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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1637**

State of Minnesota,
Respondent,

vs.

Isaiah Stephen Schuety,
Appellant.

**Filed March 1, 2021
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge**

Crow Wing County District Court
File No. 18-CR-18-2418

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Considered and decided by Frisch, Presiding Judge; Hooten, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this direct appeal, appellant Isaiah Stephen Schuety challenges his convictions for first- and third-degree criminal sexual conduct, felony stalking, and assault. He argues

that: (1) the evidence was insufficient to support the jury's guilty verdicts; (2) his conviction for felony stalking violated his right to due process because, when he pleaded guilty to a prior stalking offense, he was not told that the conviction could be used to enhance future stalking crimes; (3) he received ineffective assistance of counsel; (4) there were multiple instances of prosecutorial misconduct; (5) the delay between the assault and his charging violated his right to due process; and (6) the cumulative weight of the errors warrants a new trial.

We reject Schuety's arguments. We observe, however, that the warrant of commitment contains errors that must be corrected: (1) it improperly lists a conviction for third-degree criminal sexual conduct, which is a lesser-included offense of first-degree criminal sexual conduct and (2) it improperly lists both a guilty verdict and a conviction for fifth-degree assault, a charge that was never submitted to the jury. We therefore affirm the convictions for first-degree criminal sexual conduct and felony stalking, reverse the convictions for third-degree criminal sexual conduct and fifth-degree assault, and remand for the district court to correct the warrant of commitment accordingly.

FACTS

The following facts were proved at trial. After connecting on a dating app, K.C. and Schuety met for a date on June 14, 2017. Because K.C. had a young son and did not want to find child care, she and Schuety met at her home to watch a movie and have dinner. K.C. made it clear to Schuety before the date that she did not want to have sex. After dinner and while the movie was playing, Schuety put his arm around K.C. and began to kiss her. K.C. testified at trial that she did not mind that Schuety put his arm around her but she did not

want him to kiss her because that might give Schuety the wrong impression that she would have sex with him. Schuety stopped kissing K.C. when she told him that she was uncomfortable.

After a few minutes, however, Schuety began to kiss K.C. again and she tried to push him away. She told him that the kissing was “not okay.” In response, Schuety put his arm around K.C.’s neck and grabbed her by the arm, which indicated to K.C. that he wanted her to take him to her bedroom. K.C. believed Schuety was about to sexually assault her.

Once in K.C.’s bedroom, Schuety pulled off K.C.’s pants, forcefully choked her, and began to have vaginal sex with her for about 20 minutes. K.C. gave no verbal consent. Although K.C. did not pass out, the pressure on her neck hurt and made it harder for her to breathe. K.C. was not very strong, and Schuety was larger than she. When K.C. tried and was unable to push Schuety off her, she did not otherwise resist and instead went “numb.” K.C. thought about her “kid and [tried] to really just focus on getting through so that [she] could be with him in the morning.” The incident ended when Schuety ejaculated onto K.C.’s stomach.

K.C. was the victim of a serious sexual assault when she was younger. During that assault, she had tried to fight the perpetrator, which only made the assault more brutal. Because of this, K.C. testified, she followed Schuety’s demands. She also complied because her young son was in the other room and she did not want to endanger him. K.C. “just wanted to get [Schuety] out of there” and was “scared if he could hurt [her] and [she] couldn’t wake up to be with [her] son in the morning.”

K.C. cried while putting her clothes back on. She then smoked a cigarette with Schuety because she “didn’t really want to anger him” and she hoped that it would get him to leave as soon as possible.

Shortly after Schuety left, K.C. texted Schuety, “I told you I didn’t want to have sex . . . I wanted to sleep . . . please leave me [alone].” After a few texts, the two stopped communicating. K.C. also described the incident in a note on her phone that night.

The next morning, K.C. called the Crosby Police Department. The responding officer took and recorded K.C.’s statement and accompanied her to a medical exam. The medical exam did not show any evidence of visible injury, which one of the nurses conducting the exam testified is not uncommon.

The police did not interview Schuety until eleven months later, on May 5, 2018. While K.C. had provided the responding officer with Schuety’s phone number, the officer testified that the delay was due to his desire to interview Schuety in person so that he could see Schuety’s facial expressions, body language, and reactions to questioning. Initially, the responding officer conducted an employment check, searched addresses for Schuety on file, and had officers drive by a home where he suspected Schuety lived. Ultimately, on May 5, the officer located Schuety at his parents’ home and questioned him.

