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**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0318**

State of Minnesota,
Respondent,

vs.

Corey Lemond Bingham,
Appellant.

**Filed December 28, 2020
Affirmed in part, reversed in part, and remanded
Frisch, Judge**

Olmsted County District Court
File No. 55-CR-17-2724

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

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

FRISCH, Judge

In this direct appeal, appellant argues that the evidence is insufficient to support his two convictions of first-degree criminal sexual conduct because the state failed to prove

beyond a reasonable doubt that the victim was physically helpless or that he used force or coercion to accomplish penetration. We affirm the force-based conviction, but we reverse and remand for the district court to vacate the physical-helplessness-based conviction.

FACTS

The state charged appellant Corey Lemond Bingham with two counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(e)(i), (ii) (2016), based on an incident occurring on February 10, 2017. The first count was based on an allegation that Bingham used force or coercion to accomplish sexual penetration. The second count was based on an allegation that Bingham knew or should have known that the victim was physically helpless at the time of sexual conduct and therefore unable to consent. Both counts alleged that Bingham caused victim personal injury. At trial, the jury heard the following evidence.

The victim testified that on February 10, 2017, Bingham texted her to ask for a ride home from work. They made plans to “hang out” that evening. Together, they stopped at a store so Bingham could purchase alcohol for the victim and then went to Bingham’s home, where he lived with his aunt and uncle. They entered an attached garage, where the victim drank alcohol while they watched television. The victim testified that she drank half a bottle of whiskey over the course of about 45 minutes and indicated that Bingham made her feel “rushed to drink.” She recalled that a short time later, she went into the home with Bingham to find food, at which time she was “definitely feeling the effects” of the alcohol and “[e]verything was blurry.”

She testified that her next memory was that she was in a bedroom with Bingham, and she was not wearing her clothing. She remembered Bingham asking twice about oral sex, which she refused. She next remembered that she was positioned on her stomach while Bingham penetrated her anally. She told Bingham that it hurt and asked him to stop. Bingham told her to “deal with it” and pulled her hair. She tried but was unable to resist given the manner in which she was positioned, explaining that she “was pretty small at the time and . . . [did not] have much power” and that she was “pretty intoxicated.” Bingham then penetrated her vaginally with his penis. She again told Bingham to stop. Soon after, Bingham stopped suddenly, said that someone was home, threw the victim’s clothing at her, and ordered her to “[h]urry up and get dressed.” She later left the home, sought help from friends, and eventually was taken to a hospital. She testified that while at the hospital, she discovered she suffered anal and vaginal tearing and bleeding.

A registered nurse who specializes in sexual-assault examinations met with the victim at the hospital. The victim told the nurse that she had gone to Bingham’s home, she drank alcohol, she “ended up in” a bedroom, Bingham penetrated her vaginally and anally, Bingham “held her hair,” and Bingham did not stop even after she told him to stop. Upon examination, the nurse identified anal tearing and bleeding. Based on her training and experience, the nurse found the injury to be consistent with forced rectal penetration. At the nurse’s suggestion, the victim agreed to report the incident to police.

Police officers testified about their subsequent investigation. In an interview at the hospital, the victim told Officer Anja Kelley that she remembered drinking whiskey, going into Bingham’s home for food, and next being in Bingham’s bedroom, where he penetrated

her vagina and anus in a manner that caused her pain. Sergeant Steven Beery then recorded an interview with the victim at the hospital, in which she reported that she remembered drinking half a bottle of whiskey in 45 minutes in Bingham's garage, next going into his home, and then being in his bedroom where he sexually penetrated her even though she told him to stop. Sergeant Beery and two officers went to Bingham's home and spoke with him. Bingham allowed the officers to search the garage and Bingham's bedroom. The officers collected a bottle of whiskey, Bingham's bedding, and a used condom.

