STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0329

Carlos Avelino Contreras, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 3, 2023
Affirmed
Wheelock, Judge

Anoka County District Court
File No. 02-CR-20-2644

Robert M. Paule, Minneapolis, Minnesota (for appellant)

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

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

Considered and decided by Worke, Presiding Judge; Smith, Tracy M., Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges his convictions for first- and second-degree criminal sexual conduct, arguing that the district court abused its discretion by admitting the testimony of an expert witness and that the state's evidence of first-degree criminal sexual conduct was

insufficient to prove his guilt beyond a reasonable doubt. Because the district court did not abuse its discretion in determining that the expert witness was qualified to testify as to his opinion on the behaviors of children disclosing sexual abuse and that the expert's testimony was foundationally reliable, and because the evidence supported appellant's conviction for first-degree criminal sexual conduct, we affirm.

FACTS

In April 2020, respondent State of Minnesota charged appellant Carlos Avelino Contreras with one count of first-degree criminal sexual conduct involving genital-to-genital sexual contact with a person under age 13 under Minn. Stat. § 609.342, subd. 1(a) (2012), and one count of second-degree criminal sexual conduct involving sexual contact with a person under age 13 under Minn. Stat. § 609.343, subd. 1(a) (2010).[1] The two counts involved different victims, P.T. and A.T., who are siblings.

According to the complaint, in October 2019, the victims' neighbor called child protection and reported that P.T., who was six years old at the time, came to the neighbor's house and asked if she could stay there because someone was touching her, and she did not want to be at home. Law enforcement conducted a forensic interview with P.T. During the interview, P.T. identified body parts and the terms she used to refer to them on an anatomical drawing. Using the terms P.T. identified on the drawing, P.T. disclosed that a

[1] The complaint alleged that the conduct charged in count one occurred sometime between 2013 and 2019, and the conduct charged in count two occurred sometime between 2010 and 2019. The legislature amended Minnesota Statutes sections 609.342, subdivision 1, and 609.343, subdivision 1, in 2019, but the changes were not material to the conduct in this case. *See* 2019 Minn. Laws 1st Spec. Sess. ch. 5, art. 4, §§ 5-6, at 985-87.

family friend she knew as "Carlos" touched her genitals using his hands and his genitals. She stated that this happened more than once, when "Carlos" would take her to McDonald's or a park near her home, and sometimes her sister was also present. She described the incidents as taking place in "Carlos's" car. The information P.T. provided in the interview was consistent with what the neighbor reported having been told. Law enforcement later determined that "Carlos" was Contreras.

The officer then interviewed P.T. and A.T.'s mother. Mother initially told the officer that Contreras sometimes took P.T. and A.T. to McDonald's and that P.T. never reported any abuse by Contreras. After learning of P.T.'s allegations from the officer, however, mother stated that she remembered an incident when P.T. told her Contreras put his mouth on "where she pees." Mother's statement aligned with a statement P.T. made in her interview that she told mother about Contreras touching her, and mother examined her in the bathroom but then told P.T. not to tell anyone.

When the officer interviewed nine-year-old A.T., she disclosed that Contreras touched both her and P.T. in the "wrong parts" when he would drive them to McDonald's or the park. A.T. reported that Contreras touched her bare "privates" with his hand. A.T. recounted that her mother had told her of P.T.'s report of being touched "in her private" by Contreras's mouth. In addition, the officer interviewed P.T. and A.T.'s fourteen-year-old sister, who verified that Contreras took P.T. and A.T. to McDonald's. The older sister recalled the incident when P.T. reported to mother that Contreras touched P.T.'s genitals with his mouth. She described P.T. crying in the bathroom after reporting to mother. The sister also said that A.T. informed her of incidents that had occurred with Contreras at that

time. The older sister stated that, subsequently, Contreras's visits stopped, and the sister denied that Contreras had ever abused her.

In September 2021, Contreras was tried before a jury. The state filed pretrial motions asking the district court to admit statements P.T. and A.T. made to the state's other witnesses and videos of P.T.'s and A.T.'s forensic interviews as substantive evidence. The state also filed notice that it intended to offer the testimony of police detective Jeffrey Schoeberl as an expert on behaviors of child victims of sexual abuse, including delayed reporting, submissive conduct, and ongoing contact with a perpetrator. The state filed a memorandum describing the scope and relevance of the expert's testimony and a copy of the expert's curriculum vitae (CV). Contreras filed objections to the state's request to call an expert witness and to the admission of any prior statements of any witnesses.

