STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0070

State of Minnesota,
Respondent,

vs.

Trever Joseph Palodichuk,
Appellant.

Filed December 19, 2022
Affirmed in part, reversed in part, and remanded
Gaïtas, Judge

Anoka County District Court
File No. 02-CR-19-5135

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Trever Joseph Palodichuk appeals his conviction for first-degree criminal sexual conduct following a jury trial, arguing that respondent State of Minnesota failed to prove he used coercion in committing the offense, his trial counsel provided ineffective

assistance, the district court erroneously excluded evidence, and, in a pro se supplemental brief, that the prosecutor and trial judge committed misconduct. Because the state's evidence was sufficient to establish beyond a reasonable doubt that Palodichuk committed first-degree criminal sexual conduct, and Palodichuk's other challenges to the conviction fail, we affirm in part. But because the district court erroneously entered convictions for three lesser-included offenses, we reverse and remand to vacate those convictions and correct the warrant of commitment.

FACTS

On Thanksgiving night in 2018, 18-year-old H.Y. reported that Palodichuk sexually assaulted her. Palodichuk and H.Y. lived in the same apartment complex. H.Y., who has high-functioning autism, lived in an apartment with her parents. Palodichuk, who is ten years older than H.Y., shared an apartment in the complex with his then-girlfriend E.H.

According to H.Y.'s family and friends, H.Y. is very independent, but due to her autism, she has difficulty with interpersonal conflict. In stressful situations, H.Y. shuts down and becomes withdrawn.

H.Y. considered E.H. and Palodichuk to be her friends, and she often spent time at their apartment baking and watching movies. Unbeknownst to H.Y., E.H. and Palodichuk were having problems in their relationship.

On Thanksgiving night, H.Y. went to E.H. and Palodichuk's apartment to eat pie that she had baked earlier with E.H. Palodichuk was there, but E.H. was at work for the evening. H.Y. decided to stay at the apartment until E.H. returned from her shift. Because

H.Y.'s phone battery was low, she asked Palodichuk to plug her phone into his charger, which he did. H.Y. and Palodichuk watched movies on the couch.

According to H.Y., as they watched a movie, Palodichuk began rubbing her back. H.Y. later testified that she "froze." She somehow "ended up on [her] side." H.Y. noticed that she was no longer wearing her pants and underwear, which had been removed and were on the floor, but she did not remember how she came to be undressed. She recalled that Palodichuk was "going up and down" and his privates were touching her butt.

After this incident, H.Y. immediately got dressed, located her phone, and returned to her parents' apartment. She noticed that Palodichuk had turned her phone off.

Once H.Y. arrived home, she initiated a text-message exchange with a friend. After some texts, they continued the discussion using a social media platform. In one message to the friend, H.Y. stated, "[s]omething happened to me and I don't know what to do." When the friend inquired about what had happened, H.Y. responded with the letter "R." Over the course of additional messages, H.Y. confirmed that she meant that Palodichuk had "raped" her. The friend immediately contacted H.Y.'s mother, who then called the police.

H.Y. told the police that she did not remember much of the incident. She reported that Palodichuk was rubbing her back and then she "blacked out." H.Y. said that she had trouble remembering what happened. She recalled noticing that she was on her side and her pants and underwear were on the floor.

Following her statement to the police, H.Y. went to the hospital for a sexual assault examination. H.Y. relayed the same story about the incident to the sexual assault nurse

examiner who performed the examination. During the physical exam, the nurse noted that H.Y. had tenderness in her vaginal area. The nurse swabbed H.Y.'s vagina, cervix, and rectum for evidence of sexual assault.

At the Midwest Regional Forensic Laboratory (MRFL), the swabs were examined for DNA and serology. The rectal swab contained one sperm cell, and the cervical swab contained three sperm cells. A Y-STR DNA analysis[1] of these sperm cells could not exclude Palodichuk or his male relatives from contributing to the male DNA profile in all tested samples.

In August 2019, the state filed a complaint charging Palodichuk with first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(e)(i) (2018), alleging that Palodichuk had used force or coercion to sexually penetrate H.Y. Palodichuk was arrested in connection with the complaint and remained in custody until his trial.