During the recorded interview, Schuety acknowledged having sex with K.C. but claimed that it was consensual. Without prompting, Schuety offered that things then “went weird,” explaining that K.C.’s demeanor changed and that she accused him of “choking her.” Schuety confirmed that the two exchanged some messages immediately afterward and had not communicated since.

The state charged Schuety with first-degree criminal sexual conduct, third-degree criminal sexual conduct, felony stalking, and fifth-degree misdemeanor assault. At trial, the state called K.C., her friend, the two nurses who conducted the medical exam, a forensic scientist from the Bureau of Criminal Apprehension (BCA), and the responding officer as witnesses. Schuety testified in his own defense. After the state rested and the court denied Schuety's motions for a judgment of acquittal, the state withdrew the fifth-degree assault charge. The jury found Schuety guilty of the three remaining offenses. The district court sentenced him to 144 months' imprisonment for the first-degree criminal-sexual-conduct conviction.

This direct appeal follows.

DECISION

Schuety raises six challenges to his convictions, which we address in turn.

I. The evidence is sufficient to convict Schuety of all three charges submitted to the jury.

Schuety challenges the sufficiency of the evidence to prove his guilt beyond a reasonable doubt.

A. First-degree criminal sexual conduct

For the jury to have found Schuety guilty of first-degree criminal sexual conduct, the state had to prove five elements beyond a reasonable doubt: (1) Schuety intentionally sexually penetrated K.C.; (2) the sexual penetration occurred without K.C.'s consent; (3) at the time of the incident, K.C. had a "reasonable fear of imminent great bodily harm to [herself] or another"; (4) K.C.'s reasonable fear allowed Schuety to accomplish the act;

and (5) the incident took place on June 14, 2017, in Crow Wing County. *See* Minn. Stat. § 609.342, subd. 1(c) (2016). Schuety disputes only the third element—that K.C. had a reasonable fear of imminent great bodily harm to herself or others.

The state used direct evidence—namely, K.C.’s testimony—to prove the third element. We review challenges to the sufficiency of direct evidence by determining whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to permit the fact-finder to reach a guilty verdict. *See State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This review involves a “painstaking analysis of the record.” *Id.* In our review, we must assume that the jury “disbelieved any evidence that conflicted with the verdict.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). “This is especially true whe[n] resolution of the case depends on conflicting testimony, because weighing credibility of witnesses is the exclusive function of the jury.” *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We will not disturb a verdict if the jury, acting with due regard for the presumption of innocence and the requirement for proof beyond a reasonable doubt, could have reasonably concluded that the defendant was guilty. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

K.C. testified that, during their date, Schuety began kissing her after she said that it was not okay, put his arm around her neck, and then “grabbed [her] by the arm,” and that she then “showed him where [her] room was” out of fear that Schuety may turn violent and hurt her or her son. K.C. stated that, based on her previous experience as the victim of a violent sexual assault, she had reason to believe that Schuety was about to sexually assault her. Once they were in K.C.’s bedroom, Schuety removed K.C.’s pants and had vaginal

intercourse with her for 20 minutes. During that time, Schuety forcefully choked K.C. to the point that it was hard for her to breathe. K.C. went “numb” and thought about her “kid and [tried] to really just focus on getting through so that [she] could be with him in the morning.” After Schuety ejaculated on her stomach, K.C. cleaned up, put on her clothes, and cried. K.C. then smoked a cigarette with Schuety to keep him calm and get him away from her house as quickly as possible. Finally, after Schuety left, K.C. sent him text messages confirming that she “didn’t want to have sex . . . [she] wanted to sleep,” and communicating that she wanted him to leave her alone.

Schuety argues that this direct evidence is insufficient to prove K.C.’s reasonable fear of imminent great bodily harm for three reasons. First, Schuety argues that the direct evidence reflects only K.C.’s subjective fear of great bodily harm, and not an objective, reasonable fear of great bodily harm. Second, he asserts that the direct evidence does not prove that K.C. feared imminent harm. Finally, he contends that his actions during sex were insufficient to cause fear because evidence about K.C.’s resistance was inconsistent, and he contends that his choking her does not per se reflect force or coercion.

