

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0907**

State of Minnesota,
Respondent,

vs.

Robert Lester Caldwell, Jr.,
Appellant.

**Filed July 29, 2024
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Ramsey County District Court
File No. 62-CR-21-5436

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Ramsey County jury found Robert Lester Caldwell Jr. guilty of first-degree criminal sexual conduct. We conclude that (1) the district court did not err by excluding some evidence concerning the victim’s previous sexual conduct with Caldwell, (2) the

district court did not err by ruling that Caldwell could not cross-examine the victim about whether she waived the statutory privilege protecting her therapy records, (3) Caldwell is not entitled to a new trial on the ground of prosecutorial misconduct, (4) the district court erred by entering two convictions because one offense is a lesser-included offense of the other, (5) the district court did not err by denying Caldwell's motion for a downward dispositional departure, and (6) Caldwell's *pro se* arguments do not warrant appellate relief. Therefore, we affirm in part, reverse in part, and remand for resentencing.

FACTS

Caldwell was charged with and convicted of engaging in criminal sexual conduct against a woman with whom he had an on-again-off-again sexual relationship for approximately three years. Caldwell and S.D., who had met several years earlier, became reacquainted and began a sexual relationship in early 2018. From then until 2021, they regularly engaged in oral and vaginal sex, engaged in anal sex on a few occasions, and often engaged in what they both characterized as "rough sex."

S.D. testified at trial that, with the benefit of hindsight, her relationship with Caldwell was not a good one. She testified that Caldwell frequently belittled, demeaned, and manipulated her, and sometimes cheated on her, but that she nonetheless wanted to continue the relationship with him, believing that she was at fault and hoping that he would change. She also testified that Caldwell frequently was angry at her and that, to assuage his anger, she tried to please him by making herself available for sex, especially sexual activities that he preferred. To facilitate their sexual relationship, she sometimes sent him explicit text messages, several of which were introduced into evidence.

In August 2021, S.D. met and talked with T.H., whom S.D. knew had previously been in a sexual relationship with Caldwell that overlapped with S.D.'s sexual relationship with Caldwell. T.H. told S.D. that she no longer was in a sexual relationship with Caldwell.

On August 30, 2021, Caldwell and S.D. exchanged text messages in which they agreed to meet at an apartment belonging to one of Caldwell's friends. S.D. testified about what happened at the apartment as follows. After she arrived at the apartment, she sat on Caldwell's lap. Caldwell said that he was mad at her, without saying why. Caldwell pushed her off his lap so that she was sitting on the floor between his legs. Caldwell removed his pants and told her to "giv[e] him head." S.D. began doing so. Caldwell then said that he was mad at S.D. because she had talked to T.H. S.D. began to cry. She asked Caldwell why he wanted to engage in oral sex with her if he was mad at her. Caldwell responded by saying that he was "trying to see if [she] was worth keeping around for anything." S.D. told Caldwell that she did not want to continue, but Caldwell responded by saying that he "did not care" and by pushing her head down to his crotch. S.D. said, "I don't want to do this," while continuing to cry, and Caldwell again said that he did not care.

Caldwell then stood up and pushed S.D. onto the floor and on her back. Caldwell straddled her, grabbed her throat, and inserted his penis into her mouth. S.D. continued to cry and squirmed in an attempt to get Caldwell off her, but he continued and again said that he did not care.

Caldwell next picked up S.D., who continued to cry, and placed her on a bed so that she was on her hands and knees. Caldwell inserted his penis into her vagina. Caldwell

then inserted his penis into her anus, without any lubricant, even though they had always used a lubricant in the past when engaging in anal sex. S.D. testified that anal sex without lubrication “really hurt.” She told Caldwell that she did not want to engage in anal sex without lubrication. Caldwell told her to be quiet and that he did not care, and he continued to engage in anal sex.

Caldwell next forced S.D. to engage in oral sex again. S.D. continued to cry and asked Caldwell to stop, but he continued. Caldwell ejaculated in S.D.’s mouth. Because it was time for Caldwell to go to work, both stood up to leave, and Caldwell said that he would call her that evening.

S.D. got dressed, left the apartment, went to her car, and called her best friend and said that Caldwell had raped her. S.D. went to a hospital for a sexual-assault examination. She texted two other friends about the incident while at the hospital. S.D. reported the incident to law enforcement later that day.