At trial, the district court heard arguments on the admission of the out-of-court statements. It admitted all of the requested statements into evidence as either prior consistent statements under Minn. R. Evid. 801(d)(1)(B) or statements of child victims under Minn. Stat. § 595.02, subd. 3 (2022). By agreement of the parties, the district court accepted a letter the state submitted as an offer of proof of Schoeberl's experience and the opinions to which he would testify, and it accepted the state's memorandum and the CV to establish Schoeberl's qualifications and the foundational reliability of his testimony. The district court also heard argument on Contreras's objections to Schoeberl's testimony, which primarily focused on whether the testimony would be relevant or would invade the province of the jury. The district court ruled that it would allow Schoeberl's expert testimony.

P.T. and A.T. testified at trial, as did their mother and older sister, the neighbor to whom P.T. disclosed the abuse, P.T. and A.T.'s foster parent, the officer who conducted P.T.'s and A.T.'s forensic interviews, and Schoeberl. Contreras testified on his own behalf. Contreras stated that while he did take P.T. and A.T. to McDonald's and the park on more than one occasion, he did not touch either child sexually. He claimed that he helped the children with their shoes and jackets and cleaned P.T.'s legs after she had a bathroom accident. The jury found Contreras guilty of first-degree criminal sexual conduct as to P.T. and second-degree criminal sexual conduct as to A.T. The district court sentenced Contreras to terms of 144 months in prison on count one and 36 months in prison on count two, to run concurrently.

Contreras appeals.

DECISION

I. The district court did not abuse its discretion by admitting the expert witness's testimony.

Contreras argues that the court abused its discretion by admitting the expert's testimony because (1) the state's expert witness—a police detective and special-victims coordinator—was not qualified to testify as an expert about patterns of disclosure among child victims of sexual abuse, and (2) there was inadequate foundational reliability for the testimony the expert provided. We disagree with Contreras's arguments and conclude that the district court acted within its discretion.

Appellate courts review evidentiary rulings, including the admissibility of expert testimony, for an abuse of discretion. *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016).

"A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Garland*, 942 N.W.2d 732, 742 (Minn. 2020) (quotation omitted).

The admissibility of expert testimony is governed by Minn. R. Evid. 702, which states, in relevant part, that expert testimony is admissible "in the form of an opinion or otherwise" if (1) it consists of specialized knowledge that "will assist the trier of fact to understand the evidence or to determine a fact in issue"; (2) the witness is "qualified as an expert by knowledge, skill, experience, training, or education"; and (3) the expert's opinion has "foundational reliability." Contreras does not dispute that the expert's testimony assisted the jury's understanding of the evidence, but he argues that the state failed to prove both that the expert witness was qualified to provide his testimony and that the expert's opinion had foundational reliability. We review each argument in turn.

A. The expert witness was qualified to testify as to the behaviors of children disclosing sexual abuse.

An expert witness is qualified by "knowledge, skill, experience, training or education" to testify about and provide an opinion on "scientific, technical, or other specialized knowledge." Minn. R. Evid. 702. Whether a witness is "sufficiently qualified as an expert in a given subject area to justify testimony in the form of an opinion" is discretionary with the district court; qualification is not solely determined by formal training but includes "knowledge, skill, or experience that would provide the background necessary for a meaningful opinion on the subject." Minn. R. Evid. 702 1977 comm. cmt.

In finding Schoeberl was qualified, the district court reviewed his CV and considered his extensive experience interviewing child victims of sexual abuse, training in CornerHouse[2] protocols and other ongoing training, bachelor's degree in sociology and psychology, and master's degree in social work.[3] The district court found that Schoeberl was "clearly qualified to talk about some of these characteristics of children who have been victims of sexual abuse" as an expert based on his CV alone.

Contreras argues that nothing in the record establishes that Schoeberl's knowledge and experience qualify him to testify about the reasons children disclose sexual abuse as they do or about ongoing disclosures following a forensic interview; instead, Contreras argues, Schoeberl's qualifications extend to only the dynamics of child disclosure during a forensic interview or about how to conduct such an interview. At oral argument, Contreras conceded that Schoeberl could have testified about child victims' patterns of delaying disclosure of abuse but argued that Schoeberl's testimony about *why* child victims delay disclosing exceeded the scope of his qualifications. We are not persuaded.

