

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0305
A20-0310**

State of Minnesota,
Respondent (A20-0305),
Appellant (A20-0310),

vs.

Dane Robert Mullen,
Appellant (A20-0305),
Respondent (A20-0310).

**Filed March 1, 2021
Affirmed in part, reversed in part, and remanded
Florey, Judge**

St. Louis County District Court
File No. 69DU-CR-19-398

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

Mark S. Rubin, St. Louis County Attorney, Nathaniel T. Stumme, Assistant County Attorney, Duluth, Minnesota (for respondent)

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

Considered and decided by Reilly, Presiding Judge; Florey, Judge; and Frisch,
Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this direct appeal, appellant argues that the evidence is insufficient to support his convictions of first-degree criminal sexual conduct because the state failed to prove beyond a reasonable doubt that he or his accomplice used force or coercion to accomplish penetration. The state also appeals the district court's grant of a downward dispositional departure. We affirm one of the force-based convictions and Mullen's probationary sentence. But because the district court erroneously adjudicated multiple convictions based on the same act, we reverse and remand to the district court to vacate the physical-helplessness-based conviction and one of the force-based convictions.

FACTS

The state charged appellant Dane Robert Mullen with three counts of first-degree criminal sexual conduct based on an incident occurring on June 21, 2008. *See* Minn. Stat. § 609.342, subd. 1 (2006) (defining first-degree criminal sexual conduct). The complaint was filed approximately ten years after the incident. The first count alleged that Mullen used force or coercion to accomplish sexual penetration. *See id.* (e)(i). The second count alleged that Mullen knew or should have known that the victim was mentally impaired, mentally incapacitated, or physically helpless at the time of sexual conduct and therefore unable to consent. *See id.* (e)(ii). The third count alleged that Mullen's accomplice used force or coercion to accomplish sexual penetration. *See id.* (f)(i). All three counts alleged that Mullen caused the victim personal injury. All three counts also alleged accomplice liability pursuant to Minn. Stat. §609.05 (2006). The case proceeded to a jury trial.

The victim, A.B., testified that in June 2008 she went to a beach party with two friends. Three men that she did not know joined the party. A.B. accepted a drink from someone she did not know. A.B. testified that at that point “things get hard to remember,” but that she remembered being “between two people” who were helping her walk because her feet felt “really, really heavy.” She knew “something was very much not okay.”

The next thing A.B. remembered was waking up on her back on the beach with a man on top of her, penetrating her with his penis. She put up her hand to touch his face, and somebody grabbed her arm and held it down against the sand. She remembered

feeling that the arm couldn't be that person that was on top of [her] because the thumb was towards [her] body and not away from [her] body—or just the angle of the arm had to be somebody who was above [her] and not on top of [her]. So at that point [she] knew that there was more than one person there and that—that [she] had no control over what was happening at that point.

She testified feeling that she could not “make this stop and that felt really, really scary.”

A.B. was found on the beach the following morning and transported to detox. Her vagina was full of sand and “really raw.” When she got out of detox the following day, she reported the assault to the police and was examined at the hospital by a sexual-assault nurse examiner. The examiner discovered that A.B. had scrapes on her legs, knees and lower back, and bruises on her hips, as well as two tears in her labia minora. DNA evidence obtained from A.B.'s perineal swab matched Mullen's DNA profile. Mullen testified that he had consensual sex with A.B. on the night of the offense.

The jury found Mullen guilty of all three charges. According to the warrant of commitment, the district court entered convictions for all three charges.

At sentencing, Mullen moved the district court for a downward dispositional departure. Mullen argued, in part, that he was amenable to probation because he had successfully completed a period of supervision in Wisconsin between 2007 and 2017 without any violations. The district court granted the departure, and on count one, sentenced Mullen to 216 months in prison stayed for a period of 15 years. In making its decision to grant the downward dispositional departure, the district court stated, “I don’t feel like a lengthy period of incarceration is going to make society any safer, and that’s where my focus is.” The district court stated that Mullen’s period of supervision for his Wisconsin conviction in the years preceding this current conviction “made [him] the person that we would want to be out in society.” In the departure report, the district court further explained its decision to grant a downward dispositional departure:

This was an old case charged out more than 10 years after the offense. In that time [Mullen] successfully completed a lengthy period of parole supervision, had no other offenses, stopped using illicit chemicals, has been consistently employed, gained custody of his daughter through social services and has been in a positive committed relationship for many years. The psychosexual evaluation indicates that he has many protective factors that decrease his risk of recidivism despite the nature of this offense and recommends individual or group therapy. For all of these reasons he is particularly amenable to probation and sex offender treatment in a local correctional setting rather than with the DOC.

