STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1695

State of Minnesota,
Respondent,

vs.

Terrence Demon Bailey,
Appellant.

Filed January 9, 2023
Affirmed in part, reversed in part, and remanded
Gaïtas, Judge

Hennepin County District Court
File No. 27-CR-21-9633

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

Mary F. Moriarty, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Gaïtas, Presiding Judge; Bjorkman, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Terrence Demon Bailey appeals his convictions for first-degree burglary and fourth-degree criminal sexual conduct following a jury trial where he represented himself. He argues that respondent State of Minnesota did not meet its burden of proof for

the burglary offense and that his waiver of trial counsel did not satisfy constitutional requirements. Alternatively, Bailey argues that he must be resentenced because the district court improperly added the burglary offense to his criminal-history score before sentencing him for the criminal-sexual-conduct offense, and he notes that the warrant of commitment contains a mistake. We conclude that the state's evidence of first-degree burglary was sufficient and that Bailey validly waived his right to trial counsel. But because the district court used the wrong criminal-history score in sentencing Bailey for fourth-degree criminal sexual conduct, we reverse his sentence for that offense and remand for resentencing. We also direct the district court to correct the error in the warrant of commitment.

FACTS

In May 2021, T.N.P. reported to the police that she encountered Bailey—who was a stranger to her—in the hallway of her boyfriend's Minneapolis apartment building in the middle of the night. T.N.P. told police that during their brief encounter, Bailey sexually assaulted her. Police arrested Bailey just outside of the apartment building. Following his arrest, Bailey was charged with first-degree burglary, Minn. Stat. § 609.582, subd. 1(c) (2020), attempted third-degree criminal sexual conduct, Minn. Stat. §§ 609.344, subd. 1(c), 609.17 (2020), and fourth-degree criminal sexual conduct, Minn. Stat. § 609.345, subd. 1(c) (2020).

On the first day of trial, Bailey moved to discharge his counsel and to represent himself. The district court granted Bailey's motion to waive counsel.[1]

At trial, the state presented testimony from T.N.P., T.N.P.'s boyfriend M.P., three police officers who responded to T.N.P.'s report, the police investigator, and the apartment building's property manager.

T.N.P. testified that her boyfriend M.P. lived in the apartment building where the incident occurred. M.P.'s apartment was a garden level unit, which was located directly across the hallway from the building's laundry room. On the night of the incident, T.N.P. went to sleep in M.P.'s apartment wearing just a t-shirt. She was awakened in the early morning hours by a commotion in the common hallway. T.N.P. was concerned that one of the kids living in the apartment building needed help, so she opened M.P.'s door and stepped out into the hallway. She saw Bailey and asked him if he lived in the building

Then, T.N.P. testified, she was somehow spun around, and Bailey was pushing her back into the laundry room. According to T.N.P., Bailey, who is about six inches taller than she, placed his hand on her shoulder and advanced as she backed up into the laundry room, where she eventually ended up against the boiler-room door. T.N.P. stumbled and hit her head on the boiler-room door. Although she was not physically injured, T.N.P. testified that the blow to her head caused her to panic. She then "wiggled" her way out from between Bailey and the door and attempted to escape back into M.P.'s apartment.

[1] The district court held two hearings on Bailey's request to represent himself because, after the first hearing, Bailey mistakenly signed a guilty-plea petition, and not a petition to proceed pro se.

T.N.P. testified that Bailey followed her, grabbed her shoulder, and pinned her against the wall next to M.P.'s door. She was afraid that Bailey was going to rape her. According to T.N.P., Bailey stated, "[Y]ou're beautiful, stop resisting." Bailey touched her breasts over her t-shirt, and then he partially penetrated her vagina with his fingers.

M.P. testified that he woke up when he heard shouting in the hallway. He opened his apartment door and saw what Bailey was doing to T.N.P. M.P. pulled T.N.P. into his apartment and shut the door. Then, according to M.P., Bailey pounded on the door and shook the door handle.

T.N.P. called the police. The responding officers testified that they found Bailey standing by the back door of the apartment building. After speaking with T.N.P., they arrested Bailey. T.N.P. and M.P. both identified Bailey in a "show-up." Although the officers offered T.N.P. the opportunity to go to the hospital, T.N.P. declined because she said she was not physically injured.

