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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1008**

State of Minnesota,
Respondent,

vs.

Michael James Lovestrand,
Appellant.

**Filed July 10, 2023
Affirmed in part, reversed in part, and remanded
Wheelock, Judge**

Hennepin County District Court
File No. 27-CR-20-13193

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Considered and decided by Wheelock, Presiding Judge; Segal, Chief Judge; and
Ross, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges his convictions for first- and third-degree criminal sexual conduct, claiming that the state did not present sufficient evidence to prove his guilt and that the district court abused its discretion by denying his pretrial *Paradee* motion and erred

by determining that the state did not commit a *Brady* violation. Because the state presented sufficient evidence to support the jury’s guilty verdicts and the district court did not abuse its discretion when it denied appellant’s pretrial *Paradee*¹ motion or err by determining the state did not commit a *Brady*² violation, we affirm in part. Because the district court entered a conviction on a lesser-included offense, we reverse in part and remand for the district court to vacate the judgment of conviction for third-degree criminal sexual conduct.

FACTS

Complainant C.G. and appellant Michael James Lovestrand met on a dating site, talked for a couple of weeks, and then agreed to meet for sex at Lovestrand’s apartment. They engaged in vaginal intercourse, and Lovestrand asked C.G. to engage in anal intercourse. She agreed, but when Lovestrand penetrated her anus with his penis, she said it hurt and told him to stop. She said Lovestrand continued the anal penetration after she asked him multiple times to stop. They eventually returned to vaginal intercourse, after which C.G. dressed and left the apartment.

C.G. testified at trial that she initially thought the encounter was “just a really, really bad sexual experience.” She testified that she went to the emergency room “about a week

¹ A *Paradee* motion allows defendants in criminal trials to ask the court for an in-camera review of the complainant’s otherwise confidential or privileged records for discovery that may be relevant and material to the issues in the case, pursuant to *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987).

² The government may not withhold evidence that is material to a case, pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963). “Under *Brady*, the suppression by the State, whether intentional or not, of material evidence favorable to the defendant violates the constitutional guarantee of due process.” *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010).

later,” on July 24, 2018,³ because she had anal bleeding, was in pain, and had red bumps on her genitals. After the emergency-room visit, C.G. described her experience to her mother, who told her that the encounter was rape because Lovestrand did not stop when C.G. told him to stop.

C.G. reported the alleged criminal sexual conduct to the Bloomington Police Department in November 2019, and respondent State of Minnesota initially charged Lovestrand with third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(c) (2016).

Lovestrand filed a *Paradee* motion seeking disclosure of “all medical, psychiatric, and counseling records, as well as therapy notes” related to C.G., and the district court denied the motion. Lovestrand also moved to dismiss the charge or for a continuance, alleging a *Brady* violation after the state disclosed C.G.’s emergency-room record two business days prior to the trial date and more than a year after Lovestrand requested the record. The court ruled it “an untimely disclosure, but not a *Brady* violation,” and granted a continuance of approximately two months, which allowed Lovestrand to introduce the testimony of the emergency-room doctor who treated C.G.

The state amended the complaint at the beginning of the trial to add a charge of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i)

³ C.G. could not recall the exact date of the sexual encounter and said she had memory issues due to multiple sclerosis. During the emergency-room visit, she indicated the encounter occurred about ten days prior. Records from the dating site were not recovered. The state later amended the complaint to say the encounter occurred on or about July 14-24, 2018.

(2016), based on allegations already in the complaint that C.G. sustained personal injury during the alleged criminal sexual conduct.

The jury found Lovestrand guilty of both first-degree and third-degree criminal sexual conduct. Lovestrand then moved for a new trial based on insufficient evidence and the district court's denial of the *Paradee* motion. The district court deferred the motion for a new trial and granted a postverdict, in-camera review of C.G.'s therapy records.

The district court obtained and reviewed more than 400 pages of records from C.G.'s mental-health provider. Based on its review, the district court found that those records contained "general" statements, determined the records were "not sufficiently probative to require a new trial," and denied the motion for a new trial.

The district court entered convictions on both the first- and third-degree charges and sentenced Lovestrand on the first-degree conviction to a stayed term of 144 months' imprisonment and seven years' probation.

Lovestrand appeals.

