This opinion is nonprecedential except as provided by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
A21-1543

State of Minnesota,
Respondent,

vs.

Noe Cervantes Diaz,
Appellant.

Filed December 19, 2022
Affirmed
Ross, Judge

Scott County District Court
File No. 70-CR-20-4690

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

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Charles F. Clippert, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

A jury found Noe Diaz guilty of first-degree criminal sexual conduct after the state accused him of molesting his stepdaughter at least one hundred times while she was between the ages of nine and thirteen. We are unpersuaded by Diaz's five arguments challenging his conviction. We reject Diaz's speedy-trial argument because the pandemic-

caused delay did not prejudice him. We reject his contention that the district court should have examined the victim's counseling records because Diaz offered no plausible showing that the records likely contain material information favorable to his defense. We reject his complaint that the district court unfairly refused to allow testimony about immigration-related benefits available to crime victims because we are satisfied beyond a reasonable doubt that the testimony would not have affected the jury's finding of guilt. For the same reason and others, we also reject his argument that a witness's reference to his deportation status requires a mistrial. And we reject his contention that the district court should not have instructed the jury that guilt can rest on a single witness's testimony because the instruction did not misstate the law and resulted from his attorney's potentially confusing statements to the contrary. We therefore affirm.

FACTS

A girl (whom we will call Mary for the sake of her privacy) was nine years old when her mother married appellant Noe Diaz. About four years into the marriage, Mary's mother found a handwritten note that had fallen from Mary's pocket. Mary had recently written the note in a letter-to-God exercise that she participated in during a Catholic-school retreat. The note read in part, "God help me. I can't stand this anymore." Mary's mother pressed her to reveal the note's meaning, and Mary disclosed that Diaz had sexually molested her.

Mary later revealed that he had done so about twice weekly since shortly before the couple's wedding. She explained how it began and escalated over time. Diaz went from touching her breasts, to touching her vagina, to about 60 incidents of vaginal penetration. Each assault lasted about 25 minutes.

Mary and her mother reported Diaz's conduct to the Shakopee police. Police arrested Diaz, and Detective Nicki Marquardt interviewed him in jail. He told Detective Marquardt that he previously touched Mary's leg near her vagina, but he otherwise denied engaging in the conduct Mary had recounted. The state charged Diaz with first-degree criminal sexual conduct.

Before trial, Diaz moved the district court to examine Mary's school counseling records *in camera*, supposing that Mary spoke with her school counselor about family immigration-related matters relevant to the criminal allegations. The district court denied his motion because Mary had told police that she never discussed the abuse with her counselor and because Diaz did not support his speculation that Mary spoke to her counselor about the family's immigration issues. Diaz similarly asked the district court to receive evidence of the witnesses' knowledge of the immigration-related benefits available to crime victims, reasoning that Mary and her mother had fabricated the allegations so they could remain in the United States. He supported his theory with a record of a conversation between the county attorney's office and an attorney whom Diaz said would represent Mary's mother to obtain the type of visa available to crime victims. Mary informed the district court that she knew little about the visa program and had never discussed it with her mother or anyone else. The district court excluded all immigration-related evidence, finding that it lacked probative value and would unduly prejudice the prosecution.

Diaz filed a written demand for a speedy trial on May 27, 2020, two-and-a-half months after the state charged him, and the district court set trial for September 15, 2020. Because of the COVID-19 pandemic, the district court rescheduled the trial four times.

Diaz and the state requested the first two continuances, after which the chief justice suspended jury trials, causing the district court to reschedule the trial twice more. *See Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 2 (Minn. Nov. 20, 2020); *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 2 (Minn. Jan. 21, 2021). Diaz twice unsuccessfully sought exceptions to the chief justice's suspension. He remained incarcerated pending trial, which began on April 8, 2021, 316 days after his speedy-trial demand.

At trial, Mary recounted the sexual abuse summarized above.

