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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0856**

State of Minnesota,
Respondent,

vs.

Chad Edward Danberry,
Appellant.

**Filed September 11, 2023
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge**

Blue Earth County District Court
File No. 07-CR-18-886

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Patrick McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

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

Considered and decided by Smith, Tracy M., Presiding Judge; Segal, Chief Judge;
and Kirk, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Chad Edward Danberry appeals from judgments of conviction, following his third jury trial, for five counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct. Danberry argues that (1) he is entitled to a new trial because the district court judge was disqualified from presiding after assisting the state during the second trial, (2) his conviction for count 4, second-degree criminal sexual conduct, must be reversed because it violates constitutional and statutory double jeopardy, (3) he is entitled to reversal and remand for the imposition of a single guidelines sentence because the district court erred by imposing multiple sentences for offenses that were part of the same behavioral incident, (4) during the third trial, Danberry was improperly tried for two new counts, requiring reversal of those convictions, (5) his criminal-history score is inaccurate, making his sentence illegal, and (6) his 792-month sentence is excessive.

We conclude that Danberry's count 4 conviction violated double jeopardy, so we reverse his conviction on that count. We also conclude that Danberry's criminal-history score must be recalculated, so we reverse and remand for the district court to do so and therefore decline to address Danberry's excessive-sentence argument. As for the remaining issues, we discern no error and affirm.

FACTS

In 2018, 11-year-old I.A. reported that Danberry had sexually abused her multiple times over several years. Danberry had been I.A.'s mother's boyfriend for approximately eight years and is the biological father of I.A.'s younger brother. I.A. and Danberry lived

together from approximately 2010 until approximately 2016, while I.A. was in kindergarten through sixth grade. I.A. saw Danberry as a father figure.

Respondent State of Minnesota initially charged Danberry with six counts of first-degree criminal sexual conduct, six counts of second-degree criminal sexual conduct, criminal sexual predatory conduct, and threats of violence. The state amended the complaint twice, resulting in five counts of first-degree criminal sexual conduct and seven counts of second-degree criminal sexual conduct. The day before the first trial, the district court judge directed the state to specify the acts that supported each count within the complaint. Danberry made a motion to sever the charges, which the state opposed. The district court denied the motion to sever and instead joined nine of the charges for trial, resulting in five counts of first-degree criminal sexual conduct and four counts of second-degree criminal sexual conduct.

First Trial

During the first trial, the parties struggled to match testimony about specific alleged incidents of sexual abuse with the counts. The district court decided to provide the jury with instructions that linked some allegations with each count. The jury returned guilty verdicts on all nine charged offenses. The district court imposed guideline sentences for four of the first-degree criminal-sexual-conduct convictions based on a criminal-history score of six.

Direct Appeal and Remand for New Trial

Danberry appealed, arguing insufficient evidence on count 4—first-degree criminal sexual conduct¹—and that he was entitled to a new trial because the district court denied his motion to strike a biased juror. *State v. Danberry*, No. A19-1676, 2020 WL 6846376, at *2-5 (Minn. App. Nov. 23, 2020). We agreed that “the district court abused its discretion by allowing [a biased] juror to sit in Danberry’s trial.” *Id.* at *5. Because this constituted structural error, we reversed Danberry’s convictions and remanded for a new trial. *Id.* We did not address the sufficiency of the evidence for count 4. *Id.*

Second Trial

Throughout the second trial, the parties worked to connect allegations from testimony to the charged counts, while references to the count numbers caused confusion. At one point, the district court directed the state to use more “leading questions” to “properly cue the defense in to what count we’re talking about.” I.A.’s testimony during the second trial included information about incidents of abuse that differed from the first trial. The jury acquitted Danberry on two counts and failed to reach a unanimous verdict on the remaining counts.

Third Trial

Before the third trial, the state amended the complaint to include nine counts:

¹ In the first trial, count 4 was for first-degree criminal sexual conduct based on what has been referred to in this case as the “after-nap” incident of alleged sexual abuse. As further explained in Section II below, the after-nap incident was also the basis for count 4 in the third trial, but the count alleged second-degree, rather than first-degree, criminal sexual conduct.