DECISION

I. The district court did not abuse its discretion by denying Lovestrand's pretrial *Paradee* motion.

Lovestrand argues that the district court's decision to deny the *Paradee* motion violated his rights to a fair trial and to a complete defense by not permitting an in-camera review of "any and all medical, psychiatric, and counseling records, as well as therapy notes" regarding C.G. We disagree because the records he requested are protected by an absolute privilege and the court's denial of the motion did not violate Lovestrand's

constitutional rights. We further conclude that even if the district court's decision was improper, it did not prejudice the outcome of Lovestrand's trial.

A district court's denial of a *Paradee* motion is reviewed for an abuse of discretion, which occurs when the district court's decision applies "an erroneous view of the law" or "is against logic and the facts in the record." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted); *see also State v. Evans*, 756 N.W.2d 854, 872 (Minn. 2008) (applying abuse-of-discretion standard to review district court ruling on a *Paradee* motion). An appellate court will reverse an evidentiary ruling "only if the exclusion of evidence was not harmless beyond a reasonable doubt." *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). An error is not harmless when there is "a reasonable possibility that [it] may have contributed to the conviction." *Id.* (quoting *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003)).

The due-process protections of the Fourteenth Amendment and the Minnesota Constitution guarantee criminal defendants the right to a complete defense. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. "Criminal defendants have a broad right to discovery in order to prepare and present a defense." *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012). Pursuant to *Paradee*, a defendant may request an in-camera review of otherwise confidential or privileged records. 403 N.W.2d at 642. The Minnesota Supreme Court concluded in *Paradee* that an in-camera review of confidential medical records allowed courts to weigh the privilege inherent in those records against the defendant's right to a complete defense. *Id.* ("[T]he medical privilege, like other privileges, sometimes must give way to the defendant's right to confront his accusers." (quoting *State v. Kutchara*,

350 N.W.2d 924, 926 (Minn. 1984))). The supreme court described the *Paradee* standard as a “fairer balance” between a complete ban on the review of confidential records and “in effect allow[ing] defense counsel easy access to various types of privileged and confidential records simply by asserting that the records might contain material relevant to the defense.” *Id.*

Because a defendant’s right to relevant evidence must be balanced against any privilege that applies to the records, a district court’s decision to grant an in-camera review is not “automatic.” *State v. Schmid*, 487 N.W.2d 539, 543 (Minn. App. 1992), *rev. denied* (Minn. Sept. 15, 1992). A defendant must “make some showing as to the relevancy of the confidential material” in order to receive access to privileged or confidential records. *Id.*

Here, Lovestrand made a pretrial motion for “any and all medical, psychiatric, and counseling records, as well as therapy notes” pertaining to C.G. The motion did not provide specifics regarding a date range or subject matter for the records. In the motion, Lovestrand stated:

[P]olice reports disclose that the Complainant is in counseling to process the alleged criminal sexual conduct and that the victim did not believe a “rape” had occurred. Clearly, any information the Complainant reported to counselors that is contrary to the information she reported to police is material and goes directly to the defense theory of the case.

These records, however, are subject to an absolute privilege under Minnesota law. A registered nurse, psychologist, or licensed social worker engaged in mental-health assessment or treatment “at the [client’s] request” is not allowed to disclose information regarding that assessment or treatment. Minn. Stat. § 595.02, subd. 1(g) (2022). And

Minnesota courts have refined their analysis of this statute in two recent cases and concluded that a defendant's constitutional rights to a fair trial and due process do not permit the court to pierce a statutory privilege under section 595.02.

The Minnesota Supreme Court analyzed a different subdivision of section 595.02 in *Hope Coalition v. Conrad*, 977 N.W.2d 651 (Minn. 2022). The statutory subdivision analyzed in *Hope Coalition* is Minn. Stat. § 595.02, subd. 1(k) (2020), which reads in part, “Sexual assault counselors may not be allowed to disclose any opinion or information received from or about the victim without the consent of the victim.” The supreme court held that this language is prohibitive because the “may not” clause is followed by a specific exception for cases in which neglect or parental rights are in question, observing further that “[i]f the Legislature intended other exceptions to apply, the Legislature could have listed them.” *Hope Coal.*, 977 N.W.2d at 658. The statute thus does not permit sexual-abuse counselors to release client records “unless the victim consents” or the exception applies. *Id.* at 659.

