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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0235**

State of Minnesota,
Respondent,

vs.

Matthew Lee Rote,
Appellant.

**Filed March 18, 2024
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Pine County District Court
File No. 58-CR-20-264

Keith Ellison, Attorney General, Lisa Lodin Peralta, Assistant Attorney General, St. Paul, Minnesota; and

Reese Frederickson, Pine County Attorney, Lauren R. Dwyer, Assistant County Attorney, Pine City, Minnesota (for respondent)

Andrew C. Wilson, Wilson & Clas, Minneapolis, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

ROSS, Judge

An eight-year-old boy told his mother that his adult brother, appellant Matthew Rote, sexually abused him. Police investigated and the state charged Rote with two counts of first-degree criminal sexual conduct and one count of incest. The boy testified at trial

about Rote's abuse, and the jury found Rote guilty as charged. Rote argues on appeal from his convictions that the district court failed to properly determine the boy's competency to testify. He also argues that one of the counts of criminal sexual conduct is a lesser-included offense of the other and that the district court improperly imposed a lifetime conditional-release term. We hold that the district court did not plainly err by allowing the boy to testify. But we also hold that the district court convicted and sentenced Rote both for one crime (multiple acts of specific sexual conduct) and a lesser-included offense of that crime (a single act of that same conduct), so his conviction and sentence on the second charged crime cannot stand. And we also hold that Rote's convictions of criminal sexual conduct and incest resulted from the same act, so his incest conviction cannot stand. We therefore affirm in part, reverse in part, and remand.

FACTS

An eight-year-old boy, whom we will call Owen in the interest of his privacy, told his mother, "Matthew has had sex with me." Owen demonstrated what he meant by making "thrust moves with his hips." Matthew Rote, then 21 years old, is Owen's brother. Owen said that Rote's sexual assaults began when Owen was five years old and continued for years while Rote was living at home and after he moved out. Owen's mother relayed Owen's disclosure to an investigator in the Pine County Sheriff's Office.

The state charged Rote in a multi-count criminal complaint, but only three counts regarding Owen survived to trial and are relevant in this appeal. The numbering of the counts changed from the amended complaint to the jury's verdict on those three counts: count I, first-degree criminal sexual conduct based on Minnesota Statutes section 609.342,

subdivision 1(h)(iii) (2014) (multiple acts of sexual penetration of a child under 16 years of age over an extended period by an actor significantly related to the child); count II, first-degree criminal sexual conduct based on Minnesota Statutes section 609.342, subdivision 1(g) (2014) (an act of sexual penetration of a child under 16 years of age by an actor significantly related to the child); and count III, incest based on Minnesota Statutes section 609.365 (2014) (sexual intercourse with a related person).

Owen testified at Rote's trial after the district court briefly examined Owen for competency *sua sponte*. The district court so examined Owen, who by the time of trial was 11 years old, by asking him if he knew how to spell his name, how old he was, and when his birthday was. Owen correctly spelled his name and gave his age as 11, but he said he did not know his birthday, adding that he knew it was during the summer. The district court also asked Owen his favorite sports team, and Owen named the Minnesota Vikings. The district court asked Owen if he knew the difference between right and wrong and the difference between the truth and a lie. Owen answered that he did. He then incorrectly answered that the statement, "[T]he Vikings have won a Super Bowl," was true. And he correctly answered that the statement, "[I]t's snowing out[side] right now," was a lie. After the district court questioned Owen, it asked Rote if he had any objections to the questioning or if Owen should be asked any additional questions, and Rote, represented by counsel, said no. Rote at no point before, during, or after trial challenged or raised any questions about Owen's competency.

Owen struggled to testify with details when asked about the alleged sexual abuse, often looking down or responding to questions by nodding. He testified that the abuse

started when he was five years old. He also answered questions posed by Rote's counsel, including questions about his hobbies, whether he had been on an airplane, the layout of his home, and when the abuse occurred. Asked if he had ever been in trouble, Owen recounted his having smashed the window of a truck in a junkyard and getting in trouble with his parents.