Schoeberl's CV detailed his experience investigating child sexual abuse since 2006 and as a special-victims coordinator since 2011. Schoeberl's experience, as stated in his

[2] CornerHouse is an accredited children's advocacy center that provides specialized training in forensic-interviewing techniques to professionals who respond to reports of child abuse, such as teachers, child-protection workers, and law-enforcement officers.

[3] The district court additionally noted its review of a nonprecedential opinion from this court, *State v. Shafer*, No. A20-0541, 2021 WL 1082338, at *4 (Minn. App. Mar. 22, 2021), *rev. denied* (Minn. June 15, 2021), in which we upheld a district court's determination that Schoeberl was qualified to offer similar expert testimony, as further background on Schoeberl's qualifications.

CV, includes providing training to sexual-assault advocates about child sexual abuse and sexual predatory behavior, speaking at informational sessions for teenagers and community members on these same topics, and training and mentoring other detectives on sexual-assault cases. The CV also identified Schoeberl's work history as a youth counselor and social worker for at-risk youth and youth in residential treatment, many of whom were sexual-abuse victims as children. Along with trainings on child-forensic-interview practice through the CornerHouse and other methods, the CV listed numerous hours of training on issues of child abuse generally and updated strategies and methods used in sex-crime investigations. The CV established that Schoeberl has conducted over 400 investigations of alleged child abuse and 350 investigations of alleged criminal sexual conduct.

The district court reviewed these qualifications in light of the state's memorandum, which presented Schoeberl as qualified to testify on the behaviors of victims of childhood sexual abuse, including delayed reporting, submissive conduct during the assault, ongoing contact with the perpetrator, and "common myths and beliefs" on the topic. The state's offer of proof highlighted Schoeberl's extensive experience interacting with child victims of abuse, from disclosure through the progress of court cases involving their abuse, and his observations of children's behavior throughout that experience.

Contreras argues that this evidence of Schoeberl's qualifications to testify on the subject of why child victims delay disclosing their abuse is inadequate because it lacks specificity on how many of Schoeberl's interviews or investigations involved delayed disclosures, whether any of his trainings addressed delayed disclosures, or how his experience qualified him to testify about the reasons why child victims delay disclosure,

continue to disclose, or offer disclosures that differ over time. Our review of the record shows, however, that the district court was provided with ample evidence of this expert's knowledge about the topic of child-sexual-abuse disclosure and his relevant experience with child-sexual-abuse-disclosure behaviors.

The determination of an expert's qualification rests in the district court's discretion, and "a ruling admitting expert testimony will not be disturbed on appeal unless there is an abuse of discretion." *State v. Sandberg*, 406 N.W.2d 506, 511 (Minn. 1987) (quotation omitted) (concluding that a 15-year veteran detective who had investigated over 500 cases of child abuse was sufficiently qualified to testify that his experience demonstrated that children will often not report sexual abuse and about the settings in which they typically report when they do); *see also State v. Hall*, 406 N.W.2d 503, 505 (Minn. 1987) (holding that in cases of child sexual assault, "expert testimony as to the reporting conduct of such victims and as to continued contact by the adolescent with the assailant is admissible in the proper exercise of discretion" by the district court). Because our review of the record assures us that it contains substantial evidence of this expert's knowledge and experience in the broader areas of child-sexual-abuse disclosure to support the district court's finding that he was qualified to address child victims' patterns of disclosure of abuse, including why children delay disclosing, we conclude that the district court did not abuse its discretion in admitting Schoeberl's testimony.

B. The expert's opinion had foundational reliability.

Contreras next argues that the district court abused its discretion in finding that the expert's testimony met the foundational-reliability requirement of Minn. R. Evid. 702

because, in offering his opinions, the expert did not cite to any research, studies, or theories underlying his testimony about the behaviors of child sexual-abuse victims, nor did the state offer evidence about the underlying theories or methodologies on which the expert relied. Again, we disagree.

In finding adequate foundational reliability for Schoeberl's opinions, the district court first observed that the testimony offered was not related to new or novel scientific evidence and that the expert's opinions would be based on his experience and training. The district court also looked to Schoeberl's CornerHouse training, noting that CornerHouse's training program is both "nationally recognized as a provider of the most current up-to-date training concerning child sexual abuse forensic interviews" as well as "a clearinghouse for information, the most up-to-date research about child sexual abuse."