Mullen now appeals his convictions, and the state appeals the downward dispositional departure.

DECISION

I. The evidence is sufficient to prove that Mullen used forced or coercion to penetrate A.B.

Mullen contends that his conviction for count one must be reversed because the state failed to prove beyond a reasonable doubt that he used force or coercion to penetrate A.B.

When considering a sufficiency-of-the-evidence challenge, we carefully review the record “to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict.” *Lapenotiere v. State*, 916 N.W.2d 351, 360 (Minn. 2018) (quotation omitted). “We assume the jury believed the [s]tate’s witnesses and disbelieved any evidence to the contrary.” *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). “This is especially true where resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the jury.” *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). “[W]e will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Ortega*, 813 N.W.2d at 100.

To convict Mullen of count one, the state had to prove that he used force or coercion to accomplish the penetration of A.B., causing personal injury to her. *See* Minn. Stat. § 609.342, subd. 1(e)(i).

“Force” means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, 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 (2006). “‘Bodily harm’ means physical pain or injury, illness, or any impairment of physical condition.” Minn. Stat. § 609.02, subd. 7 (2006).

“Coercion” means 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 complainant or another, or the use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant’s will. Proof of coercion does not require proof of a specific act or threat.

Minn. Stat. § 609.341, subd. 14 (2006).

Mullen does not challenge the sufficiency of the evidence establishing sexual penetration or personal injury to A.B. Instead, Mullen argues that there is insufficient evidence to prove that he used force or coercion to penetrate A.B. Specifically, he contends that “the penetration began before any act that could have arguably constituted force of coercion occurred.” In response, the state contends that “[t]his argument ascribes a non-existent temporal predicate to the language of Minn. Stat. § 609.342, subd. 1(e)(i) by suggesting that the use of force or coercion after the moment of penetration is exempted from criminal liability.” We agree.

The supreme court rejected Mullen’s argument in *State v. Middleton*, 386 N.W.2d 226 (Minn. 1986). *Middleton* involved a charge of fourth-degree criminal sexual conduct which required the jury to find that the “[t]he actor use[d] force or coercion to accomplish the sexual contact.” Minn. Stat. § 609.345, subd. 1(c) (1984). There, the appellant claimed

the language of the statute required the state to prove that coercion was used before the sexual contact occurred. *Middleton*, 386 N.W.2d at 229-30. The supreme court rejected this interpretation of the statutory language, holding:

The coercion required by the statute need not precede or be separate from the sexual contact. It is enough that the coercive words or conduct, and the fear they produce in the victim, are an aspect of, that is, they happen concurrently with, the sexual contact.

Middleton, 386 N.W.2d at 230.

The language of Minn. Stat. § 609.342, subd. 1(e)(i), is nearly identical to the statutory language at issue in *Middleton*, and its holding also applies here; namely, that the force or coercion used against A.B. need not precede or be separate from the sexual penetration. Rather, it is sufficient if the force or coercion occurred concurrently with the sexual penetration.

Here, A.B. testified that she woke up on her back in the sand with someone on top of her having sex with her. When she put her hand up to touch the person's face, another person pushed it back down to the sand. She knew it was a different person due to the angle of that person's thumb on her arm. She did not have control over what was happening to her and felt "really, really scared." Further, although corroboration of a victim's testimony is not required in a first-degree criminal-sexual-conduct prosecution,¹ the record contains ample evidence to corroborate A.B.'s direct testimony that Mullen used force or coercion to commit the charged offense. The state presented extensive evidence of A.B.'s

¹ See Minn. Stat. § 609.347, subd. 1 (2020).

physical injuries, which included the report of the sexual-assault nurse examiner noting that A.B. had scratches throughout her body, bruising on her thighs, abdomen, and shins, and two tears of A.B.'s labia minora "consistent with sexual assault." Based on this evidence, we conclude that there is sufficient evidence with regard to the force or coercion element to sustain the jury's guilty verdict beyond a reasonable doubt.

Because the state presented sufficient direct evidence that Mullen and his accomplice used force to accomplish penetration, we affirm Mullen's conviction under Minn. Stat. § 609.342, subd. 1(e)(i).