We are not persuaded. The evidence proving reasonable fear of great bodily harm is not limited to K.C.’s subjective fear as a result of her prior experience of sexual assault. Rather, it includes K.C.’s testimony that Schuety put his arm around her neck and grabbed her arm, eliciting pain, to force her to show him to her bedroom. Further, K.C. testified that Schuety forcefully choked her during sex and that she tried but was unable to push him off. We assume that the jury believed K.C.’s testimony and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

As to the imminence of the feared great bodily harm, K.C. testified that she was afraid of what Schuety was about to do and was mentally preparing herself for a sexual assault as she led him to her bedroom. She tried to push Schuety off of her, and, when that proved futile because Schuety was larger and stronger than she, K.C. remained calm to “focus on getting through so that [she] could be with [her son] in the morning.” K.C. testified multiple times that she did not significantly resist Schuety because she was afraid that, were she to resist, Schuety would harm her or her one-year-old son. This direct evidence is sufficient to prove beyond a reasonable doubt that K.C. reasonably possessed an imminent fear of great bodily harm to herself or another.

Finally, we are not persuaded by Schuety’s argument that his actions while engaging in penetration are insufficient because the evidence regarding K.C.’s resistance is inconsistent and because choking someone during sex “does not indicate force or coercion per se.” This argument asks us to construe the evidence in a light inconsistent with the verdict. *Webb*, 440 N.W.2d at 430. K.C. testified that Schuety forcefully choked her during sex, and that testimony is consistent with the jury verdict. We must assume that the jury believed K.C.’s testimony in coming to a guilty verdict because it is solely the jury’s job to assess credibility. *See Pieschke*, 295 N.W.2d at 584.

The direct evidence is thus sufficient to support Schuety’s conviction for first-degree criminal sexual conduct.¹

¹ Because the direct evidence is sufficient to sustain Schuety’s conviction, we need not address his argument regarding circumstantial evidence. *See State v. Silvernail*, 831 N.W.2d 594, 606 (Minn. 2013) (Stras, J., concurring in part) (“[T]he ‘traditional standard’ applies when the direct evidence is sufficient to prove the disputed element.”). We do note

B. Third-degree criminal sexual conduct

For the jury to have convicted Schuety of third-degree criminal sexual conduct, the state had to prove four elements beyond a reasonable doubt: (1) Schuety intentionally sexually penetrated K.C.; (2) the sexual penetration was nonconsensual; (3) Schuety used force or coercion to accomplish the penetration; and (4) the incident took place on June 14, 2017, in Crow Wing County. *See* Minn. Stat. § 609.334, subd. 1(c) (2016). Schuety disputes only the third element—that he used force or coercion.

“Force” is defined as follows:

[I]nfliction, attempted infliction, or threatened infliction by the actor of bodily harm . . . which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit.

Minn. Stat. § 609.341, subd. 3 (2016).

“Coercion” is defined as the “use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the

that, even if the direct evidence were insufficient by itself to establish a reasonable fear of imminent great bodily harm, other, circumstantial evidence precludes any rational hypothesis inconsistent with Schuety’s guilt. *See Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (stating that when the direct evidence of guilt on a particular element is insufficient to sustain the verdict, a reviewing court may look to circumstantial evidence to sustain the verdict). K.C. testified that she told Schuety she did not want to have sex with him, she led Schuety to her room to prevent him from becoming violent, Schuety choked her during sex, and the choking was painful and made it hard for her to breathe. Moreover, Schuety, without prompting, recalled months later that K.C. had been upset and had said that he had “choked” her. There is no rational hypothesis from these circumstances other than that K.C. had a fear of imminent great bodily harm.

complainant or another.” Minn. Stat. § 609.341, subd. 14 (2016). The state need not provide proof of a specific act or threat to prove coercion. *Id.*

Schuety argues that the evidence is insufficient because K.C.’s fear was subjective and unreasonable. Again, we disagree. Construing the direct evidence in the light most favorable to the verdict,² Schuety put his arm around K.C.’s neck and grabbed K.C.’s arm, causing her pain and indicating that “he wanted [her] to take him to [her] room.” When they entered K.C.’s room, Schuety took K.C.’s pants off, put both of his hands around her neck, and sexually penetrated her. When Schuety put his hands around K.C.’s neck, she felt pain, had trouble breathing, and was unable to physically resist. This constitutes sufficient bodily harm for the jury to find that Schuety used force to accomplish penetration. *See* Minn. Stat. § 609.02, subd. 7 (2016) (defining “bodily harm” as “physical pain or injury, illness, or any impairment of physical condition”). And, based on her own testimony, this bodily harm caused K.C. to submit to the sexual assault and thus is sufficient to constitute both force and coercion. Schuety’s arguments rely on his own testimony and, because they construe the facts in a light inconsistent with the verdict, we reject them. *Webb*, 440 N.W.2d at 430. In sum, the direct evidence was sufficient to find Schuety guilty of third-degree criminal sexual conduct.