Count 1: first-degree criminal sexual conduct under Minnesota Statutes section 609.342, subdivision 1(a) (2010)

Count 2: first-degree criminal sexual conduct under Minnesota Statutes section 609.342, subdivision 1(a) (2012)

Count 3: first-degree criminal sexual conduct under Minnesota Statutes section 609.342, subdivision 1(a) (2012)

Count 4: second-degree criminal sexual conduct under Minnesota Statutes section 609.343, subdivision 1(a) (2012)

Count 5: first-degree criminal sexual conduct (multiple acts) under Minnesota Statutes section 609.342, subdivision 1(h)(iii) (2010)

Count 6: second-degree criminal sexual conduct under Minnesota Statutes section 609.343, subdivision 1(a) (2012)

Count 7: second-degree criminal sexual conduct (multiple acts) under Minnesota Statutes section 609.343, subdivision 1(h)(iii) (2010)

Count 13: first-degree criminal sexual conduct under Minnesota Statutes section 609.342, subdivision 1(a) (2010)

Count 14: first-degree criminal sexual conduct under Minnesota Statutes section 609.342, subdivision 1(a) (2012)

The jury found Danberry guilty of all nine counts. The district court left counts 5 and 7 unadjudicated and sentenced Danberry to consecutive prison terms for counts 1, 2, 3, and 13, resulting in a 792-month sentence.

Danberry appeals.

DECISION

Danberry argues that (1) he is entitled to a new trial because the district court judge was partial, (2) his conviction for count 4 must be reversed because it violated double jeopardy, (3) the district court erred in imposing multiple sentences for offenses that were

part of the same behavioral incident, (4) during the third trial, Danberry was improperly tried for two new counts, (5) his criminal-history score is inaccurate, and (6) his 792-month sentence is excessive. We address each argument in turn.

I. The district court judge was not partial.

Danberry asserts that the judge who presided over all three trials demonstrated “actual partiality or at least a reasonable question as to whether he was partial” during the second trial following the direct examination of I.A. Danberry challenges the conduct of the judge on constitutional due process grounds and based on the Minnesota Rules of Criminal Procedure and Code of Judicial Conduct. He contends that the judge “abandoned his neutral role and became an advocate for the state” and requests that we remand for a new trial.

Both the United States and Minnesota Constitutions guarantee criminal defendants the right to be tried by an impartial jury. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Although the right to a trial before an impartial judge is not specifically enumerated in the United States or Minnesota Constitution, this principle has long been recognized as a component of due process. *See Rose v. Clark*, 478 U.S. 570, 577 (1986); *see also Greer v. State*, 673 N.W.2d 151, 155 (Minn. 2004) (“[I]mpartiality is the very foundation of the American judicial system.”). Therefore, a judge is prohibited from presiding if the judge shows “actual bias” against the defendant. *State v. Dorsey*, 701 N.W.2d 238, 252 (Minn. 2005). But showing “actual bias” is not required to disqualify a judge from presiding. *See Minn. R. Crim. P. 26.03*, subd. 14(3). Under the rules of criminal procedure, “[a] judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial

Conduct.” *Id.* A judge is disqualified under the code of judicial conduct “in any proceeding in which the judge’s impartiality might reasonably be questioned.” Minn. Code Jud. Conduct Rule 2.11(A). We review whether a judge was disqualified from presiding over a proceeding de novo. *Dorsey*, 701 N.W.2d at 249; *State v. Malone*, 963 N.W.2d 453, 464 (Minn. 2021).

We first describe the challenged conduct, which occurred during a bench conference in the second of Danberry’s three jury trials. As background, at both the first and the second trials, the state charged Danberry with two counts of criminal sexual conduct causing “personal injury,” in violation of Minnesota Statutes section 609.343, subdivision 1(e)(i) (2012), based on two alleged incidents involving a rope hanging from the rafters of the basement in the home that Danberry shared with I.A., I.A.’s mother, and I.A.’s siblings.

During the second trial, I.A. testified about the two alleged incidents involving a rope. In her testimony about the second incident involving a rope at the second trial, I.A. described sexual contact that Danberry committed when the rope was wrapped around her foot while she practiced for competitive dance. She testified that Danberry kicked their dog to force the dog upstairs during the incident. But I.A.’s testimony during the second trial regarding the second rope incident differed from her testimony during the first trial. At the first trial, I.A. did not testify that her foot was through the rope during the second incident. Instead, she testified that, during the second rope incident, when Danberry touched her and kicked the dog, the rope was around her wrists. I.A. explained that, as a result, she received a scar on her wrist from the rope.