The supreme court's analysis in *Hope Coalition* clarified that courts must balance a defendant's constitutional right to discovery against the state's interest in maintaining an unpierceable privilege in certain circumstances. *Id.* at 661. “To determine whether nondisclosure based on a statutory privilege violates a criminal defendant's constitutional right, we weigh the state's interest in that privilege against the right.” *Id.* (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987)). The court in *Hope Coalition* held that the state has a compelling interest in maintaining the privacy of victims of sexual assault in order to ensure that victims are willing to seek professional help. *Id.* at 661-62. “[T]he

sexual-assault-counselor privilege in section 595.02, subd. 1(k), is narrowly tailored to achieve that compelling interest.” *Id.* at 662. Further, the state’s interest outweighs that of the appellant and his right to a complete defense because “the crux of the right to confront one’s accuser secures the ‘*opportunity of cross-examination*,’ not limitless pretrial discovery.” *Id.* (quoting *Delaware v. Fensterer*, 474 U.S. 15, 19-20 (1985)).

This court then applied the *Hope Coalition* analysis in *State v. Ramirez*, stating that “maintaining the victim-counselor privilege is essential for victims to willingly share pertinent information.” *Ramirez*, 985 N.W.2d 581, 586 (Minn. App. 2023), *rev. granted* (Minn. Mar. 14, 2023).

Although these two cases do not introduce a new rule of law, this court stated in *Ramirez* that *Hope Coalition*’s analysis of the prohibitions of Minn. Stat. § 595.02, subd. 1(k), provides “the blueprint for the construction and application of paragraphs (d) and (g)” because the legislature applied a similar construction to the privileges. *Id.* (granting the state’s writ of prohibition to prevent appellant from accessing, via subpoena, the mental-health records of the child he allegedly sexually assaulted). Together, *Hope Coalition* and *Ramirez* provide a framework for this court to apply when balancing the right of individuals to the privacy of their healthcare records against a defendant’s Sixth Amendment right to confrontation.⁴

⁴ This court decided *Ramirez* after the parties here submitted their briefs on direct appeal but before the case was argued. The supreme court decided *Hope Coalition* before the district court ordered the posttrial, in-camera review of C.G.’s mental-health records.

Here, we apply that same analysis to Minn. Stat. § 595.02, subd. 1(g), which states that a “registered nurse, psychologist, consulting psychologist, or licensed social worker” who is treating a client at that individual’s request shall not disclose information related to that treatment. The statute lists two specific exceptions: a therapist may disclose information if (1) the client consents or (2) a separate state law mandates a report regarding the mistreatment of minors or vulnerable adults. Minn. Stat. § 595.02, subd. 1(g); *see also* Minn. Stat. §§ 260E.06 (mistreatment of minors), 626.557 (mistreatment of vulnerable adults) (2022). No other exceptions apply; if the legislature had intended to create additional exceptions, it would have included them in the statute. *See Hope Coal.*, 977 N.W.2d at 658. Neither of the two exceptions listed applies here because C.G. did not consent to the release of her mental-health records, and she is neither a minor nor a vulnerable adult.

Lovestrand argues that his right to discovery outweighs C.G.’s “interest in having her confidences kept.” However, the records in this case, as in *Hope Coalition*, are not merely confidential but privileged under a statute in which “the plain language . . . *prohibits* disclosure.” *Id.* at 662. “[A] district court may not order the disclosure of protected records in criminal prosecutions if no exception applies.” *Ramirez*, 985 N.W.2d at 585-86. Because the records are protected by statutory privilege and Lovestrand’s due-process rights were not violated, we conclude that the district court did not abuse its discretion when it denied Lovestrand’s motion for an in-camera review of C.G.’s health records prior to the trial.

Moreover, Lovestrand’s appeal on this issue would fail even if we concluded that the district court had abused its discretion because the district court’s decision did not prejudice the outcome of his trial. Lovestrand argues that C.G.’s mental-health records contained “substantial, material information” regarding whether C.G. thought she had experienced sexual assault, information that “very well could have tipped the scale” in his favor at the trial. We disagree.