² The parties dispute whether the evidence used to prove force or coercion was direct or circumstantial evidence. Because K.C. testified directly to Schuety’s conduct and to the pain that it caused at multiple times during the incident, the direct evidence alone is sufficient and Schuety’s argument that the heightened circumstantial evidence standard applies is misplaced.

Although neither party raised the issue in this appeal, and we have addressed the sufficiency-of-the-evidence issue that the parties briefed, we note that a conviction for third-degree criminal sexual conduct is improperly listed on Schuety's warrant of commitment. Minn. Stat. § 609.04, subd. 1 (2016), states that "[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." The statute specifies that an included offense encompasses "[a] lesser degree of the same crime." Minn. Stat. § 609.04, subd. 1(1). Because Schuety was convicted of first-degree criminal sexual conduct, he cannot also be convicted of third-degree criminal sexual conduct based on the same act. *Id.* The district court properly did not orally adjudicate the third-degree offense at sentencing, yet third-degree criminal sexual conduct appears as a "conviction" on the warrant of commitment. *See State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999) (stating that courts "typically look to the official judgment of conviction, which generally appears as a separate entry in the file, as conclusive evidence of whether an offense has been formally adjudicated"). Because it appears the district court improperly included this conviction in its judgment of conviction, we reverse and remand to the district court to correct the warrant of commitment to vacate the conviction for third-degree criminal sexual conduct, leaving the jury's guilty verdict intact.

C. Felony stalking

For the jury to have found Schuety guilty of felony stalking, the state had to prove four elements beyond a reasonable doubt: (1) Schuety directly or indirectly manifested a purpose or intent to injure K.C. by the commission of a crime; (2) Schuety knew or had reason to know that the conduct would cause K.C. to feel frightened, threatened,

persecuted, or intimidated; (3) K.C. did feel frightened, threatened, persecuted, or intimidated; and (4) the act took place on June 14, 2017, in Crow Wing County. *See* Minn. Stat. § 609.749, subd. 2 (2016). Because Schuety pleaded guilty in 2007 to gross-misdemeanor harassment, the state enhanced this stalking charge to a felony. *See id.*, subd. 4 (2016) (making stalking a felony if violation occurs within ten years of previous qualified domestic-violence-related offense). Schuety disputes only the first element—that he intended to injure K.C. during the sexual assault.

The state proved Schuety’s intent with circumstantial evidence. Intent is usually established through circumstantial evidence by drawing inferences from the defendant’s words and actions in light of the totality of the circumstances surrounding the incident. *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). Relevant circumstances may include events occurring before and after the incident, *Davis v. State*, 595 N.W.2d 520, 526 (Minn. 1999), as well as the victim’s reaction to a threat, *State v. Schweppe*, 237 N.W.2d 609, 614 (Minn. 1975).

The sufficiency of circumstantial evidence is analyzed through a two-step process. *Silvernail*, 831 N.W.2d at 598. First, we identify the circumstances proved. *See id.* In doing so, we “defer to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.” *Id.* at 598-99 (quotations omitted). Similarly, we “consider only those circumstances that are consistent with the verdict.” *Id.* at 599. Thus, we assume “that the jury believed the State’s witnesses and disbelieved the defense witnesses.” *Id.* (quotation omitted).

Second, we independently “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 599 (quotations omitted). Here, we give no deference to the jury’s choice between any reasonable inferences. *See State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). If there is any rational hypothesis pointing to innocence, then the evidence is insufficient and we must overturn the conviction. *See State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010). For a conviction to be upheld based on circumstantial evidence, “the circumstances must form a complete chain which, in light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt.” *State v. Reed*, 737 N.W.2d 572, 581 (Minn. 2007) (quotation omitted).

There are four circumstances proved that bear on Schuety’s intent. First, Schuety forcefully grabbed K.C.’s arm after she had indicated she did not want to kiss. Second, in the bedroom, Schuety took off K.C.’s pants. Third Schuety placed both of his hands around K.C.’s neck, choking her, which caused her pain. Finally, Schuety vaginally penetrated K.C. without her consent.

There is no rational inference other than that, through choking K.C. and committing nonconsensual sexual penetration, Schuety intended to injure her during the crime. Here, Schuety knew K.C. did not consent to sex as she told him she did not want to have sex and he physically manipulated her twice. He did so once by grabbing her arm so that she would take him to her room and again when he used both hands to choke K.C. during the assault. Together, these circumstances support the reasonable inference that Schuety intended to injure K.C.