In late September 2021, the state charged Caldwell with first-degree criminal sexual conduct using force or coercion and causing personal injury, in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2020). The state later amended the complaint to add charges of third-degree and fourth-degree criminal sexual conduct using force or coercion, in violation of Minn. Stat. §§ 609.344, subd. 1(c), .345, subd. 1(c) (2020), based on the same alleged conduct. The state voluntarily dismissed the fourth-degree charge immediately before trial.

The case was tried to a jury on three days in November 2022. The state called seven witnesses. S.D. testified to the facts stated above, among other things. Caldwell testified in his own defense. He admitted that he and S.D. engaged in oral, vaginal, and anal sex on

August 30, 2021, but stated that it was consensual and that it was typical of their prior sexual encounters.

Caldwell also called T.H., who testified that she was in a relationship with Caldwell during some of the time period in which Caldwell was in a relationship with S.D. T.H. also testified that S.D. shared with her a video-recording of text messages between S.D. and Caldwell to prove the existence of her relationship with Caldwell and that T.H. passed the video-recording along to Caldwell.

The jury found Caldwell guilty on both the first-degree charge and the third-degree charge. The district court imposed a sentence of 144 months of imprisonment. Caldwell appeals.

DECISION

I. Victim's Previous Sexual Conduct

Caldwell first argues that the district court erred by denying part of his motion for leave to introduce evidence of S.D.'s previous sexual conduct. He argues that the district court's ruling violated his constitutional right to present a complete defense. This court generally applies an abuse-of-discretion standard of review to a district court's evidentiary rulings. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019). This standard of review applies even if an appellant argues that an evidentiary ruling is a violation of his constitutional rights. *State v. Wenthe*, 865 N.W.2d 293, 306 (Minn. 2015).

The applicable law is found in both a statute and a rule of evidence. The statute generally provides that, in a prosecution for criminal sexual conduct, "evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such

conduct be made in the presence of the jury, except by court order.” Minn. Stat. § 609.347, subd. 3 (2022). Such evidence “can be admitted only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only in” certain circumstances. *Id.*

When consent of the victim is a defense in the case, the following evidence is admissible:

(i) evidence of the victim’s previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue. In order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated; and

(ii) evidence of the victim’s previous sexual conduct with the accused.

Id., subd. 3(a).

Substantially similar language exists in a rule of evidence. *See* Minn. R. Evid. 412(1), (1)(A); *see also* Minn. R. Evid. 412, advisory committee comments. Both the statute and the rule are frequently called “the rape-shield law.” *Wenthe*, 865 N.W.2d at 306. The general purpose of the rape-shield law is to make evidence of the complainant’s sexual history irrelevant in most cases, but such evidence may be relevant and admissible if “admission is constitutionally required by the defendant’s right to due process, his right to confront accusers, or his right to offer evidence in his own defense.” *Id.* at 306 (quotation omitted).

This issue first arose in February 2022, when Caldwell filed a motion for leave to introduce evidence of S.D.’s previous sexual conduct. *See* Minn. Stat. § 609.347, subd. 4

(specifying procedures for introduction of evidence of previous sexual conduct); Minn. R. Evid. 412(2) (same). Caldwell submitted a confidential offer of proof, which referred to four categories of evidence: (1) the existence of an on-again-off-again sexual relationship between Caldwell and S.D., including the nature of their sexual activities; (2) numerous explicit text messages that S.D. sent to Caldwell; (3) numerous explicit photographs of S.D. that she texted to Caldwell; and (4) the fact that Caldwell and S.D. had engaged in “threesomes” with two other persons, whom the defense sought to call as witnesses to testify about “the nature of the sexual intercourse and whether [S.D.] expressed a preference for rough sex during the threesome.” In a memorandum of law, Caldwell stated that the defense would argue at trial that S.D. had consented to sexual penetration on August 30, 2021.

The district court conducted a hearing on Caldwell’s motion in March 2022. In June 2022, the district court filed an order in which it granted Caldwell’s motion with respect to the first and second categories of evidence and denied the motion with respect to the third and fourth categories. With respect to the fourth category—the only category at issue on appeal—the district court first reasoned that the rape-shield provision on which Caldwell relies does not apply because it is limited to evidence of the victim’s previous sexual conduct “with the accused” but does not encompass the victim’s previous sexual conduct with the accused *and another person*. In the alternative, the district court reasoned that the probative value of the evidence was low, that “the prejudicial nature of the threesomes . . . would humiliate the alleged victim and . . . would be too inflammatory,” and that the prejudicial nature of the evidence “highly outweighs” its limited probative value.