Rule 702 "does not define, generally, what 'foundational reliability' means." *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 165 (Minn. 2012). The foundational-reliability requirement "does not purport to describe what that foundation must look like for all types of expert testimony"; rather, the foundation required will "vary depending on the context of the opinion, but must lead to an opinion that will assist the trier of fact." Minn. R. Evid 702 2006 comm. cmt. "When determining whether an opinion is foundationally reliable under Rule 702, 'the district court must analyze the proffered testimony in light of the purpose for which it is being offered . . . [and] consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying.'" *Garland*, 942 N.W.2d at 742 (alteration in original) (quoting *Doe*, 817 N.W.2d at 167-68).

Here, the district court considered the underlying reliability and accuracy of the subject on which the expert offered opinions in the context in which the expert offered the opinions. The district court found both that the opinions would be based on knowledge gained through Schoeberl's experience and training and that his training was provided by a recognized provider of up-to-date research on the topic of child sexual abuse.

We further note the requirement that foundation "lead to an opinion that will assist the trier of fact." Minn. R. Evid 702 2006 comm. cmt. We agree with the state's position that a jury may not understand the trauma-influenced behaviors of child victims of sexual abuse and that additional context about those behaviors related to disclosure would assist a jury to understand the evidence presented. The district court did not abuse its discretion by determining that the testimony was allowable to assist the jury's understanding of the counterintuitive behaviors of children experiencing abuse, as long as the testimony did not stray into testifying about the specific victims in this case or vouching for any witness's credibility. *See State v. Burrell*, 697 N.W.2d 579, 600 (Minn. 2005) ("[I]n criminal trials, expert testimony must be monitored carefully to ensure that the jury is the sole determiner of a witness's credibility.").

The district court addressed the foundational reliability of the expert's testimony based on his experience and training, thereby satisfying the requirement that the testimony be analyzed in light of the purpose for which it is being offered, with consideration given to the underlying reliability, consistency, and accuracy of the subject of the expert's

testimony. *Garland*, 942 N.W.2d at 742.[4] We discern no abuse of discretion in the district court's determination that the expert's opinion was foundationally reliable on that basis.

In sum, we conclude that the district court did not abuse its discretion in admitting Schoeberl's expert testimony based on its determinations that Schoeberl was qualified as an expert and that the testimony offered was foundationally reliable.[5]

II. The record supports Contreras's conviction for first-degree criminal sexual conduct, and the district court did not err by not providing the jury with a lesser-included-offense instruction.

We now turn to Contreras's arguments that the evidence was insufficient to prove that he was guilty of all the elements of first-degree criminal sexual conduct and that given

[4] Contreras points to three cases to support the proposition that the district court must review evidence about the scientific theories and methodologies underlying the offered opinion to determine foundational reliability. In each of those cases, questions about the accuracy or sufficiency of the underlying methodology or research supporting the expert's opinion were raised to the district court. *Garland*, 942 N.W.2d at 742; *Doe*, 817 N.W.2d at 166-67; *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 529 (Minn. 2007). This case is distinguishable from *Garland*, *Doe*, and *Jacobson* because here, Contreras did not challenge at trial the science underlying the expert's opinions on disclosure behaviors of sexually abused children.

[5] "Under the harmless-error standard, an appellant who alleges an error in the admission of evidence that does not implicate a constitutional right must prove that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016) (quotation omitted). Contreras and the state agree that because Contreras objected to the state's request to call the expert witness, had we concluded that the district court erred in admitting Schoeberl's testimony, the harmless-error standard would then apply. Because we do not conclude that the district court erred in admitting Schoeberl's testimony, we need not reach the question of whether admission of Schoeberl's expert testimony was harmless error. *See id.* (stating the harmless-error standard applies where appellant timely objected to admission of expert-witness testimony).

the insufficiency of the evidence, the district court erred by failing to provide a lesser-included-offense instruction to the jury. We disagree.

A. Sufficient evidence supported Contreras's conviction for first-degree criminal sexual conduct.

Contreras argues that the evidence was insufficient to prove that he was guilty of first-degree criminal sexual conduct because no reasonable jury could conclude beyond a reasonable doubt that Contreras engaged in genital-to-genital contact with P.T.—a required element of the first-degree criminal-sexual-conduct offense with which he was charged—based on the record in this case.