Schuety presents no alternative hypothesis and instead argues that the evidence is insufficient because there is no physical evidence of injury. But the absence of that evidence does not undermine the presence of other sufficient evidence of Schuety's intent based on the circumstances proved. Schuety's argument mainly relies on his personal testimony that he did not intend to harm K.C. Because we must construe the circumstances proved in a manner consistent with the verdict, *see Silvernail*, 831 N.W.2d at 599, we reject Schuety's argument.

Thus, the circumstantial evidence is sufficient to support Schuety's conviction for felony stalking.

D. Fifth-degree assault

Although the parties briefed the sufficiency of the evidence to prove fifth-degree assault, it is clear from the record that Schuety was neither found guilty of nor convicted of that crime. The record shows that this charge was withdrawn by the state and was not submitted to or decided by the jury. Accordingly, at sentencing, the district court properly did not adjudicate Schuety guilty of this crime or sentence him for it. Yet the warrant of commitment lists a finding of guilt by the jury as well as a conviction by the district court.³ Because the judgment of conviction incorrectly shows that Schuety was both found guilty of and convicted of a crime never submitted to the jury, we reverse and remand this

³ The warrant of commitment uses the misnomer "convicted" under "Case Charges" on page 1 of the document to reflect (incorrectly) a jury verdict of guilt. The document goes on to also list "convicted" as the district court's "Offense Disposition" on page 3 (which is also incorrect).

conviction for the district court to amend the warrant of commitment to make both corrections regarding the fifth-degree-assault count.

II. Schuety's due-process argument against his felony-stalking conviction fails.

Schuety argues that using his 2007 guilty plea to gross-misdemeanor harassment to enhance his felony stalking charge violated his due process rights. *See* Minn. Stat. § 609.749, subd. 4(a) (“[One] is guilty of a felony who violates any provision of subdivision 2 within ten years of a previous qualified domestic violence-related offense conviction.”). Whether a due-process violation has occurred presents a question of constitutional law, which we review de novo. *See State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009).

Schuety first asserts that his counsel “apparently failed to adequately advise him of the ramification of his plea agreement” and that he is therefore entitled to relief. While Schuety cites the proposition that an uncounseled plea cannot be used to enhance a subsequent offense, *see State v. Lang*, 432 N.W.2d 478, 480 (Minn. App. 1988), Schuety’s guilty plea was not uncounseled, and his prior conviction is therefore immune from collateral attack, *see State v. Otto*, 451 N.W.2d 659, 661 (Minn. App. 1990), *review denied* (Minn. Apr. 13, 1990).

Schuety next argues that a comparison to Minnesota’s driving-while-intoxicated statute demonstrates that the felony enhancement was improper. He observes that the DWI statute requires sentencing courts to inform defendants about the enhancement of criminal penalties for repeat offenders but provides that the failure to give the enhancement advisory does not affect the applicability of enhanced penalties to a defendant. *See* Minn. Stat.

§ 169A.47 (2018). Schuety asserts that, because the felony-stalking statute, unlike the DWI statute, does not say that failure to advise will not affect future enhancement, the legislature must have intended that failure to advise during a prior plea agreement precludes a later enhancement to felony stalking. We first note that this is a statutory-interpretation argument and not a due-process argument. But, no matter how it is characterized, Schuety forfeited the argument because he did not raise it to the district court. *See State v. Roby*, 547 N.W.2d 354, 357 (Minn. 1996).

Schuety also urges us to preserve the enhancement issue for a potential postconviction petition. But, because Schuety's arguments are either barred as a matter of law or forfeited, we determine on this record that the enhancement of Schuety's felony-stalking charge through the use of his 2007 guilty plea to gross-misdemeanor harassment does not violate his due-process rights and we do not preserve the issue.

III. Schuety's ineffective-assistance-of-counsel claims fail.

Next, Schuety raises three claims of ineffective assistance of counsel. Claims of ineffective assistance of counsel are mixed questions of law and fact, which we review de novo. *See Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

Schuety asks us to preserve these issues for post-conviction relief if we determine that the trial court record does not allow adjudication of each individual ineffective-assistance-of-counsel claim. *See Leake v. State*, 737 N.W.2d 531, 535-36 (Minn. 2007). When we can resolve a claim of ineffective assistance of trial counsel on the trial record alone, the claim must be brought on direct appeal or it is procedurally barred under the *Knaffla* rule. *See id.* at 535; *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976) (holding

that any claim raised, or known but not raised, on direct appeal is forfeited during postconviction review). If, however, a claim cannot be resolved on the trial court record, the claim may be brought in a postconviction petition. *Leake*, 737 N.W.2d at 535-36. We conclude that we can fully address each claimed instance of ineffective assistance of counsel on the trial record and so do not preserve the claims for postconviction review.