As noted in *Hope Coalition*, a defendant’s due-process rights include “the opportunity of cross-examination.” 977 N.W.2d at 662. Lovestrand had the opportunity to—and did—examine witnesses on the issue of whether C.G. thought she had experienced sexual assault. Specifically, the state released the emergency-room record from July 24, 2018, which included C.G.’s statement to a doctor that her rectal bleeding and pain were from a consensual encounter. At trial, the defense called the emergency-room doctor as a witness, and the doctor testified that, according to the medical chart, the anal and vaginal intercourse were consensual. The doctor also clarified that a separate medical team examines patients who come to the emergency room and allege that they were sexually assaulted, and that C.G. was not examined by that team. Also, C.G. testified that she initially thought the encounter was a “bad sexual experience” and only later realized it was an assault: “I had talked to my counselor and she had helped me to see that it was rape” These facts and statements from the trial indicate that C.G. did not think she was sexually assaulted at the time she sought medical care, and the jury heard this information.

We agree with the district court’s analysis that C.G.’s therapy records were “not sufficiently probative to require a new trial” because (1) the statements were general and

not specific to this case and (2) the jury heard the emergency-room doctor say the anal bleeding was from consensual intercourse, which was more specific information than that found in the therapy records. We agree with the district court's conclusion that "[b]ased on their verdict, the jury obviously found [C.G.'s] testimony to be credible notwithstanding the direct contradiction in the emergency room record." We conclude that if the jury believed C.G.'s testimony that the anal intercourse was not consensual notwithstanding the doctor's testimony that C.G. told her that the sexual encounter was consensual, then general references in the therapy records were unlikely to change the jury's verdict.

Because the information revealed in the posttrial, in-camera review of C.G.'s mental-health records was less specific than the information revealed at trial, and because Lovestrand had the opportunity to examine witnesses on the topic of whether C.G. viewed the encounter as consensual, the outcome of Lovestrand's trial was not prejudiced by the district court's denial of his *Paradee* motion.

II. The state presented sufficient evidence to support the jury's guilty verdicts for third-degree and first-degree criminal sexual conduct.

Lovestrand argues the state did not present sufficient evidence to prove his guilt of either third-degree criminal sexual conduct or first-degree criminal sexual conduct beyond a reasonable doubt.

The application of a defendant's actions to the text of a statute is a question of statutory interpretation that we review de novo. *State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013).

We evaluate the sufficiency of direct evidence by conducting a thorough review of the record “to determine whether the facts and the legitimate inferences drawn from them” would allow a jury to conclude the defendant was guilty beyond a reasonable doubt. *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). “The evidence must be viewed in the light most favorable to the verdict” *Id.* “When the direct evidence of guilt on a particular element is not alone sufficient to sustain the verdict,” appellate courts apply the circumstantial-evidence standard of review. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017).

In contrast with direct evidence, which is “based on personal knowledge or observation and . . . if true, proves a fact without inference or presumption,” the supreme court has defined circumstantial evidence as evidence from which the jury “can infer whether the facts in dispute existed or did not exist.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotations omitted). “Thus, circumstantial evidence always requires an inferential step to prove a fact that is not required with direct evidence.” *Id.* (citing *State v. Silvernail*, 831 N.W.2d 594, 604 (Minn. 2013)).

Under the heightened circumstantial-evidence standard, appellate courts conduct a two-step analysis. *Silvernail*, 831 N.W.2d at 598. The first step is to identify the circumstances proved by the state. *Id.* In identifying the circumstances proved, we defer to the jury’s acceptance of the state’s evidence, “construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the [s]tate’s witnesses and disbelieved the defense witnesses.” *Id.* at 598-99 (quotation omitted). Thus, in determining the circumstances proved, “we consider only those circumstances that are

consistent with the verdict . . . because the jury is in the best position to evaluate the credibility of the evidence even in cases based on circumstantial evidence.” *Id.* at 599 (citation omitted).