When direct evidence supports an element of an offense, our review of that evidence is limited to "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted). We assume that the jury believed the state's witnesses and did not credit any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not overturn a jury's verdict if the jury could have reasonably found the defendant guilty, giving due regard to the presumption of innocence and the burden of proof beyond a reasonable doubt. *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016).

Under Minnesota law, to be guilty of first-degree criminal sexual conduct, the actor must engage in "sexual contact with a person under 13 years of age as defined in [Minnesota Statutes] section 609.341, subdivision 11, paragraph (c)," and the actor must be more than 36 months older than the complainant. Minn. Stat. § 609.342, subd. 1(a).

"Sexual contact with a person under 13" is further defined in Minn. Stat. § 609.341, subd. 11(c) (2012), as "the intentional touching of the complainant's bare genitals . . . by the actor's bare genitals . . . with sexual or aggressive intent."[6] Thus, the state had to prove beyond a reasonable doubt that (1) Contreras intentionally touched P.T.'s bare genitals with his bare genitals (2) with sexual intent (3) when P.T. was under 13 years of age, and (4) Contreras was more than 36 months older than P.T.

In arguing that the evidence does not sufficiently prove Contreras engaged in genital-to-genital contact with P.T., Contreras points to P.T.'s testimony on direct examination, during which she was asked what part of Contreras's body touched her body, and she replied that it was his penis. When further asked what part of Contreras's penis touched her body and where, she stated, "I feel like the tip touched my vagina. I don't really remember right now." Contreras contends that this statement was vague and equivocal and thus should have given the jury reasonable doubt about this element of the alleged conduct.

In addition to receiving P.T.'s testimony, the jury viewed the video of her forensic interview. In the video, P.T. indicated parts she had labeled on anatomical drawings to show Contreras touched her vagina with his hand and his penis, further indicating that his penis went inside of her body, at which point P.T. stated that she was "too nervous" to say more. P.T. provided contextual details in the video, including that the incident took place

[6] The legislature amended Minnesota Statutes section 609.341, subdivision 11, in 2019, but the changes were not material to the conduct in this case. *See* 2019 Minn. Laws 1st Spec. Sess. ch. 5, art. 4, § 4, at 984.

in Contreras's car and that Contreras had removed her pants and underwear. P.T.'s in-court testimony provided additional details specific to the incidents of genital-to-genital contact that were consistent with the statements in the video. She also stated that when genital-to-genital contact occurred, no one else was in the car "to make sure no one saw."

Contreras contends that this evidence of genital-to-genital contact is insufficient because (1) P.T. "admits she does not really remember that critical detail" in her trial testimony, and (2) the forensic interview shown to the jury in the video was unduly suggestive due to the use of anatomical drawings.

Contreras's claim that P.T. admitted to not really remembering genital-to-genital contact misstates P.T.'s testimony. P.T.'s statement, "I don't really remember right now," was made in response to a two-part question in which P.T. was asked what part of Contreras's penis touched P.T.'s body and where. We first observe that a statement of uncertainty about a detail of an incident is not the same as saying that the incident did not happen.

Second, Contreras asserts that the method of using anatomical drawings in a forensic interview has been criticized, but he points to no specific instances in the interview when the use of the drawings was unduly suggestive to P.T., nor does he explain how they were improperly used to elicit statements from P.T. about genital-to-genital contact.[7] The video

[7] To support his assertion that the use of anatomical drawings in the child-interview model employed by CornerHouse has been criticized as suggestive, Contreras provides no authority other than a journal article comparing the CornerHouse protocol with another method developed by the National Institute of Child Health and Human Development (NICHD). While the article notes that the NICHD protocol limits the use of props and

shows the interviewer and P.T. utilizing the drawings to establish a shared nomenclature for various body parts—sexual and nonsexual—and referring to the drawing occasionally as a means of communicating about the named body parts. The jury viewed the video and had the opportunity to assess whether the interview and the use of the drawings were unduly suggestive and the influence, if any, on the credibility of P.T.'s statements.

Contreras also points to the testimony of several other witnesses to support his assertion that out-of-court statements P.T. made to those witnesses did not include reports of genital-to-genital contact.[8] But the testimony of a victim in a prosecution for first-degree criminal sexual conduct need not be corroborated. Minn. Stat. § 609.347, subd. 1 (2022). We have long held that credibility determinations are left exclusively to the jury "even when testimony is uncorroborated." *State v. Epps*, 949 N.W.2d 474, 487 (Minn. App. 2020), *aff'd on other grounds*, 964 N.W.2d 419 (Minn. 2021). Ultimately, the jury found P.T.'s statements, during trial and in the forensic-interview video, that Contreras touched P.T.'s genitals with his genitals to be credible.