The jury found Rote guilty on all three counts, and the district court convicted him accordingly. It sentenced Rote to serve concurrent prison terms of 144 months and 153 months, respectively, on counts I and II, first-degree criminal sexual conduct, followed by conditional release for his lifetime. The district court did not sentence Rote on count III, incest.

Rote appeals.

DECISION

Rote raises three challenges to his convictions. He argues first that the district court erred by allowing Owen to testify without thoroughly evaluating Owen's competency. He argues second that one of the offenses of criminal sexual conduct is a lesser-included offense of the other. And he argues third that the district court improperly imposed a lifetime term of conditional release. His lesser-included-offense and conditional-release contentions prevail.

I

Rote argues unpersuasively that the district court inappropriately found Owen competent to testify at trial. Rote did not challenge Owen's competency to testify, object to the district court's method of testing Owen's competency, or object to Owen's testimony

on grounds of incompetency. We review unobjected-to alleged errors only for plain error. *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). To prevail under this standard, Rote must show that an error occurred, that the error was plain, and that the error affected his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Rote does not establish that the district court plainly erred.

Rote argues that the district court did not adequately and reliably test Owen's competency with sufficiently thorough questioning. But the record does not indicate that the district court was obligated to test Owen's competence. Even a child under the age of ten is presumed competent, and that presumption stands "unless the court finds that the child lacks the capacity to remember or to relate [facts truthfully]." Minn. Stat. § 595.02, subd. 1(n) (2022). Owen was 11 years old when he testified at Rote's trial, excluding him from the statutory reference to possible concerns about a younger child's capacity to remember facts and truthfully relate them. Because the district court was not obligated to test Owen's competency based on his age and because Rote identifies no behavior that would have raised reasonable doubts about his competency, we see little merit in Rote's argument that we must reverse his conviction based on the notion that the district court tested Owen's competency inadequately.

Rote argues that once the district court chose to test Owen's competency, it was obligated to do so in a more exacting fashion than it did. Any theoretical merit to Rote's argument rests on the maxim that, when the district court "is in doubt as to [a testifying] child's competency, it is best to err on the side of determining the child to be competent." *State v. Lanam*, 459 N.W.2d 656, 660 (Minn. 1990). And one might infer from the district

court's *sua sponte* decision to test Owen's competency that the district court had some doubt about it. Even so, Rote's challenge to the substance of the district court's examination does not support his contention that the district court's examination was infirm.

Rote argues specifically that the district court's competency examination was facially deficient because the district court was obligated to test Owen by asking about more than one event or one fact. He rests this argument on one facet of grammar; he points to the plural construction of the word "facts" in the district court's duty to determine whether the witness has "the capacity to remember or to relate [facts truthfully]." Minn. Stat. § 595.02, subd. 1(n). He buttresses the argument by quoting lines from cases that refer to the district court's competency testing also using a plural term, such as "whether the child has the ability to relate *events* truthfully," *State v. Munt*, 831 N.W.2d 569, 585 (Minn. 2013) (emphasis added), and whether he or she "could adequately relate *facts* regarding *events*," *State v. Brovold*, 477 N.W.2d 775, 779 (Minn. App. 1991) (emphasis added), *rev. denied* (Minn. Jan. 17, 1992). Rote's grammatical argument is flawed. His cited authority defines only the district court's objective to determine whether the witness can recall and relate events and facts; neither the statute nor caselaw dictates the means by which the court should meet the objective, which we believe to be a matter of the district court's discretion. Rote does not explain why a district court cannot infer a witness's competence to recall *multiple* facts and relate *multiple* events based on the witness's demonstration that he can recall and relate a *single* fact or event. Although a district court might choose a longer line of questions and ask about multiple facts—and it should do so if necessary to resolve any

doubts about the witness's competency—we see no error in the district court's choice not to test Owen by questioning him further than it did.