Her mother testified about the circumstances of Mary's allegations. Questioned whether Mary told her why she had not previously disclosed Diaz's abuse, Mary's mother testified, "[S]he . . . [told me] that she wanted to wait until she went to college in order to tell me about those things. But she knew that [Diaz] had a deportation order and that us as a family had decided that we would all go together." The next day Diaz moved the district court to declare a mistrial based on that reference to Diaz's deportation status. The district court denied the motion.

During closing arguments, Diaz's trial attorney rhetorically asked the jury, "Is there any piece of evidence or testimony other than [Mary] herself that could prove that Noe Diaz committed a crime?" He explained, "So the State of Minnesota is asking you to find Mr. Diaz guilty beyond a reasonable doubt based on the word of one person." And he urged, "Even if you found that I kind of think I believe [Mary], that's not enough. You can't convict somebody of a crime just on that." Expressly concerned that jurors might

interpret defense counsel's comments as misstatements of law, the district court instructed them, "The testimony of a single witness may be sufficient evidence, if believed, to meet the burden of proof beyond a reasonable doubt." It also instructed jurors on their role to determine witness credibility and the state's burden to prove its allegations beyond a reasonable doubt.

The jury found Diaz guilty of first-degree criminal sexual conduct. The district court convicted Diaz and sentenced him to serve 162 months in prison followed by ten years of conditional release. Diaz appeals.

DECISION

Diaz raises five arguments challenging his conviction: (1) that the district court violated his right to a speedy trial by beginning trial 316 days after he demanded a speedy trial; (2) that the district court abused its discretion by denying his request for an *in camera* review of Mary's school counseling records; (3) that the district court violated his Fourteenth and Sixth Amendment rights by preventing him from introducing immigration-related testimony; (4) that the district court abused its discretion by denying his request for a mistrial; and (5) that the district court abused its discretion by instructing the jury that a single witness's testimony could be sufficient to meet the state's burden. For the following reasons, none of Diaz's arguments persuades us to reverse his conviction.

I

We are not persuaded to reverse by Diaz's contention that the district court violated his right to a speedy trial. The federal and state constitutions afford criminal defendants the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Although neither

constitution defines "speedy," by rule a Minnesota defendant's trial must begin within 60 days of his demand for a speedy trial, absent good cause justifying a delay. Minn. R. Crim. P. 11.09(b). We review claimed speedy-trial violations de novo. *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015). In doing so, we consider the four so-called *Barker* factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his speedy-trial right; and (4) whether the delay prejudiced the defendant's case. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The state concedes, and we agree, that the first and third factors favor Diaz because he asserted his right to a speedy trial and because the delay was longer than 60 days. This triggers further analysis, and we therefore consider factors two and four.

The second *Barker* factor—the reason for the delay—assesses who bears responsibility for it. *Id.* at 316. The supreme court recently held that "trial delays due to the statewide orders issued in response to the COVID-19 global pandemic do not weigh against the State." *State v. Paige*, 977 N.W.2d 829, 838 (Minn. 2022). Put differently, the state does not bear the responsibility for the pandemic-caused delay. The second *Barker* factor therefore favors neither Diaz nor the state.

We are not persuaded otherwise by Diaz's emphasis that, unlike the *Paige* defendant, he requested and was denied exceptions to the chief justice's trial-suspension orders and the district court here relied on the inability to social distance in the "smaller-than-average courtrooms" in Scott County when finding good cause to continue the trial. Neither of these circumstances materially distinguishes this case from *Paige*, where the supreme court declined to assess the second *Barker* factor against the state because "the

emergency prompting the COVID-19 [trial-suspension] orders was an external factor outside of the court's control." *Id.* at 840. The same trial-suspension orders—not the size of the courtrooms or the district court's decision not to allow an exception—caused the delay here.

