STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1581

State of Minnesota,
Respondent,

vs.

Calvin Edward Bartz,
Appellant.

Filed September 5, 2023
Affirmed in part, reversed in part, and remanded
Ross, Judge

Carlton County District Court
File No. 09-CR-21-1729

Keith Ellison, Attorney General, Jacob Campion, Assistant Attorney General, St. Paul, Minnesota; and

Lauri Ketola, Carlton County Attorney, Carlton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

A jury found Calvin Bartz guilty on two counts of second-degree criminal sexual conduct because he molested his nine-year-old daughter. Bartz moved the district court for a downward dispositional departure from the presumptive sentence under the sentencing

guidelines. The district court denied the motion, entered convictions on both counts, and sentenced Bartz on one. Bartz cites three alleged errors on appeal: improper burden shifting by the prosecutor; improper denial of his departure motion; and the improper entry of two convictions. Because the prosecutor did not improperly shift the burden of proof to Bartz and the district court did not abuse its discretion by denying Bartz's motion for a downward dispositional sentencing departure, we affirm in part. But because the district court wrongly entered convictions on both counts, we reverse in part and remand for the district court to correct the warrant of commitment.

FACTS

Calvin Bartz's nine-year-old daughter disclosed to her mother that when Bartz had parenting time at his home, he would touch her "private parts" under her clothes. The girl told a child-advocacy forensic interviewer that Bartz, whom she stayed with on weekends, had been touching her genitals "for a while." She said that the abuse occurred in a similar way each time. Bartz would sit on his living-room armchair and tell her, "[C]ome sit with me." He had her sit on his lap. While the two watched television, Bartz would reach under her clothes and touch her.

Carlton County investigators Russell French and Jessica Laney questioned Bartz for thirty minutes at his home and recorded the interview with a body-worn camera. Bartz maintained his innocence and offered no explanation as to why his daughter would accuse him of sexually abusing her.

The state charged Bartz with two counts of second-degree criminal sexual conduct under Minnesota Statutes section 609.343, subdivisions 1(g) and 1(h)(iii) (2020).

Investigator French testified about his investigation, and the recorded interview was admitted as evidence. On cross-examination, defense counsel asked the investigator about Bartz's responses during the interview, specifically: "[I]n this interview he consistently denied any sexual activity with his daughter, beginning to end, correct?" and "[H]e denied to you consistently throughout that he ever touched his daughter in a sexual way, correct?" The prosecutor, on redirect, also asked about Bartz's responses during the interview. The prosecutor asked a series of questions: "[I]f somebody is innocent, do they deny that, deny an allegation?" "[H]as it also been your experience that people who are guilty deny the allegations?" "[D]id he ever ask you what his daughter said he did to her?" "Did he ever ask if his daughter was okay?" Bartz's attorney objected to each question, and the district court sustained the objections.

The prosecutor referred to the interview in her closing argument: "Investigator French went to great lengths to try to give [Bartz] an opportunity to provide an explanation, to somehow make sense of this outside of it being intentional and sexual." Bartz's attorney objected, and the court sustained the objection, reiterating to the jury that Bartz bore no burden of proof. The prosecutor twice returned to this theme. Summarizing the video, the prosecutor remarked, "You got to watch the interview. . . . You saw his body language. You saw how he responded to questions. You saw what he didn't -- how he didn't respond to questions. Didn't ask questions about what [his daughter] said, because he knew." Bartz's attorney successfully objected. The prosecutor began to ask the jury, "The Defendant, when asked why would she – why would she say this, his response was –" Bartz's attorney interrupted her with an objection, which again the district court sustained.

The jury found Bartz guilty on both counts. Bartz moved for a downward dispositional sentencing departure from the presumptive sentence under the guidelines. The district court denied his motion. The district court sentenced Bartz on only count two—the charge under subdivision 1(h)(iii)—to an executed 108-month prison term.

Bartz appeals.

DECISION

Bartz raises three arguments on appeal. First, he maintains that the prosecutor engaged in misconduct by referencing the police interview and highlighting Bartz's failure to challenge or explain his daughter's allegation that he touched her genitals. Second, Bartz contends that the district court abused its discretion by denying his request for a downward dispositional departure at sentencing. And third, Bartz argues that the district court erroneously entered two convictions for the same conduct. Only Bartz's third contention prevails.