Following the state's direct examination of I.A. in the second trial, the district court judge called a bench conference. The judge identified to counsel the difference in I.A.'s testimonies between the first and second trials regarding the second rope incident. The judge then asked the state if it still planned to pursue the count so as to guide "what should be cross-examined upon" by the defense. The state confirmed that the count would be pursued. Then, the judge stated:

I will say this, though. *On the first one, she did not testify about any pain or personal injury.* I was trying to find my definition of personal injury regarding emotional distress, but I didn't find it before you moved on to the next situation. *I do wonder if you should clarify on Counts VIII and IX.* It would appear there's probable cause for one count of personal injury with the rope on ankle where there was groping and the dog was there. The other count with the rope on the ankles, *I question whether we have evidence of personal injury.* I would allow you to clarify that if you wish.

(Emphasis added.)

Danberry objected and asserted that the judge "[told] the state what they've missed" showing a "lack of impartiality." Danberry asked the district court to "recuse itself" and for a mistrial. In denying Danberry's motion, the judge stated:

Under these circumstances, where we've had three years of conversations about what counts are to what circumstances and, frankly, I'm trying to gauge my own assessment of probable cause; and particularly given that I do not have the ability to read back testimony in the courtroom; I am going to find that these questions and comments are not based on partiality, rather they're based upon questions about what I foresee as motions that will be made at the close of evidence. And, at this point, I don't have clarity on the issues in order to rule on them.

Following Danberry's cross-examination of I.A., the state sought to "ask an omitted question from direct." The judge gave the state permission to do so, and the state asked I.A. if she had "any pain associated" with the first rope incident. She said "yes" and provided details. The state asked the same question about the second incident, and I.A. confirmed that there was pain and injury. After the jury exited the courtroom, Danberry objected to the state reopening direct examination and asked to have the testimony related to the omitted questions stricken from the record. The district court determined that it had "wide discretion to make decisions about trial management" and that the discretion "extend[ed]" to allowing the state to ask the follow-up questions here. The judge clarified that "in this situation . . . common sense is not locked out of the courtroom," acknowledged the difficulty that comes with a child testifying about instances from several years earlier, and asserted that his "comments reflected the confusion" of the matters and attempted to "bring clarity to the matter for the jury."

Before the third trial, Danberry filed a motion for the district court judge to recuse himself or for the district's chief judge to remove him. The district court judge issued a written order denying the motion, and the chief judge also denied the motion to remove.

A. The district court judge did not demonstrate actual partiality.

Danberry argues that the district court judge, during the second trial, "exhibited actual partiality in favor of the state and against Danberry" because he intervened "to ensure that evidence supporting an element [was] submitted" and therefore showed "an interest in ensuring conviction" all "in anticipation of a defense motion for acquittal." This,

according to Danberry, shows that the judge acted “as co-counsel would” by suggesting “what the prosecutor might do” to remedy an evidentiary deficiency.

“Impartiality requires absence of ‘actual bias against the defendant or interest in the outcome of his particular case.’” *State v. Mouelle*, 922 N.W.2d 706, 713 (Minn. 2019) (quoting *State v. Munt*, 831 N.W.2d 569, 580 (Minn. 2013)). Actual bias requires more than the “mere existence of any preconceived notion as to the guilt or innocence of an accused.” *Munt*, 831 N.W.2d at 577 (quotation omitted). Instead, “[t]o prove actual bias, the challenging party must show that the [fact-finder] exhibited strong and deep impressions that would prevent [it] from lay[ing] aside [its] impression or opinion and render[ing] a verdict based on the evidence presented in court.” *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015) (quotations omitted). Judges “must maintain the integrity of the adversary system at all stages of the proceedings.” *State v. Schlienz*, 774 N.W.2d 361, 367 (Minn. 2009). A judge must also not act as counsel for a party to the litigation. *Hansen v. St. Paul City Ry. Co.*, 43 N.W.2d 260, 264 (Minn. 1950). We begin with a “presumption that a judge has discharged his or her duties properly.” *Schlienz*, 774 N.W.2d at 366. And “[t]he challenging party has the burden of proving actual bias.” *State v. Lopez*, 988 N.W.2d 107, 117 (Minn. 2023).

In asserting actual bias of the district court judge, Danberry analogizes his circumstances to *Dorsey*. While presiding over a bench trial, the judge in *Dorsey* independently investigated a fact not introduced into evidence and then announced the results of the investigation to counsel. 701 N.W.2d at 251. The Minnesota Supreme Court found that the judge effectively introduced “a material fact that was favorable to the state—

and that the state had not yet introduced.” *Id.* Although the supreme court concluded that the judge was not barred from presiding over the trial under the Minnesota Code of Judicial Conduct, the supreme court also concluded that Dorsey’s constitutional right to an impartial judge “was compromised by the conduct of a district court judge who, sitting as the finder of fact, openly questioned the veracity of a factual assertion made by a key defense witness, independently investigated that fact, then reported the results of her investigation to counsel.” *Id.* at 241, 253. The supreme court reversed Dorsey’s conviction and remanded for a new trial. *Id.* at 253.

