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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0402**

State of Minnesota,
Respondent,

vs.

Andrew Donald Knott,
Appellant.

**Filed February 13, 2023
Affirmed in part, reversed in part, and remanded
Bratvold, Judge**

Cook County District Court
File No. 16-CR-20-219

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

Molly Hicken, Cook County Attorney, Grand Marais, Minnesota (for respondent)

Christina Zauhar, Douglas V. Hazelton, Halberg Criminal Defense, Bloomington,
Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant challenges his final judgments of conviction for third-, fourth-, and fifth-degree criminal sexual conduct following a jury trial. Appellant argues he is entitled to a new trial because (1) the district court violated his constitutional right to confrontation

by requiring face coverings during trial, and (2) the district court abused its discretion by denying appellant's request for the jury to visit the crime scene, excluding some DNA evidence from the victim's clothing, and allowing the state to call a rebuttal witness. Alternatively, he argues that his conviction must be reversed because the record evidence is insufficient to sustain the jury's guilty verdicts.

We conclude that appellant's right to confrontation was not violated, the district court acted within its ample discretion in making the challenged evidentiary rulings, and sufficient record evidence sustains the conviction for third-degree criminal sexual conduct. Thus, we affirm in part. Because we also determine that the district court erred by entering convictions and sentences for the two lesser-included offenses of fourth- and fifth-degree criminal sexual conduct, we do not review the sufficiency of the evidence related to these guilty verdicts. Thus, we reverse in part and remand to vacate the convictions for the lesser-included offenses and leave the guilty verdicts intact.

FACTS

The following summarizes the evidence received at the jury trial. We observe that the witnesses did not disagree about the events preceding the assault.

In January 2020, appellant Andrew Donald Knott travelled to northern Minnesota with an all-male group of family and friends to go skiing near Lutsen. The group spent the evening of January 24 swimming in the pool at a rented townhome, hanging out at a local bar, and socializing at the townhome. Sometime during the evening, Knott's group met M.F. through her friend, A.S., who was acquainted with some members of Knott's group.

As Knott's group, M.F., and A.S. continued to socialize at the townhome into the early hours of January 25, M.F. became very intoxicated. At trial, M.F. testified that the alcohol "caught up with her," and she became "very tired, very incoherent. Just not in a good mental state." Telling M.F. she should "sleep it off," A.S. helped M.F. to a bedroom on the lower level of the townhome.

The bedroom had a single full-sized bed. One member of Knott's group, J.D., was asleep in the bed when M.F. laid down next to him. A second male slept on the floor between J.D.'s side of the bed and the wall. A.S. testified that sometime later, she checked on M.F. but could not wake her; M.F. mumbled and fell back asleep. At some point after A.S. checked on M.F., a third male entered the bedroom and laid down on the bed behind M.F. so that M.F. was between J.D. and the third male.

M.F. testified that the third male started touching M.F.'s breasts and vagina, both over and under her clothes. He then pulled her to the edge of the bed, pulled off her skirt and tights, and sexually penetrated her with his penis. The third male then replaced her tights and skirt on her body.

During the assault, according to M.F.'s testimony, she could not move or control her body. She testified that she was "like half-asleep, half-awake," and "it felt like a dream to me," "[l]ike I was watching it happen to me." When she awoke in the morning, she realized her skirt was on backwards, and her tights were halfway down her thighs. M.F. left the townhome.

After telling A.S. about the assault, M.F. went to the emergency room and requested a physical exam, saying she had been sexually assaulted while asleep at the townhome.

M.F. reported that she had been drinking before she fell asleep. She also told medical staff that she remembered someone entering the bedroom, removing her clothing, penetrating her vaginally, and then dressing her. A sexual-assault nurse examiner (SANE) conducted a physical examination and collected samples for a sexual-assault kit—forensic evidence was collected from M.F.’s cervix, vagina, rectum, perineum, and mouth.

M.F. reported the assault to the police. M.F. told the responding police officer that the man who assaulted her was “bald” and a “bigger guy.” Law enforcement interviewed the group staying at the townhome, photographed the three men who had slept in the bedroom with M.F., and collected a DNA sample from each of them—but Knott was the only one who matched M.F.’s physical description. Knott told a deputy that A.S. and M.F. were drinking a lot of alcohol and that M.F. was “passed out” and “sleeping hard” when he got into bed next to her. Knott denied any sexual contact with M.F. Law enforcement sent the DNA samples, the sexual-assault kit, and M.F.’s skirt and tights to the Bureau of Criminal Apprehension (BCA) for forensic analysis, which found evidence of Knott’s sperm on M.F.’s tights.