The fourth *Barker* factor likewise does not favor Diaz. We consider three interests when we decide whether a delay prejudiced a defendant: "(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired." *Windish*, 590 N.W.2d at 318. The third interest most impacts our prejudice assessment. *Id.* We do not ask only whether the defendant was prejudiced by the delay but whether the prejudice was more than minimal. *Paige*, 977 N.W.2d at 841. Like the *Paige* defendant, Diaz offers only generalized assertions that the three interests prejudiced him. He says that his pretrial incarceration was more oppressive than usual because of the pandemic-related risks in jail. The *Paige* court dismissed a similar assertion because "the alleged hardships were caused by restrictions put in place to mitigate the effects of a global pandemic" rather than being caused by the delay. *Id.* at 842. The *Paige* court's reasoning also foreshadowed Diaz's complaint that he suffered anxiety during the delay: "[Although] Paige may have experienced anxiety and concern while waiting for his trial [and] that stress may have even been exacerbated by the pandemic, the anxiety and concern must be specifically related to the delay." *Id.* Because Paige's claims of stress "would theoretically apply to anyone who is involved in a trial during the COVID-19 pandemic," the *Paige* court deemed "his anxiety-and-concern argument" to be "unpersuasive." *Id.* Diaz contends third that the

passage of time impaired his defense, asserting that witness memories had faded. But he identifies no witness or potential witness whose memory diminished materially because of the delay, and nothing we have seen in the trial transcript suggests that any witnesses had significant difficulty recalling any details relevant to the prosecution or defense. Diaz has failed to demonstrate that the delay caused him any significant prejudice.

Despite Diaz's demand and the unusually lengthy delay, under these circumstances we see no unconstitutional speedy-trial violation.

II

Diaz unconvincingly challenges the district court's refusal to review Mary's school counseling records *in camera*. A criminal defendant may ask the court to so examine confidential records. *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987). But the district court acts within its discretion to deny the request if the defendant makes no plausible showing that the evidence would be both material and favorable to his defense. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992). The district court acted within its discretion by denying Diaz's request because Diaz never made a plausible showing of materiality and favorability. The supreme court's low assessment of the *Hummel* defendant's argument fits here as well: "His motion and brief gave the trial court no theories [as to] . . . why the file was reasonably likely to contain information related to the case." *Id.* Diaz does not claim that Mary ever told her counselor about the abuse, and Mary testified that she did not. Diaz speculates that Mary spoke with her counselor about immigration matters that *might* relate to his defense, but this falls far short of establishing that the examination is "reasonably likely to contain information related to the case." The challenge fails.

III

Diaz argues that the district court violated his due-process and confrontation rights when it prevented him from cross-examining Mary and her mother on the immigration-related benefits available to crime victims. Diaz has a constitutional right to due process, U.S. Const. amend. XIV, including the right to present a complete defense, *California v. Trombetta*, 467 U.S. 479, 485 (1984). He has a related right to confront his accusers. U.S. Const. amend. VI. Diaz sought, but the district court denied him, the opportunity to explore whether Mary might have fabricated the allegations so the family might qualify for a type of visa available to crime victims who are immigrants.

The state defends the district court's refusal to allow Diaz to cross-examine Mary and her mother in his effort to expose a potential reason for Mary to have fabricated the accusation. We will hold an error in the district court's exclusion of evidence harmless if we are satisfied beyond a reasonable doubt that, if the evidence had been admitted and the damaging potential of the evidence fully realized, a reasonable jury would have reached the same verdict. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). Without addressing whether the district court's evidentiary decision was flawed, we resolve the issue based on this harmless-error review.

We are convinced beyond a reasonable doubt that the challenged evidence would not have altered the jury's verdict. Mary informed the district court that she knew little about the visa program and had never discussed it with her mother or anyone else. Diaz offered no evidence to call this testimony into doubt. Mary could not have been motivated by an immigration benefit about which she was uninformed. Although Mary's mother

knew about the visa, Mary testified that her mother never discussed it with her, making her mother's knowledge irrelevant to Mary's accusation. The excluded line of questioning therefore could not have reasonably affected the verdict.