To determine whether a criminal defendant received ineffective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *See State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). Under the first prong, the defendant must show that their “counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064. An objective standard of reasonableness is the level of customary skill and diligence that a reasonably competent attorney would employ under similar circumstances. *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009). Courts “review ineffective assistance claims with a strong presumption that counsel’s performance was reasonable.” *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016).

Under the second prong, the defendant must show that “a reasonable probability exists that the outcome would have been different, but for counsel’s errors.” *Mosley*, 895 N.W.2d at 591 (quotation omitted). The reviewing court considers the totality of the evidence presented in determining if the result probably would have been different. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). If the ineffective-assistance claim fails under either prong of the *Strickland* test, the reviewing court need not address the other prong. *Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015).

We address in turn each of Schuety's claims of ineffective assistance of counsel.

A. Failure to file a *Paradee* motion

Schuety argues his trial counsel should have filed a *Paradee* motion⁴ to obtain any records of K.C.'s prior sexual assault because it would have better prepared counsel to cross-examine K.C.

"We will generally not review an ineffective-assistance-of-counsel claim that is based on trial strategy." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). "Trial strategy" includes matters such as the selection of evidence presented to the jury, what witnesses to call, what questions to ask witnesses, and whether to make objections. *Bobo*, 770 N.W.2d at 138. Such matters "lie within the proper discretion of trial counsel and will generally not be reviewed later for competence." *Id.*

Schuety has not established that his trial counsel performed unreasonably because he has not identified any records that his counsel unreasonably ignored. He has identified no information that would have aided Schuety's counsel in her cross-examination of K.C. In fact, K.C. testified at trial that she did not report her prior sexual assault. Schuety might have obtained records from K.C.'s therapist, but it is unclear—and Schuety does not clarify—what benefit these records would have had in cross-examining K.C. His counsel's decision whether to bring a *Paradee* motion was one of trial strategy, and Schuety has

⁴ A *Paradee* motion asks the district court to review privileged material in camera to determine whether it is discoverable, balancing the defendant's interest in obtaining beneficial evidence with the privilege holder's interest in having the confidences kept. *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987).

failed to demonstrate that it was unreasonable not to do so under the first prong of the *Strickland* test.

B. Failure to object to hearsay

Schuety next challenges his trial counsel's failure to object to a hearsay statement in K.C.'s testimony. While trying to explain her inability to remember certain details of the assault, K.C. stated, "I'm not sure if I'm allowed to say, but my therapist that I see said it's fairly normal to not remember a lot of things." This is hearsay. *See* Minn. R. Evid. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). While Schuety's trial counsel could have objected, her failure to do so is a tactical choice. *See Bobo*, 770 N.W.2d at 138. Trial counsel made the strategic decision not to object to a hearsay statement—a decision that we rarely review. *Id.* Schuety's argument thus fails to meet the first prong of the *Strickland* test.

C. Failure to object to enhancement of the stalking charge

Finally, Schuety argues that his trial counsel provided ineffective assistance when she failed to object to the enhancement of his stalking charge to a felony. As we explained above, the district court would have overruled any objection as an improper collateral attack on his 2007 harassment conviction. *Lang*, 432 N.W.2d at 480. Because there is no legal support for any objection by trial counsel to the enhancement of the stalking charge, this argument also fails the first prong of *Strickland*.

Because Schuety has not established that his trial counsel provided objectively unreasonable representation, his ineffective-assistance-of-counsel claims fail.

IV. The state did not commit prosecutorial misconduct.

Schuety next asserts four instances of prosecutorial misconduct arising from the state's closing argument. Schuety objected to two of these instances at trial, while two were unobjected-to. We apply different standards of review for objected-to misconduct and unobjected-to misconduct.

A. Objected-to misconduct

We review objected-to misconduct for harmless error. *See State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). The standard for determining harmless error depends on the severity of the misconduct. In “unusually serious” cases, we determine whether the misconduct was harmless beyond a reasonable doubt. *See State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974). If the misconduct is less serious, we determine whether the misconduct “likely played a substantial part in influencing a jury to convict.” *Id.*⁵ When evaluating claims of misconduct arising out of closing argument, we look to the closing argument “as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence.” *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (quotation omitted).