We are not persuaded by Danberry’s “actual partiality” argument for two reasons. First, *Dorsey* is distinguishable. In that case, the presiding judge, sitting as fact-finder in a bench trial, *independently investigated* a factual assertion and reported the results of the research to counsel. *Id.* at 241. Here, there is no allegation or basis to conclude that the judge independently investigated anything and then reported the results of an investigation to counsel. The district court judge simply called a bench conference to discuss the I.A.’s changed testimony and how it would impact the state’s case—and the scope of the defense’s cross-examination.

Second, actual bias does not result from a judge’s comments that constitute “a valid observation based on the history of the case” rather than “prejudgment on the merits of the underlying charges.” *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008). Here, the district court convened a bench conference to discuss I.A.’s changed testimony and the recurring efforts to link testimony to the counts on which the jury would eventually need to render a decision. At no point during the bench conference, or the subsequent related proceedings,

did the judge allude to a prejudgment on the merits of the underlying charges. Thus, the judge's comments were simply a valid observation based on the history of the case.

In sum, Danberry did not meet his burden to show the judge's actual partiality.²

B. The district court judge's actions did not give rise to a reasonable question about his impartiality.

Danberry alternatively asserts that the district court judge's conduct "gave rise to a reasonable question as to whether he was impartial."

Under the Minnesota Code of Judicial Conduct Rule 2.11(A), "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." And "[w]hether a judge's impartiality may reasonably be questioned is an objective consideration that evaluates whether a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." *Malone*, 963 N.W.2d at 464 (quotation omitted). "A reasonable examiner . . . is an

², We note that our decision here accords with our decision in *State v. Valentine*, No. A13-2203, 2014 WL 6862978 (Minn. App. Dec. 8, 2014), *rev. denied* (Minn. Feb. 25, 2015), which we cite for its persuasive authority. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) (stating that nonprecedential opinions are not binding authority but may be cited as persuasive authority). In *Valentine*, we rejected a constitutional challenge to an appellant's controlled-substance convictions based on the argument that the trial judge was partial because the judge (1) asked a witness about the counties in which drug sales took place and (2) pointed out that no one had testified to what a Schedule I or II drug is and let the state reopen its case to introduce that testimony. *Id.* at *2. We distinguished the judge's conduct from the judge's conduct in *Dorsey*, pointing out that Minnesota Rule of Evidence 614(b) permits the court to interrogate witnesses and that Minnesota Rule of Criminal Procedure 26.03, subdivision 12(g), permits the district court, in the interests of justice, to allow any party to reopen the party's case to offer additional evidence. *Id.* at *2-3. Similarly, here, the judge's discussion of the testimony with both counsel and the judge's permission for the state to reopen its case did not deprive Danberry of an impartial judge.

objective, unbiased layperson with full knowledge of the facts and circumstances.” *State v. Pratt*, 813 N.W.2d 868, 876 n.8 (Minn. 2012) (quotation omitted).

Danberry relies on *Schlien* and *Malone* to argue that the judge’s conduct gave rise to a “reasonable question as to whether he was impartial.” In *Schlien*, the judge, in an ex parte conversation, told the prosecutor to be prepared to respond to an anticipated motion from *Schlien* to withdraw his guilty pleas. 744 N.W.2d at 367. The judge also suggested specific arguments that the prosecutor could make in objecting to the motion. *Id.* The supreme court concluded that the conversation, “at a minimum, reasonably called the judge’s impartiality into question” because the judge initiated the conversation and suggested specific objections that the prosecutor could make to an anticipated motion. *Id.*

This comparison is unpersuasive due to the form and substance of the bench conference at issue. Here, the form of the communication is dissimilar to the ex parte communication in *Schlien*. The judge convened a bench conference that was on the record, in the presence of both parties, and outside the presence of the jury. The substance of the judge’s communications with the parties is also distinguishable. In *Schlien*, the court informed the state of specific arguments that might persuade the court to reach a certain outcome, which the supreme court characterized as a “roadmap for responding to the . . . motion.” *Id.* at 369. Here, the judge called for a bench conference following the direct examination of I.A., which revealed testimony that differed from the first trial. The initial purpose of the bench conference was to potentially limit the topics that cross-examination would need to cover if the state planned to dismiss one of the counts based on the changed testimony.