Five months later, during *voir dire*, Caldwell asked the district court to reconsider the earlier order (which had been made by a different judge) with respect to the fourth category of evidence of the victim’s previous sexual conduct. Caldwell argued that the district court earlier had misinterpreted the rape-shield law and also had erred by reasoning that prejudice would arise from humiliation as opposed to persuasion by illegitimate means. Caldwell argued that he wished to rebut S.D.’s anticipated testimony that Caldwell had engaged in coercive conduct in the past by presenting the testimony of two persons who would testify that, on prior occasions, they had observed Caldwell and S.D. engaging in sexual conduct that was not coercive. Caldwell’s attorney asserted that the two persons could give such testimony without referring to the existence of a threesome. The district court declined to change the earlier ruling, reasoning that the evidence had limited probative value because Caldwell’s purpose—to show that S.D. preferred or was not averse to “rough sex”—was not responsive to the state’s allegations.

On appeal, Caldwell challenges both reasons stated by the district court in its June 2022 order: first, that the evidence does not refer to S.D.’s previous sexual conduct “with the accused” and, second, that the probative value of the evidence is substantially outweighed by its inflammatory or prejudicial nature. In response, the state first notes that Caldwell does not cite any caselaw for the proposition that section 609.347, subdivision 3(a)(ii), and rule 412(1)(A)(ii) apply to evidence of a complainant’s previous sexual conduct with the accused and a third person. The state also argues—with greater emphasis and at greater length—that the district court did not abuse its discretion by ruling that the

probative value of the evidence was substantially outweighed by its inflammatory or prejudicial nature.

We need not determine whether the district court properly interpreted section 609.347, subdivision 3(a)(ii), and rule 412(1)(A)(ii) to not apply to evidence of a complainant's previous sexual conduct with the accused and a third person. Even if that part of the ruling was erroneous, the district court did not err in its alternative reasoning. As the state argues, there was a considerable amount of other evidence that, on prior occasions, S.D. willfully engaged in "rough sex" with Caldwell. S.D. testified that, more often than not, she and Caldwell engaged in rough sex. On the other hand, Caldwell did not characterize the sexual activity on August 30, 2021, as being rough. Furthermore, and most importantly, Caldwell's conviction rests primarily on evidence that he engaged in sexual penetration without S.D.'s consent. S.D. testified that on August 30, 2021, she did not consent and told Caldwell to stop but that he did not do so. For these reasons, the evidence of S.D.'s previous sexual conduct with Caldwell was low in probative value, which supports the district court's reasoning that the probative value of the evidence was substantially outweighed by its inflammatory or prejudicial nature.

Thus, the district court did not err by denying Caldwell's motion for leave to introduce the fourth category of evidence of S.D.'s previous sexual conduct.

II. Victim's Therapy Records

Caldwell also argues that the district court erred by sustaining the state's objection during Caldwell's cross-examination of S.D. to a question concerning the records of her visits with a therapist.

Before trial, Caldwell filed a motion for *in camera* review of S.D.’s therapy records. He later withdrew the motion in light of the then-recent opinion in *In re Hope Coalition*, 977 N.W.2d 651 (Minn. 2022), in which the supreme court held that the sexual-assault-counselor privilege in Minnesota Statutes section 595.02, subdivision 1(k), prevents a criminal defendant from obtaining disclosure or *in camera* review of records of therapy with a sexual-assault-counselor without the consent of the person who sought therapy. *Id.* at 657-62.

At trial, S.D. testified that she texted and spoke with her therapist about a 2019 incident in which she and Caldwell engaged in sex. The state did not ask S.D. about the therapy itself, either with respect to the 2019 incident or the 2021 incident at issue in this case. On cross-examination, Caldwell asked S.D. whether the prosecutors had asked her to sign a waiver “so that that information could be used in this trial.” The state objected, and the district court sustained the objection after a sidebar conference. The district court reasoned that S.D. was not obligated to sign the waiver and that her refusal to waive the privilege should not allow Caldwell to question the credibility of her testimony.

In Caldwell’s motion for a new trial, he argued that the district court erred by prohibiting cross-examination about the therapy records because it prevented him from testing S.D.’s credibility. The district court denied the motion by reiterating its earlier reasoning and by stating that S.D. “testified to just about anything I can imagine would be coming out in a therapeutic intervention.” The district court did not cite any legal authority, other than *Hope Coalition*, in connection with its ruling. It appears that the district court reasoned that the information sought by Caldwell either was not relevant or had little

probative value and that any probative value was outweighed by the potential for unfair prejudice. *See* Minn. R. Evid. 401-403.