In November 2020, respondent State of Minnesota charged Knott with third-degree criminal sexual conduct involving sexual penetration while knowing or having reason to know that the complainant is physically helpless under Minn. Stat. § 609.344, subd. 1(d) (Supp. 2019) (count 1), and fourth-degree criminal sexual conduct involving sexual contact while knowing or having reason to know that the complainant is physically helpless under Minn. Stat. § 609.345, subd. 1(d) (Supp. 2019) (count 2). During trial, the state amended

the complaint to add fifth-degree criminal sexual conduct involving nonconsensual sexual contact under Minn. Stat. § 609.3451, subd. 1(1) (Supp. 2019) (count 3).

In pretrial motions, Knott asked the district court to allow the jury to view the crime scene. The district court denied Knott's motion. The state moved to exclude DNA evidence collected from M.F.'s skirt because forensic analysis linked this DNA to a male who was not present on the night of the assault. Over Knott's objection, the district court granted the state's motion after concluding that there was "considerable risk of implied prejudice."

In December 2021, the case was tried to a jury over four days. Before opening statements, Knott asked the district court to allow testifying witnesses to remove their face coverings. The district court denied Knott's request, stating it would not make a "blanket" exception but would reconsider exceptions on an individual basis for "substantial reason[s] that would justify removal." The state called seven witnesses—M.F., A.S., the responding police officer, emergency-room medical staff, and two analysts from the BCA. The state also introduced 18 exhibits, including diagrams and photos of the townhome, the tights M.F. wore that evening, photos of the three males who shared a room with M.F., medical reports, and BCA reports.

Two witnesses from the BCA testified about the DNA samples from M.F.'s sexual-assault kit. The forensic analyst testified that the samples from the sexual-assault kit showed an amount of male DNA present but not enough to conduct DNA analysis. The serologist identified sperm on four areas of M.F.'s tights; a sample from one area was collected for sperm-cell-fraction DNA testing. The major DNA profile from the tights

matched Knott's DNA, and that profile "would not be expected to occur more than once in the world population."

Knott called four witnesses and testified in his own defense. Knott's witnesses were friends and family from the ski vacation. Defense witnesses testified to the general events of the evening and corroborated that Knott had shared a bed with M.F. and J.D. J.D. testified that he was sleeping, noticed nothing unusual, and did not witness a sexual assault. Knott testified that he slept next to M.F. on the full-sized bed and did not speak to M.F. He denied having any sexual contact with M.F.

The jury found Knott guilty of the offenses in counts 1, 2, and 3. The warrant of commitment shows that the district court entered judgments of conviction for all three offenses and imposed a sentence for each count. The district court sentenced Knott to 48 months in prison on count 1, 48 months in prison on count 2, and 365 days on count 3—the sentences on counts 2 and 3 to be served concurrently with that on count 1. Knott appeals.

DECISION

I. Knott forfeited the confrontation-clause issue, and if we assume plain error occurred, Knott fails to show that any error affected his substantial rights.

Before opening statements, Knott asked the district court to allow testifying witnesses to remove their face coverings because "the credibility determinations the jury will have to make do sometimes involve facial expressions and body language." The district court denied the request, stating that the "chief justice has ordered that people wear face coverings" in court during the COVID-19 pandemic, as did a local order signed by the

trial judge.¹ The district court also stated that it would not “grant a blanket . . . exception for all witnesses at this time,” but it would “make an exception” for a specific witness if a “substantial reason . . . would justify removal of the face covering.”

For the first time on appeal, Knott argues that requiring face coverings for witnesses violated his Sixth Amendment right to confront witnesses under the United States Constitution. “An appellate court generally will not consider matters not argued to and considered by the district court.” *State v. Diamond*, 890 N.W.2d 143, 148 (Minn. App. 2017) (citing *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996)), *rev’d on other grounds*, 905 N.W.2d 870 (Minn. 2018). An appellant generally forfeits “constitutional issues that were not raised in the trial court.” *In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981); *see also State v. Vasko*, 889 N.W.2d 551, 559 n.6 (Minn. 2017) (citing to *C.L.L.* and determining appellant forfeited constitutional issues in a criminal context by raising the issues for the first time on appeal). We conclude that Knott forfeited his constitutional challenge to the witness face coverings for two reasons.

First, Knott failed to raise constitutional grounds when he objected to the face-covering requirement during trial. His sole argument to the district court was that it should allow witnesses to remove face coverings because that would assist the jury as it made “credibility determinations” and considered facial expressions and body language.