The property manager for the apartment building testified that Bailey did not live in the building. According to the property manager, no building resident had given Bailey permission to be in the secured building.

During the trial, Bailey did not cross-examine any of the state's witnesses, present witnesses on his own behalf, testify on his own behalf, or give an opening or closing statement. The jury ultimately found Bailey guilty of all three charges.

At sentencing, the district court adjudicated Bailey guilty of counts one and three—first-degree burglary and fourth-degree criminal sexual conduct—and he was sentenced to 58 months and 60 months in prison, to be served concurrently. The district court also

imposed a mandatory ten-year conditional-release period to follow the sentence for the fourth-degree criminal-sexual-conduct conviction.

DECISION

I. The state's evidence was sufficient to prove beyond a reasonable doubt that Bailey committed first-degree burglary by unlawfully entering the apartment building and assaulting T.N.P.

Bailey argues that the trial evidence was insufficient to prove his guilt of first-degree burglary. He contends that the state failed to establish that he intended to commit or committed the alleged predicate offense—assault—when he was in the apartment building. Bailey therefore asks us to reverse his burglary conviction.

In a criminal case, the state must prove each element of the crime beyond a reasonable doubt. *State v. Martin*, 293 N.W.2d 54, 55 (Minn. 1980). Bailey was charged with first-degree burglary under Minnesota Statutes section 609.582, subdivision 1(c), which is a burglary with a predicate offense of assault. To convict Bailey of this offense, the state was required to prove beyond a reasonable doubt that Bailey: (1) was in the apartment building without consent, (2) either entered with the intent to commit a crime or entered and committed a crime while he was in the building, and (3) assaulted T.N.P. while he was in the building. *See* Minn. Stat. § 609.582, subd. 1(c).

Bailey argues that the state's evidence did not prove that he intended to assault T.N.P. in the building. To prove the predicate offense of assault, the state had to establish that Bailey inflicted or attempted to inflict bodily harm on T.N.P., or that Bailey intended to cause T.N.P. to fear immediate bodily harm or death. *See State v. Holmes*, 778 N.W.2d 336, 341 (Minn. 2010) (relying on the definition of assault in Minnesota Statutes section

609.02, subdivision 10, in identifying the elements of first-degree burglary-assault). We conclude that the trial evidence was sufficient to support Bailey's first-degree burglary conviction because it established beyond a reasonable doubt that Bailey intended to cause T.N.P. fear of immediate bodily harm.

When evaluating a sufficiency-of-the-evidence claim, appellate courts view the evidence "in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). But the level of scrutiny applied depends on whether the elements of an offense are supported by direct or circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). Intent is usually proven by circumstantial evidence. *State v. Clark*, 739 N.W.2d 412, 422 (Minn. 2007).

Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). A more rigorous two-step standard is used when reviewing the sufficiency of circumstantial evidence. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). First, the appellate court identifies the circumstances proved. *Silvernail*, 831 N.W.2d at 598. In this step, appellate courts defer to "the jury's acceptance of the proof of these circumstances" and "assume that the jury believed the State's witnesses and disbelieved the defense witnesses." *Id.* at 598-99 (quotations omitted). Second, the reviewing court determines if the circumstances proved are "consistent with guilt and inconsistent with any rational hypothesis except that of guilt, not simply whether the inferences that point to guilt are reasonable." *Id*. at 599 (quotations omitted). During this step of the analysis, the

reviewing court does not defer to the jury's choice between reasonable inferences. *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010).

Applying this standard here, the circumstances proved at trial are as follows. Bailey did not have consent to be in the building. Bailey and T.N.P. did not know each other. T.N.P. first encountered Bailey in the hallway of M.P.'s building in the middle of the night. Bailey put his hand on T.N.P.'s shoulder and pushed her backwards from the hallway into the laundry room. T.N.P. hit her head against the boiler-room door. When T.N.P. tried to get away from Bailey, he followed her and pinned her against the wall. Bailey said, "you're beautiful" and "stop resisting." He touched T.N.P.'s breasts and penetrated her vagina with his fingers. The incident ended when M.P. pulled T.N.P. away from Bailey. Bailey then attempted to enter M.P.'s apartment. Finally, while T.N.P. was not physically injured, she was afraid that Bailey was going to rape her.