Motions, Delays, and Defense Expert Report

Following his arrest, Palodichuk retained private counsel. Between October 2019 and February 2021, Palodichuk's trial counsel filed numerous motions, including motions to compel discovery and suppress evidence. Some of trial counsel's motions were incorrectly filed, which resulted in several continuances. Through his trial counsel, Palodichuk initially waived his rights to a speedy trial and to contest certain issues at an

[1] At Palodichuk's trial, a forensic analyst explained that Y-STR testing is a type of DNA analysis conducted on the male "Y" chromosome to isolate a male DNA profile from a mixture of DNA that is predominately female. It is frequently used in sexual assault forensic analysis for women because there is typically a low amount of male DNA compared to the high amount of female DNA in the samples.

omnibus hearing. But then he demanded a speedy trial and asked to litigate pretrial issues that he had previously waived. At a hearing in April 2021, the district court expressed concern about the delay in commencing Palodichuk's trial and largely attributed the delay to defense counsel's conduct. Noting that Palodichuk had requested a speedy trial, the district court scheduled the trial for June 14, 2021, and confirmed that it would prioritize the trial on that date.

On June 1, 2021—just two weeks before trial—Palodichuk's trial counsel provided written notice that he intended to call a forensic expert. The notice was accompanied by the curriculum vitae of Dr. Karl Reich and a copy of MRFL's DNA report that contained several comments purportedly made by Dr. Reich. Following the notice, the state moved to exclude any testimony from Dr. Reich at trial, arguing that Palodichuk's untimely expert disclosure violated the Minnesota Rules of Criminal Procedure and prejudiced the state's ability to prepare for trial.

The district court found that Palodichuk's expert disclosure was "shockingly deficient" and "frankly, unprofessional." It noted that Palodichuk's counsel had ample time to retain an expert and to provide adequate notice and that defense counsel's failure to properly disclose Dr. Reich's testimony violated rule 9.02 of the Minnesota Rules of Criminal Procedure. *See* Minn. R. Crim. P. 9.02, subd. 1(2)(b) (outlining the requirements for expert-witness disclosures, including the requirement to provide an expert's report or a written summary of the expert's anticipated testimony). Due to the deficient disclosure, the district court limited the scope of Dr. Reich's testimony to his interpretation of MRFL's DNA analysis.

Trial, Sentencing, and Posttrial Motion

At Palodichuk's seven-day trial, the state called nine witnesses, including H.Y., H.Y.'s mother, H.Y.'s friend, Palodichuk's ex-girlfriend E.H., police officers, the nurse examiner, and forensic analysts. After the state rested its case, both parties agreed to have the jury instructed on the lesser-included offenses of second, third, and fourth-degree criminal sexual conduct. Palodichuk waived his right to testify and called one expert witness, Dr. Reich. Following the testimony, Palodichuk also waived his constitutional right to a jury determination on the sexual-contact element of second-degree and fourth-degree criminal sexual conduct, and stipulated that he engaged in sexual contact with H.Y. In closing argument, his counsel argued that H.Y. had consented to the sexual activity.

The jury found Palodichuk guilty of first-degree criminal sexual conduct and the lesser-included offenses of second-, third-, and fourth-degree criminal sexual conduct. Following the verdicts, the district court entered judgments of conviction for all four offenses and sentenced Palodichuk to 255 months in prison for the first-degree conviction.

After sentencing, Palodichuk fired his trial counsel. A public defender then filed a motion for a new trial on Palodichuk's behalf. Palodichuk's motion included an affidavit from Dr. Reich detailing the trial testimony he would have provided if the district court had not limited the scope of his testimony. The district court denied the motion. Then, represented by an appellate public defender, Palodichuk filed a direct appeal to this court.

DECISION

I. The testimony of H.Y., in conjunction with other corroborating evidence, was sufficient to prove beyond a reasonable doubt that Palodichuk used coercion to sexually penetrate H.Y.

Palodichuk argues that the trial evidence was insufficient to prove an element of first-degree criminal sexual conduct—that he used coercion to sexually penetrate H.Y. After careful review of the record, we conclude that the testimony of H.Y., in conjunction with other corroborating evidence, proved the element of coercion beyond a reasonable doubt.