¹ *See, e.g., Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001 (Minn. Oct. 18, 2021) (discussing the use of face coverings as exposure-prevention and -mitigation measures to address the COVID-19 pandemic).

The district court, therefore, did not consider or determine whether the face-covering requirement violated Knott's constitutional right to confront the witnesses against him.

Second, despite the district court's invitation to request that a specific witness be allowed to testify without a face covering, Knott never made a request for any witness to remove a face covering during trial. In contrast, the district court granted two requests from the prosecuting attorney, one to remove the attorney's own face covering during witness questioning and one to have Knott remove his face covering for an in-court identification. Because Knott never made any request for a witness to remove a face covering even though the district court stated it would consider making exceptions, Knott forfeited the Confrontation Clause issue he tries to raise on appeal.

Unobjected-to Confrontation Clause violations are reviewed under the plain-error standard. *State v. Caulfield*, 722 N.W.2d 304, 311 (Minn. 2006). Under the plain-error standard, a defendant must establish "(1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "When the defendant satisfies these requirements, an appellate court may correct the error *only* when it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Pulczynski v. State*, 972 N.W.2d 347, 356 (Minn. 2022).

Even if we were to assume the district court erred by denying Knott's request that all witnesses testify without face coverings, Knott must then show that the error affected his substantial rights. The third plain-error factor is "satisfied if the defendant meets his 'heavy burden' to show that the error was prejudicial and affected the outcome of the case." *State v. Tscheu*, 758 N.W.2d 849, 864 (Minn. 2008) (quoting *Griller*, 583 N.W.2d at 741).

Knott analyzes the error under the harmless-error standard, arguing that because all the evidence was introduced through witness testimony, and all witnesses wore face coverings, there was no “remaining evidence” to conclude that the error was harmless. The supreme court has noted that “the third plain error factor is the same language used to define harmless error.” *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (citing Minn. R. Crim. P. 31.01). Thus, we construe Knott’s harmless-error argument to challenge the face-covering ruling under the third plain-error factor, and we reject the argument for two reasons.

First, Knott’s trial provided the opportunity for him to confront the witnesses against him. *See* U.S. Const. amend. VI; Minn. Const. art. I, § 6. We have held that while a “mask requirement did limit the jury’s view of the witnesses’ mouths and noses, the jury could still see the witnesses’ eyes, observe witnesses’ body language, and hear witnesses’ tone and vocal inflection.” *State v. Modtland*, 970 N.W.2d 711, 720 (Minn. App. 2022), *rev. granted* (Minn. Apr. 27, 2022). In *Modtland*, we held that a face-covering requirement did not raise Confrontation Clause issues because it was necessary to protect the health of trial participants, and witness testimony was still reliable. *Id.* at 716-21.

Second, all the witnesses in Knott’s trial testified with facial coverings. As we discussed in *Modtland*, “[b]ecause all testifying witnesses wore a [facial covering], the jury could consider each witness’s demeanor to the same extent and based on the same factors.” *Id.* Because the jury assessed credibility for all witnesses by considering the same factors, we conclude that the face-covering requirement did not affect Knott’s substantial rights.

Thus, even if we assume that the district court plainly erred by requiring witnesses to wear face coverings in violation of the Confrontation Clause, Knott is not entitled to a new trial because he did not meet his heavy burden of showing that this alleged error affected the outcome of the trial.

II. The district court did not abuse its discretion when it denied Knott’s request for the jury to view the scene, excluded DNA evidence, and allowed the state to call a rebuttal witness.

Knott challenges three district court rulings about the trial evidence and contends he is entitled to a new trial. First, Knott argues that the district court abused its discretion when it denied his request to allow the jury to view the townhome where the assault occurred. Second, Knott argues that the district court abused its discretion when it excluded DNA evidence from M.F.’s skirt. Third, Knott argues that the district court abused its discretion when it allowed the state to call a rebuttal witness. We address each argument in turn.

A. The district court did not abuse its discretion by denying Knott’s motion for the jury to visit the crime scene.

In a pretrial motion, Knott asked that the jury visit the townhome because “both the room and the bed” are “very, very small,” and “the tightness of this space is actually relevant to the defense in this case.” The district court denied the motion because there are “plenty of alternate ways . . . the layout of the room can be described,” including by submitting a diagram of the layout. The district court reasoned that Knott has “had plenty of time during the course of this case” to obtain exhibits “that would describe the nature of

the room.” The district court found that transporting the jury to the scene was unnecessary and “would potentially unduly delay this trial.”