When viewed in the light most favorable to the conviction and assuming that the jurors believed the state's witnesses and did not credit evidence to the contrary, the record

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drawings "due to concerns that they may unnecessarily raise the risk of eliciting inaccurate information," the article does not cite data or evidence showing that the CornerHouse protocol's use of drawings elicits inaccurate information, and it does not state that CornerHouse's use of drawings is unduly suggestive. Patti Toth, *Comparing the NICHD and RATAC Child Forensic Interview Approaches—Do the Differences Matter?* Am. Pro. Soc'y on the Abuse of Child. Advisor, Fall 2011, at 15.

[8] The statements in question were admitted over Contreras's objection as prior consistent statements under Minn. R. Evid. 801(d)(1)(B) or as statements of a child victim under Minn. Stat. § 595.02, subd. 3.

contains sufficient evidence to support the jury's finding that Contreras is guilty beyond a reasonable doubt of first-degree criminal sexual conduct.

B. The district court did not err by not providing a lesser-included-offense instruction sua sponte.

Finally, Contreras argues that the district court erred by not providing a lesser-included-offense instruction to the jury.

"[W]hen a defendant fails to request a lesser-included offense instruction warranted by the evidence, the defendant impliedly waives his or her right to receive the instruction." *State v. Dahlin*, 695 N.W.2d 588, 597-98 (Minn. 2005). But even when a defendant has expressly or impliedly waived the instruction, "a trial court may, in its discretion, ignore the waiver and give any instructions warranted by the evidence." *Id.* at 598. "[A]bsent plain error affecting a defendant's substantial rights, a trial court does not err when it does not give a warranted lesser-included offense instruction if the defendant has . . . waived that instruction." *Id.*

Our review of the record shows that the district court and the parties discussed the verdict forms and jury instructions. Contreras was present. Contreras's counsel approved the verdict forms. The district court noted that neither party had requested a lesser-included-offense instruction, observing that "there seems to be an all-or-nothing approach to this case," and asked Contreras's counsel to confirm his intent. Contreras's counsel replied, "I am not requesting any instruction on a lesser-included offense, Judge." The court inquired further, and Contreras's counsel again confirmed he was not requesting a lesser-included-offense instruction on either charge.

Yet Contreras argues that "nothing in the record indicates" Contreras made a "'knowing' waiver of his right" to the lesser-included-offense instruction. We note that under *Dahlin*, waiver occurs even when the defendant fails to request the instruction. *Id.* at 597-98. And the record belies Contreras's assertion because Contreras's counsel, *in Contreras's presence*, expressly stated at least twice that Contreras was not making any request for that instruction. Moreover, there is no requirement of which we are aware that a defendant personally waive the right to a lesser-included-offense instruction.

Contreras argues that the district court must give a lesser-included-offense instruction any time the evidence provides a rational basis for acquitting a defendant of the greater offense and convicting that defendant of a lesser-included offense. To the contrary, a district court must give a lesser-included-offense instruction only when the evidence provides a rational basis for acquittal on the greater offense and conviction on the lesser offense, *and* the defendant requests the instruction. *Id.* at 598. When an appellant waives the right to a lesser-included-offense instruction, he has waived the issue on appeal and "may not argue that the court erred in not sua sponte giving the instruction." *State v. Montermini*, 819 N.W.2d 447, 459 (Minn. App. 2012) (quotation omitted), *rev. denied* (Minn. Nov. 20, 2012).

Further, Contreras does not cite any authority to support his argument that it was plain error affecting Contreras's substantial rights for the district court not to give a lesser-included-offense instruction when Contreras did not request the instruction, thereby waiving that right. *See State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010) (stating that error is usually plain if it "contradicts case law, a rule, or a standard of conduct"). Given

Contreras's counsel's response to the district court's observation about the "all-or-nothing" approach being taken, the decision not to request a lesser-included-offense instruction appears to have been a matter of trial strategy. *See Montermini*, 819 N.W.2d at 460 (declining to assign plain error to a district court's failure to give a lesser-included-offense instruction when not requested as a matter of trial strategy). We therefore conclude that the district court did not err by failing to provide a lesser-included-offense instruction to the jury.

Affirmed.