II. The district court erred by entering convictions for more than one count of first-degree criminal sexual conduct.

Mullen also challenges his convictions for counts two and three, arguing that he is entitled to a new trial because the district court incorrectly instructed the jury on count two and because the state presented insufficient evidence to support his conviction on count three. We need not address the merits of these arguments because we conclude that the district court erroneously adjudicated multiple convictions based on the same act or course of conduct. *See State v. Balandin*, 944 N.W.2d 204, 221-22 (Minn. 2020) (remanding to the district court to vacate multiple convictions arising out of the same act); *State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) (stating the appellate courts need not decide legal issues related to claims that are not adjudicated or sentenced).

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2020). The Minnesota Supreme Court has interpreted that provision as follows:

When the defendant is convicted on more than one charge for the same act the court is to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated and sentence imposed, with credit, of course, given for time already served on the vacated sentence.

Spann v. State, 740 N.W.2d 570, 573 (Minn. 2007) (quotation omitted). Whether multiple convictions violate Minn. Stat. 609.04 is a legal question that [we] review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012). We look to the “official judgment of conviction” in the district court record “as conclusive evidence of whether an offense has been formally adjudicated.” *See Spann*, 740 N.W.2d at 573 (quotation omitted).

Here, it is undisputed that Mullen’s convictions arose out of the same act. Thus, our review is de novo. The jury found Mullen guilty of three counts of first-degree criminal sexual conduct against A.B. The district court sentenced Mullen to 216 months in prison stayed for fifteen years for count one, and stated on the record that it would not be entering convictions for counts two or three. The warrant of commitment, however, notes that Mullen was convicted of all three counts. *See Spann*, 740 N.W.2d at 573 (instructing appellate courts to look at official judgment or sentencing order in district court record to determine what counts have been adjudicated).

Because all of the offenses pertain to the same criminal act, only one conviction under Minn. Stat. § 609.342, subd. 1, was appropriate. *See State v. Grampre*, 766 N.W.2d 347, 354 (Minn. App. 2009) (vacating one of two convictions for first-degree criminal sexual conduct based on same incident), *review denied* (Minn. Aug. 26, 2009); *see also*

State v. Folley, 438 N.W.2d 372, 373 (Minn. 1989) (interpreting Minn. Stat. § 609.04, subd. 1, to mean that “a defendant may not be convicted of two counts of criminal sexual conduct . . . on the basis of the same act”). Thus, we reverse and remand to the district court to vacate Mullen’s convictions under subdivision 1(e)(ii), and subdivision 1(f)(i), while leaving in place the jury verdicts. See *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). Because the district court imposed sentence on count one, we leave that conviction in place. Only if that conviction is later vacated may the district court formally adjudicate a conviction under subdivision 1(e)(ii) or 1(f)(i). See *id.*

III. The district court did not abuse its discretion by granting a downward dispositional departure.

Finally, we must finally address the state’s argument that the district court abused its discretion when it sentenced Mullen to probation because (1) the reasons offered by the district court for the downward dispositional departure were not legally permissible and (2) the record does not show that Mullen was particularly amenable to probation. “We afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). “A district court abuses its discretion when its reasons for departure are legally impermissible and insufficient evidence in the record justifies the departure.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016).

“A defendant’s particular amenability to probation justifies a district court’s decision to stay the execution of a presumptively executed sentence.” *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). A “defendant’s age, his prior record, his remorse, his

cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Here, the district court found that Mullen was particularly amenable to probation in the sentencing report, stating:

This was an old case charged out more than 10 years after the offense. In that time [Mullen] successfully completed a lengthy period of parole supervision, had no other offenses, stopped using illicit chemicals, has been consistently employed, gained custody of his daughter through social services and has been in a positive committed relationship for many years. The psychosexual evaluation indicates that he has many protective factors that decrease his risk of recidivism despite the nature of this offense and recommend individual or group therapy. For all of these reasons he is particularly amenable to probation and sex offender treatment in a local correctional setting rather than with the DOC.

Given our deferential standard of review, we conclude that the district court’s reasons for the departure, which took into consideration appropriate factors and found Mullen particularly amenable to probation, were proper and sufficiently supported by the record in this case. *See State v. Stempfley*, 900 N.W.2d 412, 419 (Minn. 2017) (“Even if we might have come to a different conclusion had we been weighing the evidence ourselves, that is not the applicable standard upon appellate review”).

Affirmed in part, reversed in part, and remanded.