I

Bartz argues that the prosecutor engaged in misconduct when she questioned the police officer about and referenced during closing arguments his failure to ask about his daughter's wellbeing or explain the allegations during his conversation with police. When reviewing claims of objected-to prosecutorial misconduct, we first evaluate whether misconduct occurred and then assess for harmlessness, determining whether the misconduct prejudiced the appellant. *See State v. Carridine*, 812 N.W.2d 130, 150 (Minn. 2012). Because we are certain that Bartz has failed to establish that the prosecutor engaged in misconduct, we address only the first prong.

The primary concern in cases of prosecutorial misconduct is that the prosecutor's misconduct may deprive the defendant of his right to a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). Because the state bears the burden of proving a defendant's guilt beyond a reasonable doubt, a prosecutor engages in misconduct when she shifts the state's burden of proof to the defendant. *State v. Nissalke*, 801 N.W.2d 82, 106 (Minn. 2011). Contrary to Bartz's contention, that burden shifting did not occur here. During her closing argument, the prosecutor repeatedly reminded the jury—five times—that it is the state that bears the burden of proof. And although a prosecutor does engage in misconduct by commenting on a defendant's failure to testify or present evidence at trial, *see State v. Hoppe*, 641 N.W.2d 315, 321 (Minn. App. 2002), *rev. denied* (Minn. May 14, 2002), Bartz presents no authority supporting his contention that a prosecutor acts improperly by referencing a defendant's *pretrial* failure to respond to allegations during a voluntary, noncustodial police interview. The cases Bartz relies on highlight the distinction between the prosecutor's conduct here and instances when prosecutors engaged in misconduct by shifting the burden of proof. In *State v. Coleman*, the prosecutor remarked in closing that only the state, and "not the defense," presented any evidence at trial. 373 N.W.2d 777, 782 (Minn. 1985). Similarly in *State v. Porter*, the prosecutor made direct and indirect references to Porter's failure to present a defense, testify, or impeach the state's witness. 526 N.W.2d 359, 364–65 (Minn. 1995). And in *State v. Hoppe* the prosecutor highlighted the defendant's failure to rebut the state's evidence. 641 N.W.2d at 321. In each of these cases the prosecutor highlighted the defense's failure to present evidence *at trial*. In

contrast, the prosecutor here commented on Bartz's *pretrial* failure to dispute the allegations against him when questioned by officers.

The more apposite cases are those that directly address whether a defendant voluntarily interviewed by police in a noncustodial setting has a constitutional right to remain silent that is violated when the state relies on the defendant's silence to prove his guilt. This is because Bartz implicitly argues that a defendant's right to remain silent vests before he is taken into custody and advised of his right to remain silent under *Miranda*. Neither the Minnesota Supreme Court nor the United States Supreme Court has so held.

The state supreme court in fact rejected the proposition in *State v. Borg*, 806 N.W.2d 535 (Minn. 2011). The *Borg* defendant failed to respond to a letter from police seeking to arrange to interview him with his counsel present regarding a criminal investigation, and the state sought to produce evidence of this failure during its case in chief. 806 N.W.2d at 539–40. The *Borg* court was not persuaded by Borg's constitutional argument against the state's use of his silence. It held that "the Fifth Amendment . . . does not prohibit the State from introducing evidence during the State's case in chief regarding a defendant's silence unless the government compelled the defendant to speak or to remain silent." *Id.* at 537.

The United States Supreme Court essentially rejected the idea two years later in *Salinas v. Texas*, 570 U.S. 178 (2013). The *Salinas* Court faced the question of whether a defendant's silence in response to precustodial, pre-*Miranda* police questioning is admissible in the prosecutor's case in chief as evidence of the defendant's guilt. *Salinas*, 570 U.S. at 183. In a three-opinion decision, the three-Justice plurality concluded that the defendant had no Fifth Amendment right-to-silence claim because he never expressly

invoked the right. *Id.* And two other Justices more broadly rejected the defendant's claim that the prosecutor had acted improperly, reasoning that, regardless of whether the defendant attempted to invoke his right to remain silent, the prosecutor's trial references to the defendant's silence could not implicate the right. *Id.* at 192 (Thomas, J., concurring). Applying the *Borg* and *Salinas* rationale by analogy here, because Bartz was not in custody and voluntarily participated in the police interview, his constitutional right to remain silent was not implicated and the prosecutor did not commit misconduct by referencing Bartz's silence during trial.

For these reasons we hold that the prosecutor did not engage in misconduct by commenting on Bartz's silence. The references did not improperly shift the burden of proof or otherwise involve Bartz's constitutional right to silence. We need not address the state's alternative argument, which is that the references were harmless even if they were error.