Danberry asserts that the judge called the bench conference “because he anticipated a potential defense motion, and his acts aided the state in heading off that motion.” But this argument must be considered in context “with full knowledge of the facts and circumstances” to determine whether there is a reasonable question regarding the judge’s impartiality. *Malone*, 963 N.W.2d at 464 (quotation omitted). Unlike in *Schlien*, the communication here occurred during the second trial of a case characterized by recurring confusion about how testified-to conduct related to the counts at issue. At this point in the proceedings, it was reasonable for the district court to observe that it was unclear if I.A. was testifying about an entirely new incident involving a rope or providing different testimony regarding the same incident she testified about in the first trial. Therefore, Danberry’s argument that this case is similar to the disqualifying conduct in *Schlien* is not persuasive.

We are likewise unpersuaded by Danberry’s reliance on *Malone*. Danberry contends that, under *Malone*, a district court judge has the appearance of bias when the judge identifies an evidentiary gap related to an essential element of the alleged crime, violating a domestic-abuse no-contact order (DANCO). *Malone*, 963 N.W.2d at 459-60, 466. But in *Malone*, the judge suggested that the state may want to have a clerk testify about the procedures involved in notifying defendants of DANCOS. *Id.* at 466. The district court judge’s evidentiary suggestion stemmed from the judge’s independent investigation into service of DANCOS, as well as subsequent efforts within his office to identify a potential witness for the state. *Id.* at 460, 465-66. The supreme court’s conclusion that a reasonable examiner would question the judge’s impartiality was based on the judge’s investigation

of a “fact not introduced into evidence, announce[ment of] the findings from that investigation to the parties, reli[ance] on those findings in rejecting Malone’s motion to dismiss, suggest[ion] that the [s]tate might want to consider calling a second witness to testify against Malone, and . . . communications passing through the judge’s chambers as to the identity of a potential witness.” *Id.* at 466.

In sum, a reasonable examiner with full knowledge of the facts and circumstances would not question the judge’s impartiality. *See id.* at 464. Reversal for a new trial is not required.

II. Danberry’s conviction for count 4 must be reversed under the double jeopardy clause and Minnesota Statutes section 609.04 (2012).

Danberry and the state agree that his conviction for count 4—second-degree criminal sexual conduct under Minnesota Statutes section 609.343, subdivision 1(a)—violated double jeopardy and must be reversed. We also agree.

“The Double Jeopardy Clauses of the United States and Minnesota Constitutions protect a criminal defendant from a second prosecution for the same offense after an acquittal on the merits.” *State v. Large*, 607 N.W.2d 774, 778 (Minn. 2000). In addition, under Minnesota Statutes section 609.04, subdivision 2—a statute expanding Minnesota’s double jeopardy protections—an “acquittal of a crime is a bar to further prosecution of any included offense, or other degree of the same crime.”

“A [district] court’s actions amount to an acquittal on the merits when the ruling of the judge, whatever its label, actually represents a resolution in defendant’s favor, correct or not, of some or all of the factual elements of the offenses charged.” *Id.* at 779 (quotation

omitted); *see also Evans v. Michigan*, 568 U.S. 313, 318 (2013) (“[The U.S. Supreme Court’s] cases have defined an acquittal to encompass any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense.”). The “crucial question” is whether “it is clear that the [district] court evaluated the state’s evidence and determined it was legally insufficient to sustain a conviction or whether the defendant sought to terminate the prosecution solely on a legal claim unrelated to factual guilt or innocence.” *Large*, 607 N.W.2d at 780 (quotation omitted). “In determining whether a trial court’s ruling represents a resolution in the defendant’s favor of some or all of the factual elements of the offense charged, [appellate courts] consider both the form and the substance of the [district] court’s ruling.” *State v. Sahr*, 812 N.W.2d 83, 90 (Minn. 2012).

Some procedural history is necessary to explain our decision here. In his first trial, Danberry was convicted of count 4, first-degree criminal sexual conduct, based on the alleged after-nap incident. In our decision on Danberry’s direct appeal following the first trial, we did not address his argument that the evidence was insufficient to support his conviction on count 4; instead, based on our conclusion of juror bias, we simply reversed all of Danberry’s convictions and remanded the case to the district court for a new trial. *See Danberry*, 2020 WL 6846376, at *5.