A district court “may allow the jury to view a place relevant to a case at any time before closing arguments if doing so would be helpful to the jury in deciding a material factual issue.” Minn. R. Crim. P. 26.03, subd. 11(a). An appellate court reviews the district court’s refusal to allow the jury to inspect a crime scene for abuse of discretion. *State v. Gardin*, 86 N.W.2d 711, 715-16 (Minn. 1957).

Knott argues that the district court abused its discretion because it “failed to consider the sufficiency of the other evidence and the conflicting testimony.” We are not persuaded for two reasons. First, the jury received photos of the bedroom and a diagram depicting its size and layout. Second, no testimony conflicted about the size of the bed or the size of the room. All witnesses testified that the bed was likely “a full-sized bed” and was too small to comfortably accommodate three adults. Knott asserts that a “viewing of the scene would have served to demonstrate just how physically difficult it would have been for [Knott] to perpetrate the alleged offenses in a room containing four adults.” We disagree. The two other males who slept in the room testified about the small size of the bedroom and the fact that they did not wake up at any point in the night. The jury considered this evidence when it found that Knott sexually penetrated M.F. without her consent.

The district court did not abuse its ample discretion by determining Knott had many ways to demonstrate the bedroom size and sleeping arrangements to the jury and that viewing the scene would have led to undue delay.

B. The district court did not abuse its discretion by excluding DNA evidence from M.F.'s skirt.

The BCA recovered sperm-cell-fraction DNA from the skirt that M.F. was wearing on the night of the assault. Forensic analysis determined that the DNA from the skirt did not match Knott or the other two males who slept in the bedroom. Through a military database, the BCA found that the profile of the DNA from the skirt matched a man named R.B. Both parties agreed that R.B. and M.F. had never met; that R.B. was not present the night of the assault, no longer lived in Minnesota, and was last in the area about one month before the assault; and that M.F. had borrowed the skirt from a friend, and it had not been laundered.

During pretrial motions, the state moved to exclude this evidence, arguing it was not relevant and highly prejudicial. The prosecuting attorney asserted that the presence of R.B.'s sperm on the skirt could impugn M.F.'s character because the skirt was "dirty" and had semen from another male. Knott sought to admit the evidence of R.B.'s DNA, contending any prejudice was minimal because there was no evidence R.B. had had sexual contact with M.F., and Knott did not claim that R.B. was an alternative perpetrator. Knott argued that the evidence of R.B.'s DNA was relevant as "an example of transfer DNA." Knott stated that because his sperm was found on M.F.'s tights, and he denied having sexual contact, "the concept of transfer DNA is very important in this case."

The district court excluded the evidence of R.B.'s DNA, determining that there was "considerable risk of . . . implied prejudice" and that the jury "might infer . . . things that

are completely irrelevant in this proceeding.” The district court also concluded that Knott has “many other ways” to show the concept of transfer DNA.

“Evidentiary rulings rest within the sound discretion of the district court, and [an appellate court] will not reverse an evidentiary ruling absent a clear abuse of discretion.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). Our analysis of this issue begins by noting that relevant evidence has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” Minn. R. Evid. 401. Relevant evidence, however, “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Minn. R. Evid. 403.

On appeal, Knott argues that the district court abused its discretion by excluding the evidence of R.B.’s DNA. First, Knott asserts that the DNA evidence was not prejudicial because both parties agreed R.B. had never met M.F. Second, Knott asserts that the evidence of R.B.’s DNA “was highly probative because it [went] directly to the Defense theory of the case regarding transfer DNA.”

We are not persuaded. At trial, Knott submitted no evidence on transfer DNA: defense counsel did not cross-examine the BCA analyst about transfer DNA, defense counsel did not call an expert to testify about transfer DNA, and defense counsel offered no proof that Knott’s DNA was transferred to M.F.’s tights. Indeed, defense counsel mentioned the possibility of DNA transfer during one brief portion of closing argument. A criminal defendant “cannot on appeal raise his own trial strategy as a basis for reversal.” *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007). Thus, Knott cannot now claim that his

defense was prejudiced by the district court's evidentiary ruling when his own defense counsel failed to adequately present the alleged theory of the case.