IV

Diaz contends that the district court erroneously denied his motion for a mistrial based on Mary's mother's reference to his deportation status. The district court should not grant a mistrial unless "a reasonable probability" exists that the trial would have come out differently "if the event that prompted the motion had not occurred." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (quotation omitted). The district court is in the best position to assess any prejudice from the event, and we therefore review a denial only for an abuse of discretion. *State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016). The district court refused to declare a mistrial here because Mary's mother mentioned deportation only once during her testimony and because no other witness discussed Diaz's immigration status. The record supports this determination. We are mindful that making the jury aware that a defendant is subject to deportation might induce speculation in a manner that prejudices the defendant, even if the comment occurs only once. But we are nevertheless satisfied that, here, the district court acted within its discretion by denying the mistrial motion. The context of the statement did not put the emphasis on Diaz's deportation status but on Mary's concern that her accusation might separate the family. The district court also reasonably offered to provide a curative instruction to allay concern that the reference might unfairly prejudice Diaz, but Diaz declined the offer. Having declined the district court's attempt to mitigate potential prejudice, Diaz is not well positioned to complain that

prejudice required the district court to declare a mistrial. On balance, we conclude that the district court's denial did not constitute an abuse of its discretion.

V

Diaz argues that the district court improperly instructed the jury that "[t]he testimony of a single witness may be sufficient evidence, if believed, to meet the burden of proof beyond a reasonable doubt." We review a district court's jury instructions for abuse of discretion, and a district court abuses its discretion if the jury instructions "confuse, mislead, or materially misstate the law." *Taylor*, 869 N.W.2d at 14–15 (quotation omitted). The challenged jury instruction did not misstate the law. In a criminal sexual conduct prosecution, the victim's testimony need not be corroborated to support a conviction; indeed, in any criminal case a conviction may rest on the testimony of a single, credible witness. Minn. Stat. § 609.347, subd. 1 (2022); *State v. Hill*, 172 N.W.2d 406, 407 (Minn. 1969). Diaz accurately cites *State v. Johnson* for the proposition that we held that the district court erred by "instruct[ing] the jury that corroboration is not required," reasoning that "the lack of corroboration is an evidentiary matter, rather than a substantive matter." 679 N.W.2d 378, 388 (Minn. App. 2004), *rev. denied* (Minn. Aug. 17, 2004). The state requests that we overrule *Johnson*, arguing that its reasoning is flawed. The state did not sufficiently brief that request, *see State v. Noor*, 964 N.W.2d 424, 435 (Minn. 2021) (quotation omitted) (emphasizing that an effective challenge to precedent requires a compelling reason that establishes that the prior decision is not merely wrong but "clearly and manifestly erroneous"), and we need not address the request in any event here. This is because the district court has broad discretion to issue curative instructions to respond to

erroneous, confusing, or misleading remarks made by counsel during closing arguments. *See State v. Breaux*, 620 N.W.2d 326, 333 (Minn. App. 2001). And unlike the circumstances in *Johnson*, in this case the ambiguous statements in defense counsel's closing argument that we have recounted above reasonably concerned the district court that the jury might be misled to believe that a victim's testimony alone could not, as a matter of law, support a guilty verdict. The district court therefore acted well within its discretion by averting the potential confusion with the legally accurate jury instruction.

We add that we would not reverse even if we accepted Diaz's argument that the district court should not have so instructed the jury. After holding the instruction erroneous in *Johnson*, we also held that the error was harmless because the district court also properly instructed the jury on the state's burden of proof. 679 N.W.2d at 388. Likewise here, the district court properly instructed the jury on the state's burden to prove Diaz's guilt beyond a reasonable doubt. This renders harmless any error in giving the single-witness instruction.

Affirmed.