In a criminal trial, the state must prove every element of a charged crime beyond a reasonable doubt to obtain a conviction. *State v. Culver*, 941 N.W.2d 134, 142 (Minn. 2020). To convict Palodichuk of first-degree criminal sexual conduct, the state was required to prove that he used force or coercion to sexually penetrate H.Y. *See* Minn. Stat. § 609.342, subd. 1(e)(i). Because there was no evidence of force, the district court granted the state's request to limit the jury instruction to the element of coercion.

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 complainant . . . 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 (2018).

Palodichuk contends that the state's evidence of coercion was insufficient. To evaluate the sufficiency of the evidence on appeal, the appellate court examines the record

to "determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). "The evidence must be viewed 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." *Id.* The verdict will not be overturned if the jury could have found the appellant guilty of the charged offense. *Id.*

When the contested element is supported by direct evidence, appellate review is limited to "a 'painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, [is] sufficient to permit the jurors to reach the verdict which they did.'" *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quoting *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989)). "[D]irect evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Here, the state's evidence of coercion largely came from H.Y.'s testimony from her personal knowledge, which was direct evidence. Accordingly, we scrutinize the record to determine whether H.Y.'s testimony and the state's other evidence of coercion—viewed in the light most favorable to the conviction—was sufficient to support the jury's guilty verdict.

We conclude that it was. H.Y.'s trial testimony shows that Palodichuk used coercion to sexually assault her. A guilty verdict may be based on the testimony of a single credible witness, *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004), because

"[c]orroboration is not required in criminal sexual conduct cases," *State v. Wright*, 679 N.W.2d 186, 190 (Minn. App. 2004), *rev. denied* (Minn. June 29, 2004). H.Y. testified that she was 18 years old at the time of the incident and that she has autism. Palodichuk is ten years older than H.Y., and H.Y. believed that he was five inches taller than she. H.Y. was alone with Palodichuk in his apartment, and it was late at night. Palodichuk initiated the sexual contact, and H.Y. did not reciprocate. Instead, she testified that she "froze" when Palodichuk touched her back because the contact was unwanted. Palodichuk's advances made H.Y. feel "weird." H.Y. "blacked out" during some of the incident. After the sexual encounter, H.Y. left the apartment and went home, although she had planned to stay later. She realized that Palodichuk had turned off her phone. H.Y. felt "scared." Given H.Y.'s testimony, a jury could reasonably conclude that Palodichuk caused H.Y. to reasonably fear bodily harm or that Palodichuk used confinement and his superior strength to sexually penetrate H.Y.

Moreover, other evidence corroborated H.Y.'s testimony about the coercive circumstances. After the incident, H.Y. immediately texted her friend that "something happened" and then confirmed she had been raped. And H.Y. was consistent in describing the incident to her mother, the police, and the nurse examiner.

The trial evidence, viewed in the light most favorable to the verdict, supports the jury's determination that Palodichuk used coercion to sexually penetrate H.Y. We therefore reject his challenge to the sufficiency of the evidence underlying his conviction for first-degree criminal sexual conduct.

II. Trial counsel's late and inaccurate expert-witness disclosures did not violate Palodichuk's constitutional right to the effective assistance of counsel because there is no reasonable probability that the expert's testimony would have changed the jury's verdicts.

Palodichuk argues that his trial counsel violated his constitutional right to the effective assistance of counsel. He contends that trial counsel's failure to provide sufficient notice of the DNA expert's testimony, which caused the district court to exclude some of that testimony, was deficient performance. And he asserts that trial counsel was deficient in failing to move for admission of the expert's opinions under Minnesota Rule of Evidence 412—a "rape shield" rule. Palodichuk argues that his defense was hampered by his inability to present the excluded evidence. Although we reject Palodichuk's argument that the attorney should have moved to admit clearly inadmissible evidence under rule 412, we agree that trial counsel's insufficient notice of the expert-witness testimony was deficient performance. However, because Palodichuk cannot show any prejudice stemming from the attorney's deficient performance, his ineffective-assistance-of-counsel claim fails.