Bailey argues that his conviction for the separate offense of fourth-degree criminal sexual conduct is not "per se proof" of assault and that his intent to commit the sexual assault was different than the intent required for an assault. He contends that the circumstances proved at trial lead to a reasonable inference, which is inconsistent with guilt, that he wanted to "control" T.N.P. for the purpose of committing criminal sexual conduct, not to cause her fear.

We are not persuaded. Given how and when the criminal sexual conduct occurred, the only reasonable inference is that Bailey had the specific intent to commit assault-fear when he attacked T.N.P. Bailey broke into the apartment building in the middle of the night, used his size relative to T.N.P. to physically force her into an isolated location,

caused her to hit her head, followed her when she attempted to get away, told her to "stop resisting," and then sexually assaulted her. Moreover, in returning a guilty verdict for the additional charge of fourth-degree criminal sexual conduct, the jury expressly found in a special-verdict form that Bailey used force to commit that offense, which was strong evidence of his specific intent to cause T.N.P. to fear immediate bodily harm.[2] *See* Minn. Stat. § 609.345 subd. 1(c) (stating that a person is guilty of fourth-degree criminal sexual conduct if force, as defined by Minnesota Statutes section 609.341, subdivision 3, is used in the commission of the offense); *see also* Minn. Stat. § 609.341, subd. 3 (2020) (defining force to include "the attempted infliction, or threatened infliction by the actor of bodily harm"). The circumstances proved clearly support a reasonable inference that Bailey intended to cause T.N.P. to fear immediate bodily harm.

Additionally, the circumstances exclude, beyond a reasonable doubt, any rational hypothesis that Bailey did not have the intent to cause fear of immediate bodily harm. We initially reject the distinction that Bailey attempts to draw between an intent to control T.N.P. for the purpose of a sexual assault and an intent to cause T.N.P. fear of immediate bodily harm. These intents are not mutually exclusive, and the evidence here established

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[2] The district court instructed the jury that force is

> 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 T.N.P. which: (a) causes T.N.P. 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 T.N.P., also causes T.N.P. to submit.

that Bailey simultaneously intended both outcomes.[3] Furthermore, the circumstances proved do not support any reasonable hypothesis other than guilt. They are only consistent with Bailey's intent to cause T.N.P. to fear immediate bodily harm while he sexually assaulted her.

The state's circumstantial evidence established beyond a reasonable doubt that Bailey specifically intended to cause T.N.P. to fear immediate bodily harm while he was unlawfully in the apartment building. Thus, the trial evidence was sufficient to support Bailey's conviction for first-degree burglary.

[3] Our determination is also consistent with nonprecedential decisions of this court. *See State v. Daniels*, No. A09-757, 2010 WL 1966790, at *1, *6-7 (Minn. App. May 18, 2010) (determining there was sufficient evidence to support the defendant's conviction for first-degree burglary-assault where the state established the defendant's intent to cause fear of bodily harm with evidence that the defendant broke into the victim's house in violation of an order for protection, followed her around while attempting to kiss her, and made statements suggesting that he would harm her if she did not submit to sex), *rev. denied* (Minn. July 20, 2010); *State v. Abdisalan*, No. A15-1191, 2016 WL 6923505, at *1-3 (Minn. App. Nov. 28, 2016) (determining there was sufficient evidence to support the defendant's conviction for first-degree burglary-assault/assault-fear where the defendant broke into the bedroom of two girls he did not know in the middle of the night, touched them, "expressed his desire to have sex," and did not stop when they asked), *rev. denied* (Minn. Feb. 22, 2017). While these nonprecedential decisions are not binding, they are persuasive authority. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) ("Nonprecedential opinions . . . are not binding authority except as law of the case, res judicata or collateral estoppel, but . . . may be cited as persuasive authority.").

II. Bailey's sentence for fourth-degree criminal sexual conduct is unlawful because the district court erroneously included the first-degree burglary offense in his criminal-history score.

Bailey argues, and the state concedes, that his sentence for fourth-degree criminal sexual conduct is unlawful because it is based on an inaccurate criminal-history score. We agree.

An appellate court reviews a district court's determination of a defendant's criminal-history score for an abuse of discretion. *State v. Edwards*, 900 N.W.2d 722, 727 (Minn. App. 2017), *aff'd mem.*, 909 N.W.2d 594 (Minn. 2018). "A district court abuses its discretion when its decision is based on an erroneous view of the law." *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017).