Schuety asserts that the prosecutor in two instances improperly shifted the burden of proof to him during closing argument. First, Schuety argues that the prosecutor's

⁵ We note that this two-tier test for determining whether objected-to prosecutorial misconduct constitutes reversible error has come under increased scrutiny. *See State v. Graham*, 764 N.W.2d 340, 348 (Minn. 2009). Despite this, the Minnesota Supreme Court “[has] yet to decide whether the two-tiered approach for objected-to prosecutorial misconduct as set forth in *State v. Caron* remains viable.” *Id.*

comment in closing argument that Schuety had not presented proof of any text messages that might alleviate suspicion amounted to improper burden shifting. The prosecutor said, “[T]here’s been no testimony, there’s been no evidence presented to you at all that there were any more text messages than what’s been put into evidence.” Schuety’s trial counsel objected to this statement. The district court then struck the statement from the record and instructed the jury to disregard it.

Assuming that the struck statement was improper burden-shifting, this statement does not warrant reversal under either harmless-error standard. Schuety’s trial counsel immediately objected to the statement, and the district court sustained that objection. The district court also instructed the jury to disregard the statement. On appeal, a reviewing court must assume that jurors listen to and follow all instructions from the court. *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). In addition, the statement was brief, any implication of burden shifting regarding the text messages was not pervasive, and the evidence against Schuety was strong. *See State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (explaining that appellate courts look to “the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions”). K.C. testified about the assault, she confronted Schuety about his actions that night, narrated what happened that evening on her phone, and called the police the next morning to report the sexual assault. The prosecutor’s statement that Schuety had not presented any other text messages constitutes harmless error.

Schuety asserts a second instance of burden-shifting. During closing argument, the prosecutor said:

[I]f somehow [the assault] triggered her and so she really wasn't raped or sexually assaulted, her rape from the age of 13 . . . was triggered during this. [K.C.] has a little boy. Presumably she's had sex with somebody in the meantime. There's been no evidence presented that she runs around falsely accusing people of raping her.

Schuety objected to this statement, the district court sustained the objection and instructed the jury to disregard it.

Again, even assuming this constitutes improper burden-shifting, this statement does not meet either harmless error standard to warrant reversal. Like the improper-burden-shifting complaint above, the district court instructed the jury to disregard the statement, and we assume that the jury followed its instruction. *See Ferguson*, 581 N.W.2d at 835. What is more, when compared to the weight of the evidence presented at trial, this statement regarding K.C.'s prior sexual assault was an isolated, immediately objected-to statement. Thus, the prosecutor's statement regarding Schuety's inability to provide evidence that K.C. falsely reported a previous sexual assault was harmless error.

B. Unobjected-to misconduct

Schuety also brings two claims of prosecutorial misconduct that were unobjected to during trial. When the defendant fails to object to prosecutorial misconduct during trial, we review the misconduct under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The defendant bears the burden of establishing (1) error (2) that is plain. *Id.* An error is plain if it “contravenes case law, a rule, or a standard of

conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). If the defendant meets that burden, the burden then shifts to the state to prove that the misconduct did not affect the defendant’s substantial rights—that is, that there is no reasonable likelihood that, without the misconduct, there would be a significant effect on the jury’s verdict. *Ramey*, 721 N.W.2d at 302. In determining misconduct’s effect on the defendant’s substantial rights, we consider “(1) the strength of the state’s evidence; (2) the pervasiveness of the erroneous conduct; and (3) whether the defendant had an opportunity to rebut any improper remarks.” *State v. Longo*, 909 N.W.2d 599, 609 (Minn. App. 2018) (quotation omitted).

First, Schuety argues that the prosecutor improperly vouched for the responding officer in closing argument. The prosecutor stated, “Mr. Schuety confirmed that there weren’t any other texts other than what’s been admitted into evidence following the assaults. . . . [The responding officer] didn’t think [K.C.] was lying. She reported in the morning. He said, she seemed—he believed her.”

Vouching occurs when “the [prosecutor] implies a guarantee of a witness’s truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness’s credibility.” *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted). Because the prosecutor said that the responding officer “believed” K.C.’s statement, Schuety argues, the statement constitutes improper vouching for K.C.’s credibility.