Under the federal and state constitutions, a criminal defendant is entitled to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. This right means "the right to the *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added). The threshold for assessing any ineffective-assistance-of-counsel claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim that counsel

was ineffective, a defendant must show that (1) counsel was deficient and (2) the deficient performance prejudiced the defense. *Id.* at 687.

"Generally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief" because a postconviction evidentiary hearing provides the district court with additional facts regarding an attorney's decisions. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). However, "[w]hen a claim of ineffective assistance of trial counsel can be determined on the basis of the trial record, the claim must be brought on direct appeal." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

When, as here, an ineffective-assistance-of-counsel claim is raised in a direct appeal, we examine the claim under the two-prong test set forth in *Strickland*. *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (citing *Andersen*, 830 N.W.2d at 10). "Application of the *Strickland* test involves a mixed question of law and fact, which we review de novo." *State v. Mouelle*, 922 N.W.2d 706, 715 (Minn. 2019). "If a claim fails to satisfy one of the *Strickland* requirements, we need not consider the other requirement." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017).

A. Trial counsel's untimely and inadequate disclosure of expert testimony, which was objectively unreasonable, was deficient performance.

Palodichuk argues that his trial counsel's performance was deficient in two ways. First, he contends that his trial counsel failed to provide timely and sufficient notice of the proffered testimony of Dr. Reich, the defense's DNA expert. Dr. Reich planned to testify about deficiencies in the MRFL report and to offer his opinion that the DNA evidence contained multiple male profiles. Second, Palodichuk argues that his trial counsel failed

to follow the procedures required by the Minnesota Rules of Evidence for admitting Dr. Reich's testimony suggesting that H.Y. had a sexual encounter with Palodichuk and another male. We conclude that trial counsel was deficient in the first instance, but not the second.

When evaluating claims of ineffective assistance of counsel, "there is a strong presumption that counsel's performance was reasonable." *Andersen*, 830 N.W.2d at 10. "Counsel acts within that objective standard of reasonableness when the attorney provides the client with the representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009) (quotation omitted).

We first consider trial counsel's expert-witness disclosures. Under the Minnesota Rules of Criminal Procedure, for any expert who will testify to results or reports that the expert did not create, defense counsel must provide a "written summary of the subject matter . . . along with any findings, opinions, or conclusions the expert will give, [and] the basis for them." Minn. R. Crim. P. 9.02, subd. 1(2)(b). Exclusion of evidence is a possible sanction for noncompliance with discovery requirements. *See State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). Reasonable trial counsel must understand that the failure to comply with discovery requirements could result in the exclusion of evidence. *See id.* ("The imposition of sanctions for violations of discovery rules and orders is a matter particularly suited to the judgment and discretion of the trial court.").

We agree with Palodichuk that his trial counsel's performance in failing to properly disclose the expert opinions of Dr. Reich was objectively unreasonable. As the district

court determined, trial counsel's initial disclosure, which consisted of a marked-up report disclosed by the state, violated rule 9.02, subdivision 1(2)(b). And, when the district court gave trial counsel a second opportunity to comply with the rule, trial counsel's subsequent disclosure was also noncompliant and ethically questionable. Trial counsel personally drafted the second submission, which purported to be a summary of Dr. Reich's opinions. But at a hearing outside of the jury's presence, Dr. Reich testified that he was never asked to write a report, was not consulted in connection with the report that trial counsel submitted, and that the submitted report did not accurately reflect his opinions. The district court found trial counsel's notice "shockingly deficient" and "frankly, unprofessional," and consequently, limited Dr. Reich's testimony to his interpretation of MRFL's DNA analysis while excluding any testimony about the manual manipulation of data not in evidence, the reliability of gene mapping software, and the possibility of third-party male contributors to the DNA evidence. Trial counsel's conduct in disclosing the opinions of Dr. Reich was objectively unreasonable, and therefore constitutionally deficient.