Before the second trial, Danberry moved to dismiss count 4—which, again, alleged first-degree criminal sexual conduct based on the after-nap incident—for lack of probable cause. Danberry argued that, during the first trial, the state did not produce evidence sufficient to prove first-degree sexual assault because I.A. testified that all touching during that incident was over her clothes. The state opposed Danberry’s motion but did not dispute

the evidence. Based on the district court's review of the transcript from the first trial, the district court granted Danberry's motion to dismiss, explaining that permitting a second trial on the count would violate "constitutional due process and fundamental fairness." But the district court stayed dismissal of count 4 until the jury trial to allow the state to either amend or dismiss that count. The state then amended count 4 to allege second-degree criminal sexual conduct based on the after-nap incident. But, when the evidence at trial ended up not addressing the alleged after-nap incident at all, the state moved the district court to dismiss the count based on that alleged incident, which the district court granted.

At the third trial, the state again charged Danberry with count 4, second-degree criminal sexual conduct, based on the after-nap incident. This time, the jury found him guilty of the charge.

Danberry argues that the district court's grant of his motion to dismiss count 4 for lack of probable cause before the second trial constituted an acquittal and that constitutional and statutory double jeopardy protections barred Danberry's prosecution for count 4 in the third trial.³ We agree.

This case is analogous to *State v. Gurske*, where, before commencement of a retrial following a mistrial, the district court granted the defendant's dismissal motion and "clearly ruled that the evidence, all of which he had heard or seen at the first trial, was legally insufficient to sustain a guilty verdict on the intentional felony murder charge." 395

³ Danberry alternatively asserts that the district court's ruling on the state's motion during the second trial constituted an acquittal. The state agrees and urges us to reverse Danberry's conviction based on that midtrial ruling, rather than the pretrial order. We conclude that an acquittal for double jeopardy purposes occurred at the point of the pretrial order.

N.W.2d 353, 354 (Minn. 1986). The supreme court determined that the district court's order constituted an acquittal for double jeopardy purposes. *Id.* at 356. Unlike in *Gurske*, in which the district court dismissed the charge, the district court here allowed the state to amend the charge to second-degree criminal sexual conduct. Despite that difference, the district court's order is an acquittal on the merits because the district court evaluated all the evidence from the first trial and determined it could not support a conviction.

Moreover, the prosecution of that alleged after-nap incident was barred whether it was charged as first-degree or second-degree criminal sexual conduct. In *Sahr*, the supreme court held that "the trial court's dismissal of the complaint based on the finding that there was insufficient evidence to convict Sahr of first-degree criminal sexual conduct constituted an acquittal on the merits." 812 N.W.2d at 92. The supreme court reasoned that the subsequent prosecution of that alleged incident as either first-degree or second-degree criminal sexual conduct created a double jeopardy problem. *See id.* at 92, 92 n.7 (discussing the double jeopardy clause's prohibition for the "same offense" and explaining that the new second-degree criminal sexual conduct charge was an "other degree" of first-degree criminal sexual conduct barred by section 609.04). Accordingly, here, the district court's pretrial order granting the motion to dismiss for lack of probable cause barred further prosecution of the incident underlying count 4 during the second and third trials. Therefore, Danberry's conviction for count 4 violated double jeopardy and must be reversed.

III. The district court did not err by imposing multiple sentences because Danberry's offenses were not part of a single behavioral incident.

Danberry argues that district court erred by imposing more than one sentence because his offenses were part of the same behavioral incident. He requests reversal and remand for the imposition of a single guidelines sentence.

Under Minnesota Statutes section 609.035, subdivision 1 (2010), “if 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.” Consequently, “multiple sentences for multiple offenses committed as part of the same behavioral incident are prohibited.” *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020). To determine whether offenses are part of the same behavioral incident, courts evaluate whether the offenses “occurred at substantially the same time and place” and whether the conduct was motivated “to obtain a single criminal objective.” *Id.* at 265 (quotations omitted). Whether offenses occurred as part of the same behavioral incident is a mixed question of law and fact; appellate courts review findings of fact for clear error and application of the law de novo. *Id.* at 265.

Danberry does not assert error based on the facts underlying the offenses in this case. Rather, he contends that, because the district court had already determined that the alleged offenses were part of a single behavioral incident when it denied his request to sever the charges for trial, judicial estoppel precludes a different determination at sentencing.