When a defendant is sentenced on the same day for a burglary offense and a separate offense committed during the same course of conduct, the sentencing guidelines bar the district court from using the burglary conviction to increase the criminal-history score before sentencing the separate offense. *See* Minn. Sent'g Guidelines 2.B.1(e)(1) (2020) ("When multiple current convictions arise from a single course of conduct and multiple sentences are imposed on the same day under Minnesota Statutes, section[] . . . 609.585 . . . , the conviction and sentence for the 'earlier' offense does not increase the criminal history score for the 'later' offense."); *see also* Minn. Stat. § 609.585 (2020) ("[A] prosecution for or conviction of the crime of burglary is not a bar to conviction of or punishment for any other crime committed on entering or while in the building entered."). Thus, if a defendant committed burglary and a criminal-sexual-conduct offense during a single behavioral incident, a district court should not include criminal-history points from

the burglary in calculating the defendant's criminal-history score for the criminal-sexual-conduct offense. *State v. Hartfield*, 459 N.W.2d 668, 670 (Minn. 1990).

Here, the district court first sentenced Bailey for the first-degree burglary offense using a criminal-history score of one. Then, incorporating two additional criminal history points from the burglary, the district court recalculated Bailey's criminal-history score before sentencing him for the criminal-sexual-conduct offense. The district court identified the presumptive sentence for fourth-degree criminal sexual conduct using a criminal-history score of three and imposed that sentence—60 months in prison, concurrent with the burglary sentence, to be followed by a ten-year conditional release period.

Because the district court abused its discretion in calculating Bailey's criminal-history score, his resulting sentence is unlawful. We therefore reverse Bailey's sentence for fourth-degree criminal sexual conduct and remand for resentencing. On remand, the district court should impose the presumptive sentence for fourth-degree criminal sexual conduct calculated with a criminal-history score of one, which is a stayed 36-month prison sentence and probation. *See* Minn. Sent'g Guidelines 4.B (2020). Because the presumptive sentence is stayed, the district court should not impose a conditional-release period.[4] *See*

[4] The state asks us to reverse both of Bailey's sentences under the sentencing-package doctrine. *See State v. Hutchins*, 856 N.W.2d 281, 285-86 (Minn. App. 2014) (holding that, if a defendant is sentenced for multiple convictions but only attacks one of those convictions on appeal, the appellate court may, in its discretion, reverse and remand both sentences for resentencing), *rev. granted* (Minn. Dec. 30, 2014) *and appeal dismissed* (Minn. July 20, 2015). Given Bailey's separate argument that his decision to waive counsel was predicated on the information he received from his attorney regarding sentencing, *see infra* III, we reject that request and reverse only Bailey's sentence for fourth-degree criminal sexual conduct.

Thong v. State, 892 N.W.2d 842, 846 (Minn. App. 2017) (concluding that a conditional-release period is only required when a defendant's sentence is executed), *rev. denied* (Minn. May 30, 2017); *see also infra* III.

III. Bailey's waiver of trial counsel complied with the Minnesota Rules of Criminal Procedure and was constitutionally valid.

Bailey argues that he is entitled to a new trial because his waiver-of-counsel hearing violated rule 5.04 of the Minnesota Rules of Criminal Procedure and because his decision to represent himself was constitutionally invalid. He contends that, before waiving counsel, he did not understand the possible punishments he faced or the fact that mitigating circumstances could reduce his sentences. Because Bailey was correctly informed about the lawful sentences available to the district court before he waived counsel, and the record shows that his waiver was otherwise knowing, voluntary, and intelligent, we conclude that his waiver of counsel satisfied the requirements of rule 5.04 and was constitutionally valid.

To comport with constitutional requirements, a criminal defendant's waiver of counsel must be knowing, intelligent, and voluntary. *State v. Rhoads*, 813 N.W.2d 880, 884-85 (Minn. 2012). The Minnesota Rules of Criminal Procedure provide a process that a district court must follow to ensure that a defendant's waiver of counsel satisfies these constitutional requirements. *See* Minn. R. Crim. P. 5.04, subd. 1(4). Under rule 5.04, subdivision 1(4), a defendant must sign a written waiver-of-counsel form. Alternatively, or in addition to the form, the district court must conduct an on-the-record advisory, which informs the defendant of "the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel." *Id.*, subd. 1(4)(f).