Caldwell contends that the district court erred on the ground that the question did not implicate or undermine the sexual-assault-counselor privilege because he did not attempt to elicit information about the therapy itself but only the fact that she did not waive the privilege and allow the disclosure of the records of her therapy sessions. Caldwell also contends that the district court erred on the ground that he should be allowed to ask the jury to draw an adverse inference from S.D.'s reliance on the statutory privilege. The district court's ruling is consistent with the purpose of the statutory privilege and the holding in *Hope Coalition*. A contrary ruling might chill the assertion of the privilege and subject a witness to unfair attacks on the witness's credibility. Caldwell further contends that the district court erred on the ground that the state opened the door by asking S.D. questions about her therapy. But the state did not elicit testimony about the substance of S.D.'s therapy sessions, so the state did not gain an unfair advantage due to S.D.'s decision to not disclose her therapy records. For these reasons, the district court did not abuse its discretion in sustaining the state's objection.

Thus, the district court did not err by excluding evidence concerning whether S.D. waived the statutory privilege protecting the records of her therapy sessions.

III. Prosecutorial Misconduct

Caldwell next argues that the prosecutor engaged in misconduct on four occasions during the trial.

The right to due process of law includes the right to a fair trial, and the right to a fair trial includes the absence of prosecutorial misconduct. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005); *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *rev. denied* (Minn. June 19, 2007). “Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial.” *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008) (quotation omitted).

The state concedes that the prosecutor engaged in misconduct on two of the four occasions identified by Caldwell. First, the state concedes that the prosecutor engaged in misconduct by twice eliciting testimony that, on one occasion between 2019 and 2021, Caldwell bit S.D.’s breast during sex, even though the district court previously had ruled that that evidence was inadmissible. The prosecutor explained that she had instructed the state’s witnesses to not mention that incident, and the district court found that the attempt to introduce inadmissible evidence was unintentional.

Second, the state concedes that the prosecutor engaged in misconduct by eliciting hearsay testimony concerning the reasons why a witness was not available for trial. Specifically, S.D. testified that, immediately after the incident, she called her best friend and said that Caldwell had raped her. The prosecutor continued by asking S.D. where the friend was at the time of trial and whether the friend was available to testify. S.D. stated that the friend was living abroad and was unable to return to Minnesota at that time. The state asserts that the prosecutor’s act of eliciting that evidence is “probable error.”

In addition, Caldwell contends that the prosecutor engaged in misconduct on two other occasions. His third contention is that the prosecutor engaged in misconduct by

eliciting evidence that inaccurately suggested that Caldwell had used surreptitious means to gain access to S.D.'s cell phone and obtain a video-recording of text messages between him and S.D. Caldwell contends that the prosecutor violated the principle that the state may not "deprive a defendant of a fair trial by means of insinuations and innuendos which plant in the minds of the jury a prejudicial belief in the existence of evidence which is otherwise inadmissible." *State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994) (quotation omitted). The prosecutor may not have anticipated S.D.'s testimony because the prosecutor asked a relatively broad question. For that reason, we are unable to conclude that the prosecutor engaged in misconduct with respect to this issue. Furthermore, Caldwell's attorney later elicited evidence that S.D. had given the video-recording to T.H. and that T.H. had passed it along to Caldwell. Caldwell's attorney effectively rebutted any lingering suggestions in closing argument.

Caldwell's fourth contention is that the prosecutor improperly impeached him with statements in a police report that was prepared by an officer who did not testify at trial. Caldwell objected, and the district court sustained the objection. The state contends that, despite the district court's ruling, the prosecutor's attempt to impeach Caldwell is justified by caselaw stating that a prosecutor may impeach a witness with the statement of a non-testifying third party so long as the impeachment is not "simply an attempt by the prosecutor to use innuendo." *State v. Ostlund*, 416 N.W.2d 755, 761-762 (Minn. App. 1987) (quoting *State v. Stofflet*, 281 N.W.2d 494, 497 (Minn. 1979)), *rev. denied* (Minn. Feb. 24, 1988). Caldwell acknowledges this caselaw but asserts that it is no longer good law in light of *State v. Scales*, 518 N.W.2d 587 (Minn. 1994). But Caldwell has not

identified any caselaw expressly overruling *Ostlund* or *Stofflet*. For that reason, we are unable to conclude that the prosecutor engaged in misconduct with respect to this issue.