Rote's failure to identify any error defeats his plain-error challenge. But we add that, even if the district court had committed a plain error by asking Owen too few questions, Rote has also failed to meet his burden to show that the error affected his substantial rights. He does not contend, for example, that additional questioning would have led the district court to find Owen incompetent. And the record belies the notion. Owen's answers to the prosecutor's and defense counsel's questions at trial on various topics were responsive and congruent, and they suggest that he was attempting to reply carefully. This corroborates the district court's finding that Owen was competent to testify. Owen's reluctance to provide details when he was asked specifically about the alleged acts of abuse does not suggest a different result. It is not uncommon, even for adult witnesses, to struggle at trial when questioned about traumatizing sexual assaults, and incompetence is not generally the suspected cause of their reluctance or hesitation.

Rote's competency argument fails. He has neither identified an error nor shown that any plain error affected his substantial rights.

II

Rote next argues that his conviction of one of the counts of first-degree criminal sexual conduct must be reversed because it is a lesser-included offense of the other. The state concedes that Rote is correct. We review *de novo* whether an offense is a lesser-included offense of another. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012). Our *de novo* review supports Rote's argument and the state's concession. An offender "may be

convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2014). An included offense is, among other things, “a crime [that is] necessarily proved if the crime charged were proved.” *Id.*, subd. 1(4). One of the charged crimes was first-degree criminal sexual conduct as alleged in count I. Conviction for this offense is premised on proof that, over an extended period, Rote engaged in multiple acts of sexual penetration or sexual contact with a victim under 16 years old. *See* Minn. Stat. § 609.342, subd. 1(h)(iii). The included offense was first-degree criminal sexual conduct as alleged in count II. Rote’s conviction for this offense is premised on proof that he engaged in at least one act of the same conduct that supports the conviction under count I. *See* Minn. Stat. § 609.342, subd. 1(g). The jury found Rote guilty on both counts. Because count II was necessarily proved when count I was proved, count II is a lesser-included offense of count I. The district court erred by convicting and sentencing Rote for both offenses. We therefore reverse the conviction on count II, leaving the jury’s guilty verdict intact, and remand for the district court to vacate that conviction and amend Rote’s sentence.

III

Rote argues too that the district court erred by imposing a lifetime conditional-release term rather than a ten-year term because he does not have a prior sex-offense conviction under Minnesota Statutes section 609.3455 (2014). The state does not contest Rote’s sentencing argument, and it adds that the district court also improperly convicted Rote of incest, acknowledging that the guilty verdict for Rote’s criminal sexual conduct and incest arose from the same criminal behavior. *See* Minn. Stat. § 609.035, subd. 1 (2014)

(“[I]f a person’s conduct constitutes more than one offense . . . , the person may be punished for only one of the offenses and a conviction”). The state’s concessions are well supported by the law. We therefore reverse both the incest conviction and the lifetime term of conditional release.

IV

For the reasons we have discussed, we affirm Rote’s conviction of first-degree criminal sexual conduct based on his multiple acts of abuse against a child, under Minnesota Statutes section 609.342, subdivision 1(h)(iii). We reverse his conviction of first-degree criminal sexual conduct based on a single act of abuse against a child, under section 609.342, subdivision 1(g). We reverse his conviction of incest, under section 609.365. We remand for the district court to amend the warrant of commitment and to amend the sentence.¹

Affirmed in part, reversed in part, and remanded.

¹ We add that we have uncovered errors that the parties did not identify in the district court or on appeal only to clarify that we have carefully considered them *sua sponte* in the interests of justice and that we have determined that they do not affect our analysis or the outcome. The jury verdict and warrant of commitment both identify as count I the crime (Minn. Stat. § 609.342, subd. 1(h)(iii)) that the jury instructions instead describe as count II. And the jury verdict and warrant of commitment identify as count II the crime (Minn. Stat. § 609.342, subd. 1(g)) that the jury instructions instead describe as count I, including additional elements not necessary for that crime. Because the verdict of guilty on all counts demonstrates that the jury found that Rote’s conduct met every element of each crime regardless of the misnumbering, we are certain that the errors did not prejudice Rote in any way. Because the errors are harmless, they warrant no further discussion.