B. Jury was not a fair cross-section

Appellant, an African-American man, argues that the all-white jury did not represent a fair cross-section of his peers. We review fair-cross-section claims de novo. *See State v. Griffin*, 846 N.W.2d 93, 99 (Minn. App. 2014), *review denied* (Minn. Aug. 5, 2014). A party challenging a jury panel must do so "in writing and before the court swears in the jury." Minn. R. Crim. P. 26.02, subd. 3. Appellant did not do so here. Therefore, we will consider an issue not raised before the district court only if it constitutes plain error, which

requires (1) an error, (2) that is plain, and (3) that affects the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To prove a fair-cross-section claim, appellant has the burden of showing, among other factors, that "the group allegedly excluded . . . was not fairly represented in the venire." *Griffin*, 846 N.W.2d at 100 (citing *State v. Williams*, 525 N.W.2d 538, 542 (Minn. 1994)).

Appellant provides no legal arguments and points only to the racial composition of the petit jury. However, the record shows that Black or African American individuals were fairly represented in the jury venire.[4] Appellant cannot show any error. As a result, his claim fails.

C. Improper testimony

Appellant next argues that the district court improperly admitted hearsay statements from the victims, expert-witness testimony from a CornerHouse forensic interviewer, and testimony from the hotel general manager regarding his viewing of a hotel videotape that did not get introduced at trial.

We review district court determinations regarding hearsay for an abuse of discretion. *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009). A prior statement by a

[4] Absolute and comparative disparities in the venire are two common methods by which to analyze fair-cross-section claims. *See Williams*, 525 N.W.2d at 542-43. Here, comparing the percentage of individuals who identified as "Black or African American" in the 35-person jury venire (11.4%) with that in Hennepin County (12.7%), based on the 2017 American Community Survey from the U.S. Census Bureau, the jury venire had an absolute disparity of 1.3% and a comparative disparity of 10.2%. We have held that figures much higher than these do not warrant a new trial. *See id.* at 543 (concluding representation of African-Americans in jury venire was fair with 1.7% absolute disparity, 46% comparative disparity, and no showing of systematic exclusion).

witness is not hearsay when it is "consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." Minn. R. Evid. 801(d)(1). The district court admitted into evidence prior recorded statements from the victims. Both victims testified at trial consistent with their out-of-court interviews. The district court therefore did not abuse its discretion in allowing the recorded statements of the victims.

We review evidentiary rulings on the admissibility of expert testimony for an abuse of discretion. *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016). An expert may testify "in the form of an opinion" if his or her "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. The state laid a sufficient foundation for the forensic interviewer as an expert on child forensic interviewing. Because her testimony assisted the jury, we discern no abuse of discretion by the district court.[5]

Finally, the state presented the testimony of the hotel general manager regarding the contents of the hotel-security footage because the hotel no longer had the videotape, which it retains for only seven days. The district court did not abuse its discretion in admitting this testimony in light of the unavailability of the video.

[5] In response to the state's motion to offer expert testimony, defense counsel stated, "I don't really see any legal basis for an objection here, provided that, you know, the state can lay appropriate foundation, and I believe they probably will be able to do so." Appellant did not object at trial to the foundation the state laid.

D. Conflict of interest between attorney and judge

Appellant asserts that his counsel had "previously written [the judge] up for improper conduct," creating a conflict of interest at trial. Appellant appears to imply that the district court judge should have recused herself, but he filed no motion in the district court requesting recusal. Decisions to recuse are "within the [district] court's discretion" and "should not be reversed absent clear abuse of that discretion." *Carlson v. Carlson*, 390 N.W.2d 780, 785 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986). Appellant's mere assertion of a conflict of interest, without more, fails.

E. Improper limitation of DNA evidence

Appellant argues that the district court abused its discretion by excluding testimony about DNA evidence. At trial, after discussion with the district court regarding the DNA evidence, defense counsel and the state agreed to allow sufficient testimony to show that appellant's DNA was not found on victim E.C., but to prevent testimony that would violate Minnesota rape-shield laws. The district court did not abuse its discretion in admitting this stipulated-to testimony.

F. Improper denial of in-camera review of victim's medical records

Appellant challenges the district court's denial of his request for in-camera review of medical records of one of the victims from a hospitalization one week before the offenses. A party requesting in-camera review must make a "plausible showing that the information sought would be both material and favorable to his defense." *State v. Hummel*, 483 N.W.2d 68, 71-72 (Minn. 1992). The district court denied appellant's request for in-camera review of these records, finding that appellant could not establish why the records

were relevant, beyond mere speculation. Because the record supports this determination, we conclude that the district court did not abuse its discretion.

G. Ineffective assistance of counsel

Appellant lastly claims that his counsel failed to prepare for trial, make objections, and prepare him to testify and dozed off during the trial. On a claim of ineffective assistance of counsel, the defendant must show (1) deficient performance by counsel and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). In analyzing the first element, disputes over trial strategy generally do not rise to the level of being a deficiency. *State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014). Counsel's representation must have fallen below an objective standard of reasonableness. *Strickland*, 466 U.S. at 669, 104 S. Ct. at 2055.

Defense counsel did state at a hearing that he "practically fell asleep while that statement was being read." However, he made this statement in the context of arguing forcefully against the state's *Spreigl* motion by emphasizing the pressure that the late motion had placed upon counsel. The district court ultimately denied the state's motion. Overall, there are no indications that defense counsel performed in an unreasonably deficient manner. Because appellant has not met the first *Strickland* prong, we need not address the second prong. *See Vang*, 847 N.W.2d at 266 ("We need not analyze both prongs if either one is determinative." (citation omitted)). Appellant's ineffective-assistance-of-counsel claim therefore fails.

D E C I S I O N

When an offender is convicted simultaneously of multiple sex offenses in the same hearing, the offender does not have a prior sex-offense conviction under Minn. Stat. § 609.3455, subd. 1(g) (2016), and is not subject to lifetime conditional release under Minn. Stat. § 609.3455, subd. 7(b) (2016), absent another qualifying conviction.

The district court convicted appellant simultaneously of two sex offenses in the same hearing and imposed lifetime conditional release based on those convictions. Appellant had no other qualifying convictions under Minn. Stat. § 609.3455, subd. 7(b). Because neither offense constituted a prior sex-offense conviction under Minn. Stat. § 609.3455, subd. 1(g), the district court improperly imposed a lifetime conditional-release term.

Affirmed in part, reversed in part, and remanded.