Among other things, before accepting a waiver of counsel, the district court must advise the defendant about the "range of allowable punishments" and that "mitigating circumstances may exist." *Id.*, subd. 1(4)(c), (e).

When there are no disputed facts underlying a district court's finding of a valid waiver, the constitutional question of whether the waiver was knowing, intelligent, and voluntary is reviewed de novo. *Rhoads*, 813 N.W.2d at 885. Here, the parties do not dispute what occurred during the waiver-of-counsel proceedings.

A. Bailey was appropriately advised about the presumptive sentence for fourth-degree criminal sexual conduct before he waived counsel.

Bailey first argues that his waiver of trial counsel was deficient because he was not aware of the sentences he faced if convicted. He contends that before he waived counsel, he was affirmatively misinformed that the presumptive sentence for fourth-degree criminal sexual conduct was probation. And he argues that he was never advised of the mandatory ten-year conditional release period that must follow an executed sentence for this offense. *See* Minn. Stat. § 609.3455, subd. 6 (2020). We reject these arguments for two reasons.

First, before he waived counsel, Bailey was correctly advised that the presumptive sentence for fourth-degree criminal sexual conduct was probation. During two on-the-record discussions with counsel and the district court, Bailey stated that he understood the presumptive sentence for the most serious offense—first-degree burglary—was 58 months in prison, but that the upper end of the presumptive range was 69 months' imprisonment. As to the fourth-degree criminal-sexual-conduct charge, Bailey told the district court that he understood the presumptive sentence was probation. Based on the record, we conclude

that Bailey was aware of the presumptive sentence for fourth-degree criminal sexual conduct before he waived counsel. And although the district court imposed an unlawful prison sentence for fourth-degree criminal sexual conduct, we now reverse that sentence and have instructed the district court to impose the presumptive probationary sentence on remand.

Second, even though the record does not reflect that Bailey was told he would receive a ten-year conditional release period if his probationary sentence for fourth-degree criminal sexual conduct were ever revoked, this does not invalidate his waiver of counsel. The district court followed the requirement of rule 5.04, subdivision 1(4)(c), that a defendant be informed about the "range of *allowable* punishments." A mandatory ten-year conditional-release period should be imposed for a fourth-degree criminal-sexual-conduct conviction under Minnesota Statutes section 609.345 "when a [district] court commits an offender to the custody of the commissioner of corrections." Minn. Stat. § 609.3455, subd. 6. A person is "committed" to custody only when their sentence is *executed*. *See Thong*, 892 N.W.2d at 846 (defining commit as "[t]o send (a person) to prison," and custody as "[t]he detention of a person by virtue of lawful process or authority" (alterations in original) (quoting *Black's Law Dictionary* 329 (10th ed. 2014)).[5] Because the presumptive sentence for fourth-degree criminal sexual conduct in Bailey's case was

[5] *Thong* examined a statute requiring conditional release for a defendant convicted of driving while intoxicated (DWI). 892 N.W.2d at 845-47. We have previously equated DWI and criminal sexual conduct conditional-release statutes. *See Kubrom v. State*, 863 N.W.2d 88, 92 n.3 (Minn. App. 2015).

probation, and not commitment, the mandatory conditional-release period was not an allowable sentence for that offense when Bailey waived counsel.

Citing *Kubrom*, 863 N.W.2d at 92, and *State v. Henthorne*, 637 N.W.2d 852, 855-56 (Minn. App. 2002), *rev. denied* (Minn. March 27, 2002), Bailey argues that, because a defendant must be informed about the possibility of conditional release before pleading guilty, a defendant must also be informed about the potential for conditional release before waiving counsel. But no Minnesota appellate case has extended the holdings of these guilty-plea decisions to invalidate a defendant's waiver of counsel. Moreover, even assuming without deciding that *Kubrom* and *Henthorne* apply in the context of a defendant's waiver of counsel, a constitutional violation does not automatically occur when a defendant pleads guilty without knowing about the possibility of conditional release. In *State v. Rhodes*—a guilty plea case—the Minnesota Supreme Court held that constructive notice of the possibility of conditional release before sentencing is sufficient to avoid a constitutional violation. 675 N.W.2d 323, 327 (Minn. 2004); *see also State v. Calmes*, 632 N.W.2d 641, 648-49 (Minn. 2001) (concluding that there was no due-process violation when a sentence modification resulted in a five-year conditional-release period). Here, because conditional release was referenced in the complaint and in the presentence investigation report, Bailey had constructive notice of the possibility of a conditional-release period.