“The second step is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotations omitted). In making this determination, appellate courts review the circumstances proved “not as isolated facts, but as a whole,” and independently examine the reasonableness of all inferences rather than deferring to the jury’s choice between reasonable inferences. *Id.* Even so, “inconsistencies in the state’s case or possibilities of innocence” do not require reversal so long as the evidence as a whole “makes such theories seem unreasonable.” *State v. Tschew*, 758 N.W.2d 849, 858 (Minn. 2008). Therefore, rather than relying on “mere conjecture,” a defendant challenging the sufficiency of circumstantial evidence must point to evidence in the record “consistent with a rational theory other than guilt.” *Id.*

To prove that Lovestrand committed third-degree criminal sexual conduct, the state had to prove that (1) Lovestrand engaged in sexual penetration with C.G., (2) the penetration occurred without C.G.’s consent, and (3) Lovestrand used force or coercion⁵ to accomplish the penetration. Minn. Stat. § 609.344, subd. 1(c). To prove Lovestrand committed first-degree criminal sexual conduct, the state had to prove the above elements

⁵ The case was submitted to the jury on a theory of coercion.

as well as that the act caused personal injury to C.G. Minn. Stat. § 609.342, subd. 1(e)(i). Lovestrand disputes the elements of lack of consent and personal injury.

A. Lack of Consent

Minnesota law defines consent in criminal-sexual-conduct cases as “words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. . . . Corroboration of the victim’s testimony is not required to show lack of consent.” Minn. Stat. § 609.341, subd. 4(a), (c) (2016).

Here, C.G. initially consented to anal penetration, but after the act began, she asked Lovestrand to stop. Because she told him to stop, her words indicated that she was not giving consent in the present. Lovestrand argues that the state did not present direct evidence at trial showing that he heard and understood C.G.’s withdrawal of consent, and thus, the circumstantial-evidence standard of review applies. We agree.

First, we identify the circumstances the state proved at trial, assuming that the jury believed the state’s witnesses. *See Silvernail*, 831 N.W.2d at 598-99. The state presented C.G.’s testimony that the anal penetration began as consensual intercourse but that immediately after the penetration began, she said, “Oh my God, ow, that hurts, stop.” C.G. also testified that “[h]e kept going” after she told Lovestrand to stop multiple times. C.G.’s testimony further established that at the time of the anal penetration, she was on her stomach and Lovestrand, who was about ten inches taller than C.G. and outweighed her by about 100 pounds, was on top of her. C.G. testified that there was no way Lovestrand did not hear her because she did not speak quietly, there was no music, the television was on but not at a high volume, and Lovestrand heard the other things C.G. said to him.

Next, we “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 599 (quotations omitted). It was reasonable for the jury to find that the state proved the consent element by inferring that Lovestrand heard C.G. tell him to stop. Lovestrand argues that it was also a reasonable inference that he did not hear C.G. tell him to stop. We disagree. C.G. testified that she told Lovestrand to stop multiple times, she did not speak quietly, and he heard the other things she said to him. Based on these circumstances taken as a whole, it is not a reasonable inference that Lovestrand did not hear C.G. withdraw consent. Instead, the only reasonable inference was that C.G. submitted to the continued anal penetration because Lovestrand was of “superior size and strength” to her, and thus, Lovestrand accomplished the sexual penetration by coercion. *See* Minn. Stat. § 609.341, subd. 14 (2016) (defining “coercion” as “the use by the actor of confinement, or superior size or strength, against the complainant, that causes the complainant to submit to sexual penetration or contact against the complainant’s will”).

B. Personal Injury

The additional element required to prove first-degree criminal sexual assault is “personal injury,” which is statutorily defined as “bodily harm,” Minn. Stat. § 609.341, subd. 8 (2016), which in turn is further defined as “physical pain, injury, or illness, or any impairment of physical condition,” Minn. Stat. § 609.02, subd. 7 (2016).

C.G.’s injury was documented by the emergency-room doctor who treated her. The doctor testified that C.G. had abrasions on her rectum and that she reported rectal pain and bleeding, although no blood was visible during the exam. Both abrasions and pain would

fall under the statutory definition of “personal injury.” C.G. also testified that she felt “ripping” in her anus and rated her pain as an eight on a scale of one to ten.

Lovestrand argues that the state did not provide direct evidence as to precisely when C.G. sustained the injury, and he points to C.G.’s testimony that the anal intercourse hurt as soon as it began. In other words, Lovestrand argues the injury occurred during the consensual portion of the anal intercourse before C.G. told Lovestrand to stop. For this reason, Lovestrand argues that the circumstantial-evidence standard applies to the personal-injury evidence. We disagree.