II

Bartz alternatively argues that the district court abused its discretion by denying his motion for a downward dispositional departure. District courts must presume that the sentence designated by the sentencing guidelines is the appropriate sentence. Minn. Sent'g Guidelines 2.D.1 (2020); *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). A district court may depart from the presumptive sentence directed by the guidelines only if substantial and compelling reasons to depart are present. Minn. Sent'g Guidelines 2.D.1; *Soto*, 855 N.W.2d at 308. We afford great deference to a district court's decision to sentence within the guidelines range and will only reverse when the district court abuses its discretion, *Soto*, 855 N.W.2d at 307–08, meaning that the district court based its decision on "an erroneous

view of the law or [its decision] is against logic and the facts in the record," *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted). The record informs us that the district court imposed a sentence within its discretion.

Bartz argues that the district court abused its discretion by concluding that Bartz was not particularly amenable to probation. A defendant's "particular amenability" to probation may support a district court's decision to dispositionally depart from the sentencing guidelines by imposing probation rather than a term of imprisonment. *Soto*, 855 N.W.2d at 308. In determining whether a defendant is particularly amenable to probation, the sentencing court considers the defendant's "age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends . . . or family." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Bartz alleges two legal errors.

Bartz maintains first that the district court erred as a matter of law by deeming his stable life, consistent appearances in court, and family support irrelevant under *Trog*. Bartz misconstrues the district court's order. Although the district court stated that the fact that Bartz had built a life was "irrelevant to [the court]," the district court's analysis reflects its reasoning that Bartz's life-developing circumstances—while relevant—were not compelling. Immediately after making its statement, the district court correctly articulated and applied *Trog*'s particular-amenability standard. It observed that Bartz was cooperative in court but indicated that his cooperation was not extraordinary. And regarding Bartz's support from friends and family, the district court observed that Bartz had no more support at the time of sentencing than he had when he committed the offense. The district court did not erroneously treat any *Trog* factor as irrelevant.

Bartz maintains second that the district court erred by treating remorse as a "strict prerequisite" to departing downward dispositionally from a guidelines presumptive sentence. While remorse is not a prerequisite to granting a downward dispositional departure, it is a relevant factor for the district court's consideration. *Soto*, 855 N.W.2d at 311. And the district court here treated remorse only as a factor. The district court observed Bartz's apparent lack of remorse in the context of its discussion of all the *Trog* factors. Before acknowledging Bartz's lack of remorse, the district court acknowledged his lack of a criminal history. It then weighed the cooperation and community-support factors. Bartz has not shown that the district court's sentencing decision focused exclusively on his lack of remorse.

We are mindful that, as Bartz emphasizes, some of the *Trog* factors—his prior record, cooperation in court, and family support—are factors that might weigh in favor of a dispositional departure. But even when grounds exist to depart from the presumptive guidelines sentence, a district court is not required to depart. *See State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). And when the record shows that the district court "carefully evaluated all the testimony and information presented" before imposing a presumptive guidelines sentence, we will defer to the district court's discretion. *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation omitted). Here the district court advised the parties that it had reviewed the submitted sentencing documents "very closely," including the presentence investigation, Bartz's motion for a departure, the state's response, and the letters of Bartz's supporters. The district court did not abuse its discretion by denying his motion for a downward dispositional departure.

III

We address last the warrant of commitment. Bartz and the state agree that the district court erred by entering convictions on both counts of second-degree criminal sexual conduct because count one was an included offense. Courts may correct an illegal sentence "at any time," Minn. R. Crim. P. 27.03, subd. 9, and whether a sentence conforms to the requirements of a statute or the sentencing guidelines is a question of law we review *de novo*. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). A defendant may be convicted of "either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2020). An offense is an included offense if it is "a crime necessarily proved if the crime charged were proved." *Id.*, subd. 1(4). Bartz was charged under Minnesota Statutes section 609.343, subdivisions 1(g) and 1(h)(iii). The elements of these offenses overlap except that subdivision 1(h)(iii) involves multiple acts of sexual abuse committed over time. Because proving that the abuse occurred on multiple occasions under subdivision 1(h)(iii) also proves that the abuse occurred under subdivision 1(g), Bartz cannot be convicted of both. We therefore reverse Bartz's conviction on count one and remand to the district court, which we instruct to vacate that conviction.

Affirmed in part, reversed in part, and remanded.