Knott also argues that "because the district court appeared to base its ruling, at least in part, on Minnesota's rape shield law, [his] constitutional rights are implicated." We disagree with Knott's assertion that the district court based its ruling "in part" on the rape-shield law.² The prosecuting attorney mentioned that the evidence of R.B.'s DNA may implicate the rape-shield statute. The district court responded: "[I]s that last argument even relevant given the fact that you're arguing that she's had no contact with [R.B.] and that was somebody else's skirt?" The prosecuting attorney conceded that the rape-shield statute "was not relevant," and the district court ruled on the motion by discussing only the relevance and prejudicial effect of the evidence of R.B.'s DNA. Because Knott did not argue that the evidence should be admitted under exceptions to the rape-shield law, this issue is forfeited. *See C.L.L.*, 310 N.W.2d at 557 ("[A]ppellant cannot now for the first time raise constitutional issues that were not raised in the trial court."); *Vasko*, 889 N.W.2d at 559 n.6 (applying *C.L.L.*'s bar on raising constitutional issues for the first time on appeal in a criminal context); *Diamond*, 890 N.W.2d at 148 ("An appellate court generally will not consider matters not argued to and considered by the district court.").

We conclude that the district court did not abuse its discretion when it excluded evidence of R.B.'s DNA as irrelevant. The proposed evidence of DNA from R.B. has no

² Called the "rape-shield law," Minnesota Statutes section 609.347 prohibits the use of evidence of a victim's previous sexual conduct except under very narrow exceptions. *State v. Wenthe*, 865 N.W.2d 293, 306 (Minn. 2015). Evidence admitted under the exceptions must follow the process described in Minnesota Rule of Evidence 412.

tendency to prove whether Knott sexually penetrated M.F. Nor did the district court abuse its discretion by excluding the evidence as more prejudicial than probative given that Knott offered no evidence about transfer DNA.

C. The district court did not abuse its discretion by permitting the state to recall A.S. as a rebuttal witness.

Knott called his brother as a character witness. His brother testified on direct examination that in his opinion, Knott was “honest” and “sexually appropriate.”³ During cross-examination, the prosecuting attorney asked Knott’s brother whether he had met A.S. at a restaurant and discussed the case. Knott’s brother denied making any statement about M.F. The state recalled A.S. in rebuttal, who testified that the summer before the trial, she met Knott’s brother at a restaurant. They discussed the upcoming trial, and Knott’s brother referred to M.F. as “one of them girls.” The state argued that A.S.’s rebuttal testimony impeached Knott’s brother by proving that he was dishonest and biased against M.F. The district court overruled Knott’s objection to A.S.’s rebuttal testimony.

During a criminal trial, the state “may rebut the defense evidence, and the defense may rebut the [state’s] evidence.” Minn. R. Crim. P. 26.03, subd. 12(g). Rebuttal evidence generally consists of “that which explains, contradicts, or refutes the defendant’s

³ During the first part of the brother’s cross-examination, the prosecuting attorney tried to impeach the brother by asking if he had ever referred to M.F. as “one of those girls” in a conversation with A.S. Defense counsel objected on relevancy grounds, and the district court sustained the objection. The district court allowed the prosecuting attorney to voir dire the brother outside the presence of the jury. After hearing this examination, the district court determined that the brother’s testimony was relevant to his credibility and bias against M.F., and the district court allowed the prosecuting attorney to resume questioning the brother about his conversation with A.S.

evidence.” *State v. Swaney*, 787 N.W.2d 541, 563 (Minn. 2010) (quotation omitted). “The determination of whether or not something is appropriate rebuttal evidence rests within the discretion of the trial court and will only be reversed upon a showing of clear abuse of discretion.” *State v. Gutierrez*, 667 N.W.2d 426, 435 (Minn. 2003).

Knott argues that “[n]othing in A.S.’s testimony explained, contradicted, or refuted [Knott’s] evidence.” We disagree. The evidence was offered to impeach the character testimony of Knott’s brother by showing that he was untruthful and biased against M.F. Knott also argues that A.S.’s testimony is inadmissible hearsay. Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Minn. R. Evid. 801(c). The state correctly points out that the brother’s statement to A.S. was not offered to prove whether M.F. was “one of those girls.” It was offered to show that Knott’s brother was biased against M.F. Evidence of a witness’s bias is admissible “[f]or the purpose of attacking the credibility of a witness.” Minn. R. Evid. 616. Thus, the district court did not abuse its discretion when it allowed the state to call A.S. as a rebuttal witness.

Knott finally argues that he is entitled to a new trial because the “sheer number of errors operated to [his] prejudice by producing a biased jury.” *See State v. Hill*, 801 N.W.2d 646, 659 (Minn. 2011) (stating that cumulative errors can “tip the scales, operate to the defendant’s prejudice by producing a biased jury” (quotation omitted)). We reject Knott’s cumulative-error argument. Our careful review of the record has led us to conclude that the district court did not abuse its discretion in the evidentiary rulings at issue.