Minnesota law supports the conclusion that personal injury sustained from the acts related to a sexual assault is caused by the sexual assault. *State v. Sollman*, 402 N.W.2d 634, 636 (Minn. App. 1987) (concluding that an injury from a sexual assault needs to be “sufficiently related to the act to constitute ‘personal injury’” under the statute and that the injury does not need to coincide with sexual penetration). This court in *Sollman* concluded that the bruises the victim sustained in that case “either were caused by the actual sexual act or were sufficiently related to the assault” to fall within the statutory definition of “personal injury.” *Id.*; see also *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985) (“[T]he evidence of pain and bruising established in this case has been sufficient to establish personal injury.”). Thus, the state proved the personal-injury element based on direct evidence of C.G.’s physical injuries and direct evidence provided through C.G.’s testimony that Lovestrand’s act of penetration caused her pain and injuries. We also conclude that C.G.’s injuries are sufficiently related to the nonconsensual penetration to

constitute “personal injury” and support the jury’s guilty verdict for first-degree criminal sexual conduct.

Because the state presented sufficient evidence to prove the elements of lack of consent, coercion, and personal injury to C.G., sufficient evidence supports the jury’s guilty verdicts for first-degree and third-degree criminal sexual conduct against C.G.

III. The district court did not err when it determined that the state did not violate *Brady* and denied the motion to dismiss the case.

Lovestrand argues that the district court erred when it determined that the state’s delayed disclosure of C.G.’s emergency-room record did not constitute a *Brady* violation. We disagree.

“Under *Brady*, the suppression by the State, whether intentional or not, of material evidence favorable to the defendant violates the constitutional guarantee of due process.” *Walen*, 777 N.W.2d at 216. A district court’s ruling on a *Brady* violation involves mixed questions of fact and law, and we review whether the state has violated *Brady* de novo. *Id.* (specifically applying de novo review to the issue of materiality under *Brady*). Minnesota courts apply a three-prong test to determine whether a *Brady* violation has occurred:

(1) the evidence must be favorable to the defendant because it would have been either exculpatory or impeaching; (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and (3) the evidence must be material—in other words, the absence of the evidence must have caused prejudice to the defendant.

Id. “The facts . . . if proven at an evidentiary hearing, must meet all three requirements to establish a *Brady* violation.” *Zornes v. State*, 903 N.W.2d 411, 417 (Minn. 2017).

“[T]he remedy for a *Brady* violation is a new trial” *State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000). However, a new trial is warranted only if the court determines “there is reasonable probability” the disclosure of the evidence would have altered the outcome of the trial. *State v. Clobes*, 422 N.W.2d 252, 255 (Minn. 1988). A discovery violation that does not meet the elements of a *Brady* violation still may be subject to sanctions or remedies, and the court is to consider “the feasibility of rectifying that prejudice with a continuance.” *Woodruff v. State*, 608 N.W.2d 881, 886 (Minn. 2000). And we review a district court’s ruling on discovery issues for an abuse of discretion. *State v. McNeil*, 658 N.W.2d 228, 234 (Minn. App. 2003) (citing *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979)).

Here, the district court concluded that although the state’s disclosure of C.G.’s emergency-room record was untimely, it was not a *Brady* violation and ordered a continuance to remedy any potential prejudice to Lovestrand. A review of the three *Brady* factors reveals that the withheld evidence met only one of the factors.

A. Exculpatory or Impeaching Evidence

As to the first factor, Lovestrand argues the evidence from the emergency-room record was favorable to him because it could be used to impeach C.G. by showing that C.G. told the emergency-room doctor that the anal intercourse was consensual. We agree that the emergency-room record contained evidence favorable to Lovestrand, satisfying the first *Brady* factor. Notably, Lovestrand received a copy of the record before the district court ordered the continuance, and at trial, C.G. and the emergency-room doctor who treated her testified as to the contents of the medical record and Lovestrand examined them

about it. Thus, the jury heard the testimony regarding the record, had the opportunity to consider this information as part of its deliberations, and still found Lovestrand guilty.

B. Suppression of the Evidence

As to the second factor, Lovestrand argues that the “state offered no explanation or timeframe regarding its receipt of the medical records [T]he most likely scenario is that the records had been in the possession of the police or prosecution for quite some time.” The record, however, establishes that Lovestrand’s assertion is inaccurate and that the prosecution did not suppress the evidence, intentionally or otherwise. The record contains the prosecutor’s explanation at a pretrial hearing that an investigator had tried to obtain the record earlier and that on September 24, 2021, the prosecutor noticed that the record had not yet been received. The prosecutor then contacted C.G. and obtained the record on September 30, 2021. Although Lovestrand had requested the medical record in June 2020, he received it September 30, 2021—the same day the prosecutor obtained it.