Before trial, Danberry moved the district court under Minnesota Rule of Criminal Procedure 17.03, subdivision 3, to sever the charges against him. As part of the severance

analysis, a district court “must first decide whether the offenses are related,” and that analysis is the same “inquiry used to decide whether multiple offenses arose from a single behavior incident for purposes of [Minnesota Statutes section] 609.035.” *State v. Kendall*, 723 N.W.2d 597, 607 (Minn. 2006). If the district court determines the offenses are related, the district court then considers whether the defendant would be prejudiced by joining the charges, which may include considering whether offenses would be admissible as *Spreigl* evidence if tried separately. *See State v. Profit*, 591 N.W.2d 451, 458-59 (Minn. 1999) (“Only if the offenses are found to be related does the court proceed to decide whether severance is nonetheless required because the joinder would be prejudicial.”).

Here, the district court concluded that joining the charges would not prejudice Danberry when denying his motion to sever, and thus, according to Danberry, implicitly found that all the charged offenses were related. After the third trial, the district court imposed four separate sentences.

We are not persuaded by Danberry’s argument that the pretrial severance ruling prevents the district court from imposing multiple sentences posttrial for two reasons.

First, we are unconvinced by Danberry’s argument that judicial estoppel applies when a district court judge denies a pretrial motion to sever. Under the doctrine of judicial estoppel, “when a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, [they] may not thereafter, simply because [their] interests have changed, assume a contrary position, especially if it prejudices the party who acquiesced in the position taken by [them].” *Ryan Contracting Co. v. O’Neill & Murphy, LLP*, 883 N.W.2d 236, 248 (Minn. 2016). Danberry is correct that a finding of a “single behavioral

incident” is required to deny a motion to sever the charges. *See Kendall*, 723 N.W.2d at 607. And, according to Danberry, “[t]he state will have unfairly received the advantage of both having Danberry’s charges all tried together and then having multiple sentences imposed.” But, as the Minnesota Supreme Court has recognized, it has not adopted the judicial-estoppel doctrine. *Ryan Contracting Co.*, 883 N.W.2d at 248-49. We decline to do so here.

Second, our caselaw has consistently recognized that multiple, separate incidents of criminal sexual conduct involving a single victim are separate behavioral incidents under section 609.035 (2010). For example, in *State v. Suhon*, this court considered “sex abuse” against a single victim that occurred “on a regular basis.” 742 N.W.2d 16, 24 (Minn. App. 2007), *rev. denied* (Feb. 19, 2008). We acknowledged that the abuse always occurred in the family home, but it happened in different rooms at different times; and, as we had previously recognized, “motivation by perverse sexual desires is too broad to constitute a single criminal objective.” *Id.* (quotation omitted). Therefore, we concluded that the abuse was not a single behavioral incident. *Id.* The supreme court has also affirmed the imposition of two sentences for two sexual assaults against the same victim occurring at different times in the family home. *Barthman*, 938 N.W.2d at 265-67. Consistent with this caselaw, we conclude that the criminal sexual conduct in this case did not constitute a single behavioral incident requiring one sentence under Minnesota Statutes section 609.035.

The district court did not err by imposing multiple sentences.

IV. The addition of counts 13 and 14 did not violate Danberry's statutory protection against serialized prosecution under Minnesota Statutes section 609.035.

Danberry argues that adding counts 13 and 14 through an amended complaint before the third trial violated his statutory protection against serialized prosecution under Minnesota Statutes section 609.035 and that his convictions on those counts must therefore be reversed.

As relevant here, Minnesota Statutes section 609.035, subdivision 1, states:

Except [for subdivisions that do not apply to this case], if a person's conduct constitutes more than one offense under the laws of this state, . . . a conviction or acquittal of any one of them is a bar to prosecution for any other of them.

As discussed in Section III, before the first trial, Danberry moved to sever the charges for separate trials. The district court denied this motion and joined the charges for trial. After the first trial, this court reversed Danberry's convictions and remanded for a new trial. *Danberry*, 2020 WL 6846376 at *2-5. During the second trial, the jury acquitted Danberry of two charges and failed to reach verdicts on the remaining seven charges. Before the third trial, the state amended the complaint to add two first-degree criminal-sexual-conduct charges—counts 13 and 14.