III. The record evidence is sufficient to sustain Knott’s conviction for third-degree criminal sexual conduct.

To sustain a conviction in a criminal proceeding, the state must prove every element of the charged offense beyond a reasonable doubt. *State v. Culver*, 941 N.W.2d 134, 142 (Minn. 2020). Knott was convicted of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d). The state needed to prove that Knott “engage[d] in sexual penetration with another person . . . [and knew] or ha[d] reason to know that the [person was] mentally impaired, mentally incapacitated, or physically helpless.” Minn. Stat. § 609.344, subd. 1(d). Knott argues that the record evidence is not sufficient to prove two elements beyond a reasonable doubt. We first consider the correct standard of review and then analyze the record evidence for both challenged elements.

A. The correct standard of review evaluates direct evidence, not circumstantial evidence.

When evaluating the sufficiency of the evidence to sustain a criminal conviction, our standard of review turns on whether the challenged element is proved by direct or circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). Direct evidence is “based on personal knowledge or observation and . . . if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Circumstantial evidence is “evidence from which the factfinder can infer whether the fact in dispute existed or did not exist”; circumstantial evidence “always requires an inferential step to prove a fact that is not required with direct evidence.” *Id.* (quotation omitted).

When the appellant's conviction is based on direct evidence, the appellate court undertakes 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). In contrast, when the appellant's conviction is based on circumstantial evidence, the appellate court applies a two-step analysis to identify the circumstances proved and then examines all reasonable inferences that may be drawn from the circumstances proved to determine whether there is a reasonable alternative hypothesis other than guilt. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010).

Knott argues that only circumstantial evidence supports the jury's guilty verdict on the elements of sexual penetration and knowledge of physical helplessness. The state contends that direct evidence supports both elements. "[W]hen a disputed element is sufficiently proved by direct evidence alone . . . it is the traditional standard, rather than the circumstantial-evidence standard, that governs." *Horst*, 880 N.W.2d at 39. We agree with the state because the record evidence of sexual penetration includes M.F.'s testimony, the evidence of Knott's knowledge of M.F.'s physical helplessness includes Knott's testimony, and both M.F. and Knott testified based on personal knowledge. Because there was direct evidence for each disputed element, we apply the direct-evidence standard of review.

B. The evidence of sexual penetration was sufficient.

"Sexual penetration" is defined as "sexual intercourse" or "any intrusion however slight into the genital or anal openings." Minn. Stat. § 609.341, subd. 12 (Supp. 2019).

Knott challenges the sufficiency of evidence on this element but fails to apply the direct-evidence standard of review and instead argues that the circumstances proved are not inconsistent with innocence because “the record reflects the continued inconsistency of the complainant’s story and her own uncertainty as to what happened.” But 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). We must assume, therefore, that the jury found M.F.’s testimony to be credible.

M.F. testified at trial that she was asleep on a bed next to one male and a second male was sleeping on the floor when a third male entered the room and lay down behind her. The third male started touching her breasts and vagina, both over and under her clothes. He then pulled her to the edge of the bed, pulled off her skirt and tights, and sexually penetrated her. During this time, M.F. could not move her body or resist because she was “like half-asleep, half-awake,” and “it felt like a dream to [her],” “like [she] was watching it happen to [her].” When she awoke in the morning, M.F. realized her skirt was on backward and her tights were halfway down her thighs. M.F.’s testimony is direct evidence of sexual penetration. To find Knott guilty, the jury credited M.F.’s testimony as describing sexual penetration, not a “dream.” In fact, M.F. testified the assault was “dream-like,” which was supported by her other testimony about her heavy alcohol consumption.

Knott asserts that “[o]ther than the complainant’s evolving story that culminated with her testimony at trial, there is no evidence to suggest that [Knott] sexually penetrated or had nonconsensual sexual contact with her.” We disagree with this description of the

record and also note that the law does not require corroboration. *See* Minn. Stat. § 609.347, subd. 1 (2022) (stating that sexual-assault-victim testimony “need not be corroborated”).⁴ In this case, the record includes ample corroborating evidence. The responding police officer testified that Knott admitted having slept in the bed with M.F. and that Knott fit M.F.’s description of the assailant. Several witnesses, including Knott himself, testified that Knott entered the bedroom and slept in the same bed as M.F. after she had fallen into an intoxicated sleep. Knott’s sperm-cell-fraction DNA was recovered from M.F.’s tights. M.F. told A.S. about the assault the next morning, A.S. testified that M.F. was in emotional distress, and M.F. immediately sought medical attention and promptly filed a police report. *See State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004) (stating that a prompt complaint and evidence of a victim’s emotional condition are corroborative), *rev. denied* (Minn. Aug. 17, 2004). M.F.’s statements to the emergency-room staff and the responding police officer described vaginal penetration and tracked her trial testimony.