Although it is true that Lovestrand did not receive the medical record until two business days before the trial was scheduled to begin, the state did not have the record in its possession until the same day it provided the record to him. The state’s duty to disclose the emergency-room record did not arise until it possessed the record. *See* Minn. R. Crim. P. 9.01, subd. 1a(1) (stating that the prosecutor’s obligation to disclose evidence applies to “material and information in the possession or control of the members of prosecution staff”). Lovestrand argues that the state did not explain the delay in receiving the records, but that is not the legal standard. *See Schmid*, 487 N.W.2d at 543 (affirming the district court did not err when it “declin[ed] to order the prosecution to disclose records over which

it exercised no control”). Moreover, Lovestrand requested dismissal of the case or a continuance based on his late receipt of the medical record, and the district court granted Lovestrand a two-month continuance, which was twice the amount of time his counsel asserted he needed to fully address the emergency-room record. We discern no error by the district court in determining that Lovestrand’s delayed access to the emergency-room record was a discovery violation that did not implicate *Brady* and ordering a continuance to remedy any potential prejudice rather than dismissing the case.

C. Materiality of the Evidence

Because the evidence was not suppressed, we do not need to reach the third factor, but even if we were to consider it, we would conclude that the emergency-room record was not material under the *Brady* analysis. We review a district court’s materiality determination by considering the effect the undisclosed evidence would have had in the context of the whole trial record. *Walen*, 777 N.W.2d at 216 (“Evidence is material under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” (quotation omitted)).

On this factor, Lovestrand argues that there was “scant evidence at trial in this case,” and therefore, “any information that challenged the credibility of [C.G.] was material” because it went to Lovestrand’s theory of defense. Lovestrand’s argument fails because he received the emergency-room record the same day as the state, the district court granted him a two-month continuance after he received the record, he was able to review the record and contact witnesses, he called the doctor as a witness, and he cross-examined C.G. about the emergency-room record. The third factor requires that “the evidence must be

material—in other words, the absence of the evidence must have caused prejudice to the defendant.” The emergency-room record cannot be material because it was not absent and thus its absence did not prejudice Lovestrand; rather, Lovestrand availed himself of the opportunity to review the emergency-room record and secure testimony at trial regarding the same. On this record, the emergency-room record cannot be material for the purpose of establishing a *Brady* violation.

Because the elements of a *Brady* violation are not present here, we conclude the district court did not err when it determined that no *Brady* violation occurred regarding the emergency-room record.

IV. Lovestrand was not denied a fair trial due to cumulative error.

“An appellant may be entitled to a new trial in rare cases where the errors, when taken cumulatively, have the effect of denying the appellant a fair trial.” *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017) (quotation omitted). This is not one of those rare cases. Because we found no errors based on the issues Lovestrand raises on appeal, there is no cumulative error, and Lovestrand is not entitled to a new trial on this basis.

V. The district court erred by entering a conviction for a lesser-included offense.

Finally, we consider whether the district court erred when it entered a judgment of conviction for third-degree criminal sexual conduct. Neither Lovestrand 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 (2022). 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).

Lovestrand’s warrant of commitment shows that the district court entered judgments of conviction for first-degree and third-degree criminal sexual conduct. Third-degree criminal sexual conduct is a lesser-included offense of first-degree criminal sexual conduct because it is both “a lesser degree of the same crime” as well as “a crime necessarily proved if the crime charged were proved.” *Id.* As noted in our sufficiency-of-the-evidence analysis, all of the elements of third-degree criminal sexual conduct must be proved to prove first-degree criminal sexual conduct. *Compare* Minn. Stat. § 609.342, subd. 1(c)(i) (first-degree criminal sexual conduct), *with* Minn. Stat. § 609.344, subd. 1(c) (third-degree criminal sexual conduct).

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 judgment of conviction for third-degree criminal sexual conduct.

In sum, we affirm Lovestrand's conviction for first-degree criminal sexual conduct. We also reverse and remand for the district court to vacate the judgment of conviction for third-degree criminal sexual conduct.

Affirmed in part, reversed in part, and remanded.