The state counters that Schuety takes the statement out of context and that it is more properly understood as an explanation as to why the responding officer did not pursue a

search warrant of Schuety's phone to look for more texts. Thus, the state argues, the "he believed her" language does not relate to the responding officer's general credibility determination of K.C., but to his belief that there were no other text messages between K.C. and Schuety.

We need not determine whether, in context, this unobjected-to statement was plain error because the state has met its burden of showing it did not affect Schuety's substantial rights. The state's evidence against Schuety was strong. In addition, the prosecutor's alleged vouching was an isolated incident in the middle of a long closing argument. Finally, Schuety's trial counsel had the chance during her own closing argument to rebut the misconduct but chose not to do so. Thus, even if this statement were plain error, it does not amount to reversible prosecutorial misconduct.

Second, Schuety argues that the prosecutor committed reversible misconduct by repeating K.C.'s hearsay statement that K.C.'s therapist told her that trauma can affect a person's memory during closing argument. The prosecutor stated that K.C. "testified also that her therapist says that trauma can cause forgetting the details. Can't imagine a bigger trauma than being sexually assaulted."

We conclude that, even if the prosecutor plainly committed misconduct by repeating inadmissible hearsay during closing argument, the error did not significantly impact Schuety's substantial rights. First, this was one repeated hearsay statement in the face of strong evidence from the state. Second, the improper statement came in the middle of a long closing argument in which the state mainly focused on other evidence. Finally, Schuety's trial counsel had the opportunity to address K.C.'s credibility during her own

closing argument and did so, arguing that K.C.’s testimony was clouded “because of this prior rape and not necessarily because of what my client allegedly did to her.” As a result, the state’s repetition of K.C.’s hearsay statement during its closing argument did not constitute reversible prosecutorial misconduct.

V. The delay between the assault and Schuety’s charging did not violate his due process rights.

Schuety next alleges that the delay between K.C.’s assault and his charging violated his due process rights. He asserts that, because almost a year passed between the assault and the police’s initial interview of him, even though he was the only suspect, his memory of the assault faded and limited his ability to mount a proper defense.

Schuety advances a new standard for evaluating police delay in investigating a crime that is distinct from our standard when evaluating for prosecutorial delay in bringing charges for a crime. To establish reversible prosecutorial delay in charging, the appellant must prove “both actual prejudice *and* an improper state purpose” for the delay. *In re Welfare of F.C.R.*, 276 N.W.2d 636, 639 (Minn. 1979) (emphasis added). Schuety suggests that, for police delay in investigation, he need not show that the police had an improper motive but need only show the delay was unreasonable. Because the police had “no reasonable reason” to delay their investigation, Schuety argues, his ability to mount an adequate defense was prejudiced.

Schuety’s argument fails because it is forfeited. First, it is forfeited because Schuety raises it for the first time on appeal. *See Roby*, 547 N.W.2d at 357. Schuety did not provide the district court the opportunity develop a factual record on this issue, which would in turn

provide us with the ability to adequately evaluate the reasonableness of any delay. *Id.* at 356 (stating that the allegations raised in a petition must have factual support). Second, the argument is forfeited because Schuety provides no legal authority supporting why our standard of review for police delay should differ from the standard of review for prosecutorial delay. *See Loudon v. Loudon*, 22 N.W.2d 164, 166 (Minn. 1946) (explaining that an argument is forfeited when it is a mere assertion of error and prejudicial error is not “obvious on mere inspection”).

VI. A new trial is not warranted based on multiple errors.

Schuety finally argues that the cumulative weight of harmless errors warrants a new trial. In rare cases, the cumulative effect of multiple harmless errors may be cause for a new trial if the errors led to an unfair trial. *State v. Litzau*, 650 N.W.2d 177, 187 (Minn. 2002). In determining whether to reverse, we balance the severity of the errors with the weight of the evidence against the defendant. *See State v. Cermak*, 350 N.W.2d 328, 334 (Minn. 1984). A new trial is warranted when the errors “affect the jurors’ deliberations or their assumptions about [Schuety’s] innocence or guilt.” *State v. Erickson*, 610 N.W.2d 335, 341 (Minn. 2000).

To accept Schuety’s argument that the cumulative weight of the errors warrants a new trial, we must first find several errors. While there were some errors committed during Schuety’s trial, these errors were few and not severe. The errors were either objected to by Schuety’s trial counsel and corrected by the district court, or were harmless and did not significantly impair Schuety’s substantial rights. Compared with the weight of the evidence

pointing towards Schuety's guilt, these errors are not egregious enough to warrant a new trial.

Affirmed in part, reversed in part, and remanded.