Finally, Bailey relies on *Rhoads* to argue that because conditional release was a possibility, he was not fully informed about the maximum punishment for fourth-degree criminal sexual conduct before he waived counsel. In *Rhoads*, the state filed an amended

complaint that doubled the maximum possible punishment after the defendant had waived counsel. 813 N.W.2d at 883. Under these circumstances, the Minnesota Supreme Court determined that the district court should have revisited the defendant's waiver of counsel to ensure that the defendant understood the new sentencing implications. *Id.* at 888. Here, when Bailey waived counsel, he was advised of the maximum allowable sentence, and that sentence remained the same following his waiver. Thus, we do not find *Rhoads* persuasive.

Because the presumptive sentence for fourth-degree criminal sexual conduct is probation, the information that Bailey received before waiving counsel was accurate. We therefore conclude that, in this respect, Bailey's waiver of counsel complied with the Minnesota Rules of Criminal Procedure and constitutional requirements.

B. The district court's inquiry ensured that Bailey's waiver of counsel was otherwise valid.

Bailey also contends that he did not knowingly, intelligently, and voluntarily waive counsel because the district court failed to sufficiently explain the concept of mitigating circumstances. He further argues that informing a defendant about mitigating circumstances is an explicit requirement of Minnesota Rule of Criminal Procedure 5.04, subdivision 1(4)(e). Based on our review of the record, we are satisfied that the district court's comprehensive inquiry regarding Bailey's decision to waive counsel ensured that Bailey fully understood the implications of his decision.

In arguing otherwise, Bailey points to a discussion of mitigating circumstances that occurred at the first of two hearings held to discuss Bailey's petition to waive counsel. During that discussion, the district court asked Bailey whether he understood that

mitigating circumstances might exist. Bailey asked the district court to repeat its statement. The district court stated, "[M]itigating circumstances might exist that you're—whatever. Do you understand what you're doing? Are you here with a clear head today?" Bailey responded, "yes." We note that the district court was not required to assist Bailey by identifying circumstances that could mitigate his conduct. Moreover, Bailey did not ask the court to further explain the concept of mitigating circumstances. And although the district court's statements may appear incomplete when viewed in isolation, based on our review of all the proceedings involving Bailey's decision to represent himself, we conclude that the district court ensured that Bailey's waiver of counsel was knowing, voluntary, and intelligent and complied with rule 5.04.

IV. Bailey's warrant of commitment contains a clerical error.

Finally, Bailey directs our attention to a clerical error in his warrant of commitment, which incorrectly shows that he was convicted of three offenses. The jury found Bailey guilty of three charged offenses—first-degree burglary, attempted third-degree criminal sexual conduct, and fourth-degree criminal sexual conduct. But consistent with the law, at sentencing, the district court formally adjudicated Bailey on just two counts—count one, first-degree burglary, and count three, fourth-degree criminal sexual conduct.[6] Contrary to the district court's oral pronouncement at sentencing, the warrant of commitment shows

[6] If a defendant is found guilty of multiple counts stemming from a single behavioral incident, the district court should only formally adjudicate and sentence a defendant for one of those counts. *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quoting *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999)). Here, the district court explicitly stated at sentencing that Bailey was "not being adjudicated on count II" because "count II and count III involve the same behavioral incident."

that Bailey was also adjudicated on count two, attempted third-degree criminal sexual conduct.

When there is a conflict between a warrant of commitment and a clear oral sentencing order, a district court's oral pronouncement of a conviction and sentence controls. *State v. Staloch*, 643 N.W.2d 329, 332 (Minn. App. 2002). "Clerical mistakes in a judgment, order, or in the record arising from oversight or omission may be corrected by the court at any time." Minn. R. Crim. P. 27.03, subd. 10. Because the warrant of commitment does not reflect the district court's pronouncement at sentencing, we instruct the district court to correct the clerical error on remand.

Affirmed in part, reversed in part, and remanded.