On the other hand, we disagree with Palodichuk that his trial counsel's failure to move for the admission of evidence regarding H.Y.'s alleged prior sexual conduct was deficient performance. In a criminal-sexual-conduct case, Minnesota law precludes the defense from admitting or referencing a victim's prior sexual conduct except under very limited circumstances. *See* Minn. R. Evid. 412(1) (limiting evidence of previous sexual conduct to evidence showing a common scheme or plan of similar sexual conduct, evidence of the victim's previous sexual conduct with the accused, or evidence to show the source of semen, pregnancy, or disease); *see also* Minn. Stat. § 609.347, subd. 3 (Supp. 2021)

(providing the same limitations on such evidence). To seek admission of such evidence, defense counsel must file a pretrial motion "setting out with particularity the offer of proof of the evidence that the accused intends to offer." Minn. R. Evid. 412(2).

Here, the record contains no evidence suggesting that H.Y.'s alleged sexual history would have been admissible under the narrow exceptions delineated under Minnesota law. Thus, trial counsel's failure to seek admission of such evidence was not deficient performance.

B. Palodichuk cannot establish that trial counsel's deficient performance was prejudicial because the excluded expert testimony would not have changed the outcome of the trial.

Although we conclude that trial counsel was deficient in disclosing proffered expert testimony, Palodichuk's ineffective-assistance-of-counsel claim ultimately fails because he cannot establish that the attorney's deficient performance prejudiced his defense. Under the second prong of *Strickland*, Palodichuk must establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome of the case." *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016) (quoting *Strickland*, 466 U.S. at 694). No such probability exists here.

Palodichuk argues that the introduction of expert testimony about an alternative possible source of male DNA would undermine the state's evidence of penetration by offering another explanation for the forensic evidence. But Dr. Reich's testimony would not have changed the outcome of the trial. Dr. Reich *agreed* that Palodichuk's DNA profile

could not be excluded as a contributing source of DNA. And Palodichuk stipulated to having sexual contact with H.Y. and argued that the contact was consensual, rendering his proffered DNA evidence inadmissible and irrelevant to any of the issues at trial.

Palodichuk cannot establish that, but for his attorney's deficient performance, he would have prevailed at trial. Thus, his ineffective-assistance-of-counsel claim fails under the second prong of *Strickland*.

III. Palodichuk was not prejudiced by the district court's trial rulings that he challenges on appeal.

Palodichuk argues that the district court abused its discretion when it prohibited his trial counsel from arguing that H.Y.'s testimony required corroboration, asserting or suggesting that H.Y. failed to resist the sexual encounter, and conceding the date and location of the offenses in closing argument without Palodichuk's consent. He contends that these errors, which were preserved with objections, deprived him of his constitutional rights to present a complete defense and to the effective assistance of counsel. We conclude that, even if the district court erred in its rulings, the errors were harmless beyond a reasonable doubt and do not require reversal of Palodichuk's conviction.

The appellate court reviews a district court's evidentiary decisions and restrictions on the scope of closing argument for an abuse of discretion, even when a defendant alleges that the district court's errors violated constitutional rights. *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017); *State v. Caldwell*, 815 N.W.2d 512, 516 (Minn. App. 2012). If a district court abused its discretion, the appellate court will reverse any resulting conviction unless the error was harmless beyond a reasonable doubt. *State v. Sterling*, 834 N.W.2d

162, 171 (Minn. 2013). "An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error." *Id.*

Assuming without deciding that the district court's rulings were erroneous, Palodichuk cannot show that any of these alleged errors were prejudicial.

First, as noted, the state presented ample evidence corroborating H.Y.'s testimony. Given this corroborating evidence, any argument that the state *failed* to corroborate H.Y.'s testimony would have had little impact on the jury's decision.

Second, Palodichuk's trial counsel was unimpeded by any error in the district court's ban on questions, arguments, or inferences that H.Y. did not resist the sexual encounter. In closing argument, trial counsel argued about H.Y's lack of resistance:

> I mean, to say that she froze and that's why she couldn't do anything, is—it's ridiculous. . . . Clearly it was a long time. Tell me, folks, how can—that's not consent? It has to be.
>
> . . . Did she ever say no? Stop? She is an adult. At any time, she could have said, "Stop. No. I'm uncomfortable.". . . And so, if there is no testimony, then you have to look at her actions and what she said.
>
> . . . And if there was rubbing and petting where, you know, where she should have said no, she didn't.
>
> . . . .
>
> . . . She would not have allowed him to do any of this or she would have probably said something.
>
> . . . .
>
> . . . She never said, "Oh, my God. What are you doing to me? Get off get [off] of me. Get away from me." She never said that, nor did she run away.
>
> . . . .
>
> And at all of these times, she could have said no. If she could have said no, she could have turned around and she could have walked out.