Bingham testified in his own defense, contradicting the victim's testimony and the substance of her prior statements. According to Bingham, the victim did not appear intoxicated. He testified that they went inside the home to get food for the victim before returning back to the garage. He claimed that the victim then voluntarily pulled down his pants and began performing oral sex on him—testimony that Officer Beery later contradicted on rebuttal based on Bingham's inconsistent statements soon after the incident. Bingham testified that they then went into the home and got undressed. He admitted to penetrating the victim anally but claimed he did so accidentally. He further testified that he stopped immediately because the victim said it hurt, and she instructed him to penetrate her vaginally. Bingham claimed that the victim never gave him any indication that she wanted him to stop. He denied either attempting to force or actually forcing the victim to have sex, instead testifying that he believed she had consented.

The jury found Bingham guilty of both charges. The district court adjudicated convictions on both counts and sentenced Bingham to 330 months' imprisonment for the force-based offense. This appeal follows.

DECISION

Bingham urges us to reverse his convictions of first-degree criminal sexual conduct because the state failed to present sufficient evidence to prove that he used force or coercion to accomplish penetration or that the victim was physically helpless. We affirm the conviction based on Bingham's use of force but reverse and remand for the district court to vacate the conviction based on the victim's physical helplessness because it was improperly adjudicated.

I. The direct evidence that Bingham used force to accomplish penetration is sufficient to sustain his conviction under Minn. Stat. § 609.342, subd. 1(e)(i).

Bingham argues that the evidence is insufficient to sustain his conviction under Minn. Stat. § 609.342, subd. 1(e)(i), because the state failed to prove beyond a reasonable doubt that he used either “force” or “coercion.” When the state proves a contested element by direct evidence, we view the evidence in the light most favorable to the jury's verdict and assume that the jury believed the state's witnesses and rejected conflicting evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not reverse a conviction if the jury, mindful of both the state's burden and the presumption of innocence, could reasonably have concluded that the defendant was guilty beyond a reasonable doubt. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

“A person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if . . . the actor causes personal injury to the complainant, and . . . the actor uses force or coercion to accomplish sexual penetration.” 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 (2016). “‘Bodily harm’ means physical pain or injury, illness, or any impairment of physical condition.” Minn. Stat. § 609.02, subd. 7 (2016).

“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 (2016).

Bingham argues that the state failed to prove one of the theories the prosecutor argued to the jury: that Bingham used his “superior size or strength” to cause the victim to submit to penetration. He emphasizes that the victim’s testimony established that it was her awkward positioning that prevented her from resisting rather than Bingham’s exercise of superior size or strength. But the prosecutor *also* argued to the jury that it could find Bingham guilty based on his use of “force” because he knew the penetration hurt the victim and because the case “involve[d] the infliction of physical pain and injury.” The jury was not required to limit its consideration of the evidence to a narrow definition of coercion. Indeed, the definitions of “force” and “coercion” are broad, and the use of superior size or strength is merely one subdefinition of “coercion.” *See id.*, subds. 3, 14.

Bingham insists that the state “offered *no* evidence that [Bingham] used force or the threat of bodily harm to force [victim] to submit to the sexual encounter.” (Emphasis added.) But the statutory definition of “force” does not always require proof that an actor’s use of “force” caused a victim to submit to penetration. Rather, the statute defines “force” disjunctively as meaning

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 (emphasis added). Because “the infliction . . . of bodily harm” is itself “force” as defined by the statute, the jury was not required to find that infliction of bodily harm caused the victim to submit to penetration.

This plain-language reading is consistent with caselaw holding that, although the statute requires proof that the “actor uses force or coercion *to accomplish* sexual penetration,” Minn. Stat. § 609.342, subd. 1(e)(i) (emphasis added), evidence of an actor’s use of force or coercion *during* criminal sexual conduct is sufficient to prove the element of the offense. *See State v. Middleton*, 386 N.W.2d 226, 229-30 (Minn. 1986) (“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 . . . happen concurrently with[] the sexual contact.”); *see also In re Welfare of D.L.K.*, 381 N.W.2d 435, 438 (Minn. 1986) (“[W]e have found the requirement of force . . . satisfied when the actor inflicts bodily harm or

pain or the threat thereof on another *while accomplishing sexual contact.*” (emphasis added)).