Counts 13 and 14 were based on I.A.'s testimony about incidents that she had not previously testified about during the second trial. Because Danberry asserts that this case involves a single behavioral incident, he argues that counts 13 and 14 were prohibited as new charges following a trial that resolved charges that were part of that same behavioral incident. *See State v. Sater*, 588 N.W.2d 512, 514 (Minn. App. 1998) (“[W]hile a

prosecutor cannot file a new indictment or complaint to begin prosecution of any new charge following a trial that resolved a charge arising from that same behavioral incident, charges tried but unresolved are subject to retrial.”), *rev. denied* (Minn. Feb. 18, 1999). We disagree.

Count 13 was an entirely new charge based on a new alleged incident of sexual abuse. As we concluded in Section III, a pretrial ruling on severance or joinder does not control the subsequent application of section 609.035, which bars later prosecution “only if the multiple offenses arise out of a single behavioral incident.” *State v. Pettee*, 538 N.W.2d 126, 129 (Minn. 1995). The new allegation of abuse underlying count 13 could be added to the complaint and tried at the third trial without violating section 609.035.

As to count 14, Danberry asserts that it was improper to amend it to become first-degree criminal sexual conduct before the third trial because the underlying conduct of the count went to the jury as a second-degree charge during the second trial. Minnesota Statutes section 609.04, subdivision 2, only bars prosecution of “any included offense, or other degree of the same crime” when there has been a conviction or acquittal. The count based on the relevant underlying conduct resulted in a mistrial during the second trial. Therefore, the inclusion of count 14 did not violate Danberry’s statutory protection against serialized prosecution under section 609.035.

V. The district court abused its discretion by assigning Danberry a criminal-history score of six.

Danberry argues that his criminal-history score of six is erroneous and that the matter must be remanded for resentencing with a criminal-history score of four. The state

agrees that the matter should be remanded but disputes Danberry's assertion that this court should order resentencing with a criminal-history score of four.

Appellate courts review the district court's determination of a criminal-history score for an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *rev. denied* (Minn. Aug. 20, 2002). "[S]entences must be based on correct criminal history scores, as these scores are the mechanism district courts use to ensure that defendants with similar criminal histories receive approximately equal sanctions for the same offense." *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). When a defendant is sentenced based on an incorrect criminal-history score, the district court must resentence the defendant. *State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017).

When computing an offender's criminal-history score, "the offender is assigned a particular weight for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given for a felony level offense . . . before the current sentencing." Minn. Sent'g Guidelines cmt. 2.B.101 (2012). An offender's criminal-history score is the sum of points assigned to their custody status at the time of the offense and points assigned to certain prior felonies, gross misdemeanors, misdemeanors, and juvenile adjudications. Minn. Sent'g Guidelines 2.B (2012).

Danberry's presentence investigation report and sentencing worksheets indicate that Danberry should be assigned a criminal-history score of six based on six felony points from eight felony convictions. During sentencing after the first trial, Danberry objected to the criminal-history score calculation, asserting that the score includes "multiple points from

one complaint.” The state submitted two sentencing exhibits to support the criminal-history score of six.

Danberry’s eight convictions stemmed from several cases, including a case with a 1999 disposition date and another with a 2001 disposition date. Danberry asserts that in each of these two cases, though he was convicted of multiple offenses, he was sentenced for only one offense. He argues that his criminal-history score incorrectly includes points for more than one offense from each case and we should remand to the district court for resentencing using a criminal-history score of four.

A review of the state’s sentencing exhibits reveals a lack of clarity about the appropriate assignment of points to felonies in those 1999 and 2001 cases. Therefore, we remand for the district court to reconsider Danberry’s criminal-history score and to sentence accordingly. The parties dispute whether further development of the evidentiary record is appropriate to determine the criminal history score. Given the complicated procedural history of this case, we decide that the district court may, in its discretion, reopen the record to determine the correct criminal-history score.

VI. We will not reverse Danberry’s cumulative sentence as unjustifiably disparate and excessive—or impose a sentencing cap—because we are remanding for recalculation of Danberry’s criminal-history score.

Danberry argues that his cumulative 792-month sentence is excessive and unjustifiably disparate from sentences imposed in similar cases. But Danberry and the state agree that this court need not address this argument if we reverse and remand for resentencing based on Danberry’s criminal-history score.

We agree that it is premature to address Danberry's disparate-sentencing argument without a sentence based on an accurate criminal-history score. *Cf. Barthman*, 938 N.W.2d at 275 n.6 ("Because we are remanding for resentencing on count two and do not know what new sentence the district court will impose, we will not consider whether Barthman's new sentences unfairly exaggerate the criminality of his conduct."). Therefore, we decline to consider this argument.

Affirmed in part, reversed in part, and remanded.