Third, we are confident that trial counsel's inability to concede the date and location of the offense without first obtaining Palodichuk's permission (which Palodichuk refused to give) had no effect on the outcome of the case. Although Palodichuk now contends that conceding these uncontested elements would have helped his attorney build credibility with the jury, the defense conceded a far more significant fact (with Palodichuk's consent)—that Palodichuk had sexual contact with H.Y. Given this concession, the benefit of also conceding the date and location of the offense would have been negligible, at best.

In sum, even if the district court erred in its rulings, Palodichuk's conviction was surely unattributable to any error. Because any error was harmless beyond a reasonable doubt, Palodichuk is not entitled to a new trial.

IV. The record contains no evidence of prosecutorial or judicial misconduct.

In a pro se supplemental brief, Palodichuk identifies multiple evidentiary and procedural issues that he contends demonstrate both prosecutorial and judicial misconduct. We reject these claims.

Palodichuk's allegations of prosecutorial misconduct primarily concern the admissibility of the state's evidence. We note that Palodichuk failed to object to most of the rulings he now asks us to address. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) ("[An appellate court] will not decide issues which were not raised before the district court."). And to the extent that he preserved his allegations of error, we see no abuse of discretion in the district court's decisions to allow the evidence now challenged. *See Zumberge*, 888 N.W.2d at 694 (stating that an appellate court reviews evidentiary rulings

for abuse of discretion). Additionally, based on our review of the record, we see no prosecutorial misconduct.

Likewise, we reject Palodichuk's allegations of judicial misconduct. Palodichuk argues that the district court judge displayed bias because several evidentiary rulings did not favor his case. There is a presumption that a judge properly discharges judicial duties. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). And an adverse ruling alone does not constitute judicial bias. *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). Judicial bias must be proved considering the record as a whole. *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008). After carefully reviewing the record as a whole, we find that there is no support for Palodichuk's judicial misconduct claims.

V. The district court erred when it entered judgments of conviction for three lesser-included offenses.

Palodichuk argues, and the state concedes, that the district court erred by entering a conviction for each of the three lesser-included offenses. We agree. A criminal defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2018). Minnesota Statutes define an included offense as "a lesser degree of the same crime." Minn. Stat. § 609.04, subd. 1(1). When a criminal defendant is "convicted on more than one charge for the same act," the proper procedure is for the district court to "adjudicate formally and impose sentence on one count only." *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). We review this question of law de novo. *Spann v. State*, 740 N.W.2d 570, 572 (Minn. 2007).

The jury found Palodichuk guilty of first-degree criminal sexual conduct in violation of section 609.342, subdivision 1(e)(i). And the jury found him guilty of three lesser-included offenses—second-, third-, and fourth-degree criminal sexual conduct. At sentencing, the district court entered a conviction and sentenced Palodichuk for the first-degree charge. However, the court also entered convictions for the lesser-included offenses, which was error. We reverse and remand to the district court to vacate the judgments of conviction for the three lesser-included offenses, while leaving the findings of guilt for these offenses intact, and to correct the warrant of commitment.[2]

Affirmed in part, reversed in part, and remanded.

[2] Respondent points out that, after Palodichuk filed his appeal, the district court attempted to vacate the lesser-included-offense convictions by filing an amended sentencing order and warrant of commitment. The register of actions confirms that the district court filed an amended sentencing order on June 16, 2022. However, because an appeal had already been filed, the district court did not have authority to vacate the convictions when it filed the amended sentencing order. *See* Minn. R. Civ. App. P. 108.01, subd. 2 (stating that "the filing of a timely and proper appeal suspends the trial court's authority to make any order that affects the order or judgment appealed from").