Here, the victim’s testimony was sufficient direct evidence that Bingham used “force” to accomplish penetration. Specifically, she testified that the anal penetration “hurt really bad.” Her prior statement to Sergeant Beery added that Bingham had been “pulling [her] hair and [she] told him to stop, *that it hurt.*” (Emphasis added.) This testimony established that Bingham inflicted bodily harm during penetration by causing the victim physical pain; it was therefore evidence that he employed “force” to accomplish sexual penetration. Viewing that evidence in the light most favorable to the jury’s verdict, the jury could have reasonably found Bingham guilty beyond a reasonable doubt.¹

Because the state presented sufficient direct evidence that Bingham used force to accomplish penetration, we affirm Bingham’s conviction under Minn. Stat. § 609.342, subd. 1(e)(i).²

¹ We also note that, even if the direct evidence were insufficient by itself to establish force, additional circumstantial evidence precludes any rational hypothesis inconsistent with Bingham’s guilt. *See Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). Both the victim and the nurse testified that the victim suffered anal tearing, a physical injury separate from physical pain. *See* Minn. Stat. § 609.02, subd. 7. The nurse testified the injury was consistent with forced rectal penetration. The fact of the injury, its consistency with forced anal penetration, and its discovery after penetration permit only one rational hypothesis: Bingham caused the injury.

² Because we affirm Bingham’s conviction based on direct evidence that he used “force” by inflicting bodily harm, we need not consider the parties’ arguments regarding the victim’s position or potential confinement.

II. Bingham’s conviction based on the victim’s physical helplessness must be vacated.

Bingham also argues that we must reverse his conviction under Minn. Stat. § 609.342, subd. 1(e)(ii), because the state failed to prove beyond a reasonable doubt that the victim was “physically helpless.” We need not address the merits of this argument because we conclude that the district court erroneously adjudicated multiple convictions on the basis of the same act or course of conduct. *See State v. Balandin*, 944 N.W.2d 204, 221-22 (Minn. 2020) (remanding sua sponte to the district court to vacate multiple convictions arising out of the same act).

“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 (2016). Our supreme court has interpreted this provision as meaning that “a defendant may not be convicted of two counts of criminal sexual conduct . . . on the basis of the same act or unitary course of conduct.” *State v. Folley*, 438 N.W.2d 372, 373 (Minn. 1989); *see also State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985) (“[W]e have consistently held that section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.”). When a defendant is found guilty of two charges based on the same act or conduct, “the proper procedure to be followed . . . is for the [district] court to adjudicate formally and impose [a] sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time.” *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

Whether offenses form a single course of conduct is a question of law if the facts are undisputed. *State v. Grampre*, 766 N.W.2d 347, 353-54 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009). Although the district court made no determination that Bingham’s two offenses arose from the same course of conduct, this record permits no other inference—the acts of penetration occurred moments apart in the same place and during one sexual encounter. Only one conviction under Minn. Stat. § 609.342, subd. 1(e), was appropriate. *See Folley*, 438 N.W.2d at 373. Because we affirm Bingham’s force-based conviction under subdivision 1(e)(i), we reverse and remand for the district court to vacate Bingham’s conviction under subdivision 1(e)(ii) while leaving the jury verdict in place. Only if the force-based conviction is later vacated may the district court formally adjudicate a conviction under subdivision 1(e)(ii). *See LaTourelle*, 343 N.W.2d at 284. Because the conviction based on physical helplessness will be vacated on remand, we need not consider the sufficiency of the supporting evidence.³

Affirmed in part, reversed in part, and remanded.

³ We note that in the event the conviction under subdivision 1(e)(ii) is later adjudicated, Bingham may appeal that conviction pursuant to Minn. R. Crim. P. 28.02, subd. 2(1). *See also State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) (stating that an appellate court need not decide whether the evidence was sufficient to support convictions on counts that were not formally adjudicated and sentenced).