Although we conclude that the direct evidence is sufficient, even if we apply the two-step circumstantial-evidence standard, as Knott argues, Knott’s proffered theory is not a rational hypothesis inconsistent with guilt. Knott argues that it is reasonable to infer that M.F. “in fact does believe that she was assaulted, and what [she] remembers was a bad dream—or even a nightmare.” We reject this alternative hypothesis because it disregards the presence of Knott’s sperm on M.F.’s tights and M.F. waking to find that her skirt was on backwards, and her tights were halfway down her thighs.

⁴ We cite the most recent version of Minn. Stat. § 609.347 because it has not been amended in relevant part.

Our “painstaking analysis of the record” leads us to conclude that “when viewed in the light most favorable to the conviction,” there was sufficient direct evidence to permit the jurors to find that Knott sexually penetrated M.F. *See Horst*, 880 N.W.2d at 40 (defining the direct-evidence standard of review).

C. The evidence of physical helplessness was sufficient.

Physically helpless “means that a person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.” Minn. Stat. § 609.341, subd. 9 (2018). Consent is defined as “words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor.” Minn. Stat. § 609.341, subd. 4 (2018). Consent specifically “does not mean . . . that the complainant failed to resist a particular act.” *Id.* Knott also argues that the record evidence is insufficient to establish that he “knew or had reason to know” that M.F. was physically helpless.

We view Knott’s testimony in the light most favorable to the verdict. The jury heard the following evidence of Knott’s knowledge of M.F.’s condition: Knott testified that his memory of the night was clear and “coherent.” Knott saw M.F. drinking alcohol throughout the night because he was near her at the bar and townhome. He stated that by the end of the night, he knew that M.F. was “fairly” intoxicated. He also testified that some of the group, including M.F., were ingesting cocaine. Knott testified that when he entered the lower-level bedroom and got into bed next to M.F., he did not talk to M.F. and “[t]o the

best of [his] knowledge, [M.F. and J.D.] were both sleeping.” Knott also told the deputy that M.F. was “sleeping hard.”

Knott contends that the record evidence establishes that before she fell asleep, M.F. was awake, walked on her own, and had conversations. From this evidence, Knott contends that this case is analogous to the record evidence in *State v. Blevins*, in which this court reversed Blevins’s conviction for third-degree criminal sexual conduct because there was insufficient evidence the complainant was “physically helpless” during a sexual assault. 757 N.W.2d 698, 701 (Minn. App. 2008). In *Blevins*, the complainant was intoxicated yet able to walk and talk. *Id.* at 699. Blevins led the complainant into a crawlspace, where Blevins initiated sexual contact. *Id.* During the assault, the complainant told Blevins she “didn’t want him to” and “to please not”; after the assault began, she “just let it happen” because she was afraid. *Id.* This court reasoned that “because [complainant] withheld her consent, the evidence is insufficient to demonstrate that she was unable to withhold or withdraw her consent.” *Id.* at 701.

Blevins is not analogous because the record evidence in Knott’s case is materially different. Knott did not sexually penetrate M.F. at a time when she could walk and have a conversation. Knott testified that when he entered the room, M.F. was sleeping, and they did not talk. Knott’s brother testified that when he went with A.S. into the bedroom to attempt to rouse M.F., “[s]he was just making noises.” A.S. testified that M.F. did not wake up when she asked M.F. to leave with her.

State v. Berrios is instructive. 788 N.W.2d 135 (Minn. App. 2010), *rev. denied* (Minn. Nov. 16, 2010). This court affirmed Berrios’s conviction for third-degree criminal

sexual conduct after determining there was sufficient evidence that Berrios knew or had reason to know that the complainant was physically helpless. *Id.* at 142-43. In *Berrios*, the complainant was intoxicated, required help getting into bed, and awoke later to an individual sexually penetrating her. *Id.* at 137. While the complainant said “no” once, she was in and out of consciousness during the assault. *Id.* M.F.’s testimony is like the complainant’s testimony in *Berrios*. M.F. was intoxicated, A.S. helped M.F. into bed, and during the assault, M.F. was “half-asleep, half-awake,” and “it felt like a dream.”

Viewing Knott’s testimony in the light most favorable to the verdict, the record evidence shows that Knott knew or had reason to know of M.F.’s physical helplessness given the alcohol and cocaine consumption he had observed, his testimony that she did not talk when he got into bed, and his testimony that M.F. was asleep or “sleeping hard.”

Thus, for the reasons stated, we affirm Knott’s conviction for third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d).⁵

IV. The district court erred by entering convictions and imposing sentences for two lesser-included offenses that arose from a single behavioral incident.

Finally, we consider whether the district court erred when it entered judgments of conviction and imposed sentences for fourth- and fifth-degree criminal sexual conduct.⁶

⁵ For reasons stated *infra* Part IV, we do not separately analyze the sufficiency of the evidence for Knott’s fourth- and fifth-degree criminal sexual conduct offenses. *State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) (stating that an appellate court need not decide whether record evidence was sufficient when a defendant is not formally adjudicated on a guilty verdict).

⁶ A transcript from the sentencing hearing was not provided in the record on appeal. Our decision is based on the information reflected in the warrant of commitment.

Neither Knott nor the state raised this issue on appeal. But “it is the responsibility of appellate courts to decide the cases in accordance with law, and that responsibility is not to be diluted by counsel’s oversights.” *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (quotation omitted). Whether an offense is a lesser-included offense of another charged offense is a legal question that an appellate court reviews de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

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). An included offense is “a lesser degree of the same crime” or “a crime necessarily proved if the crime charged were proved.” *Id.*, subd. 1(1), (4). Section 609.04 “bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985).

Knott’s warrant of commitment shows that the district court entered judgments of conviction for third-, fourth-, and fifth-degree criminal sexual conduct. Fourth- and fifth-degree criminal sexual conduct are lesser-included offenses of third-degree criminal sexual conduct because they are “a crime necessarily proved if the crime charged were proved.” Minn. Stat. § 609.04, subd. 1(4); see *State v. Kobow*, 466 N.W.2d 747, 752 (Minn. App. 1991) (holding that a lower degree of criminal sexual conduct is a lesser-included offense where the “difference is simply one of sexual contact versus sexual penetration”), *rev. denied* (Minn. Apr. 18, 1991). Compare Minn. Stat. § 609.344, subd. 1(d) (sexual penetration), with Minn. Stat. § 609.345, subd. 1(d) (sexual contact), and Minn. Stat.

§ 609.3451, subd. 1(1) (sexual contact). Thus, when the state proved that Knott engaged in sexual penetration, it necessarily proved sexual contact.

When the state proved that Knott knew or had reason to know M.F. was physically helpless for third- and fourth-degree criminal sexual assault, it necessarily proved M.F. did not consent, as is required to prove fifth-degree criminal sexual conduct. “Physically helpless” means a person “is (a) asleep or not conscious, (b) *unable to withhold consent or to withdraw consent* because of a physical condition, or (c) *unable to communicate nonconsent.*” Minn. Stat. § 609.341, subd. 9 (emphasis added). Based on this analysis of the elements of third-, fourth-, and fifth-degree criminal sexual conduct, we conclude that counts 2 and 3 are lesser-included offenses of count 1. Thus, under section 609.04, the district court erred by entering judgments of conviction on counts 2 and 3.

The Minnesota Supreme Court has described the proper procedure to correct this error:

[T]he proper procedure to be followed by the trial court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated and sentence imposed, with credit, of course, given for time already served on the vacated sentence.

State v. LaTourelle, 343 N.W.2d 277, 284 (Minn. 1984). As a result, we remand to the district court to vacate the judgments of conviction on counts 2 and 3. Because counts 2 and 3 should no longer be formally adjudicated, as directed in *LaTourelle*, the district court

should vacate the sentences imposed on counts 2 and 3. *Id.*; *see also* Minn. Stat. § 609.035, subd. 1 (2018) (“[I]f a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses.”).

Knott’s brief to this court raises two issues solely related to the lesser-included offenses in counts 2 and 3: (1) whether the record evidence is sufficient to sustain a finding of guilt on the element of sexual contact for the fourth- and fifth-degree criminal-sexual-conduct offenses and (2) whether the district court abused its discretion when it instructed the jury that fourth- and fifth-degree criminal sexual conduct includes intentional touching with seminal fluid. If Knott were later formally adjudicated on either count 2 or 3, he could challenge that conviction at that time. For that reason, we need not address the two issues raised in Knott’s brief that are solely related to the lesser-included offenses in counts 2 and 3, fourth- and fifth-degree criminal sexual conduct.

In sum, we affirm Knott’s conviction for third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d). We also reverse and remand for the district court to vacate the judgments of conviction and sentences imposed on counts 2 and 3.

Affirmed in part, reversed in part, and remanded.