The state argues that Caldwell is not entitled to a new trial for the two instances of prosecutorial misconduct that are conceded. Whether objected-to prosecutorial misconduct deprived the defendant of a fair trial is determined according to a two-tier approach. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). If “the case involves less serious prosecutorial misconduct, [the court examines] whether the misconduct likely played a substantial part in influencing the jury to convict.” *Id.* (quotation omitted). If the case involves more serious misconduct, courts will reverse “unless the misconduct is harmless beyond a reasonable doubt.” *Id.* The state contends that the conceded misconduct falls in the less-serious category. Caldwell does not dispute the state’s argument.

The evidence that Caldwell once bit S.D.’s breast might have placed him in a bad light. But Caldwell’s conduct in that incident did not resemble Caldwell’s conduct on August 30, 2021. In addition, the district court gave the jury a curative instruction with respect to the first mention of biting, and Caldwell declined a curative instruction with respect to the second. We presume that the jury followed the district court’s curative instructions and disregarded this evidence. *See State v. Steward*, 645 N.W.2d 115, 122 (Minn. 2002). The unavailability of S.D.’s best friend to testify at trial does not appear to have had any impact on the verdict. Two other witnesses testified that S.D. texted them about this incident soon afterward. With respect to both instances of conceded misconduct, the district court sustained Caldwell’s objection. Accordingly, it appears unlikely that

prosecutorial misconduct played a substantial part in influencing the jury to convict. Thus, Caldwell is not entitled to a new trial due to prosecutorial misconduct.

Caldwell also argues that he is entitled to a new trial on the ground of cumulative errors relating to both prosecutorial misconduct and the district court's evidentiary rulings. The cumulative-error rule applies if an appellant establishes two or more errors, none of which individually requires reversal but which have the cumulative effect of denying the appellant a fair trial and requiring a new trial. *State v. Jackson*, 714 N.W.2d 681, 698 (Minn. 2006); *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006). But we have concluded that the district court did not err in its evidentiary rulings. *See supra* parts I-II. Because we have concluded that there is only one error, prosecutorial misconduct, the cumulative-error rule does not apply. *See State v. Mayhorn*, 720 N.W.2d 776, 791-792 (Minn. 2006) (reversing and remanding for new trial based on combination of multiple evidentiary errors and multiple incidents and types of prosecutorial misconduct).

IV. Multiple Convictions

Caldwell next argues, in the alternative, that the district court erred by entering convictions on both count 1 and count 2 on the ground that the latter offense is included in the former offense.

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). Caldwell contends that count 2 is an included offense because it is a “lesser degree of the same crime” charged in count 1 and because it is a “crime necessarily proved if the crime charged [in count 1] were proved.” *See id.*, subds. 1(1), 1(4). In determining whether an offense is an “included

offense” under section 609.04, courts examine “the elements of the offense instead of the facts of the particular case.” *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). This court applies a *de novo* standard of review to the application of section 609.04. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013).

The state concedes that the offense in count 2 is a lesser-included offense and that the district court erred by entering convictions on both count 1 and count 2. But the parties take slightly different positions concerning the appropriate appellate remedy. Caldwell asks this court to vacate the conviction on count 2 and remand to the district court with instructions to issue an amended sentencing order. The state asks this court to vacate the conviction on count 2 without remanding. Consistent with this court’s customary remedy, we reverse the entry of the conviction on count 2 and remand to the district court with instructions to vacate the conviction on count 2 while leaving the adjudication of guilt intact and to issue an amended warrant of commitment reflecting a single conviction on count 1. *See State v. Bonkowske*, 957 N.W.2d 437, 443-44, 446 (Minn. App. 2021); *see also State v. Jones*, No. A23-0950, 2024 WL 3024993, at *3 (Minn. App. June 17, 2024); *State v. Skinaway*, No. A19-1324, 2020 WL 1910179, at *1, 5 (Minn. App. Apr. 20, 2020); *State v. Rogers*, No A17-1373, 2018 WL 3716086, at *2 (Minn. App. Aug. 6, 2018); Minn. R. Civ. App. P. 136.01, subd. 1(c) (stating that “nonprecedential opinions may be cited as persuasive authority”).

V. Motion for Downward Dispositional Departure

Caldwell next argues, again in the alternative, that the district court erred by denying his motion for a downward dispositional departure and imposing the presumptive sentence.

The Minnesota Sentencing Guidelines prescribe presumptive sentences for felony offenses. Minn. Sent’g Guidelines 2.C (2022). For any particular offense, the guidelines sentence is “presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.” Minn. Sent’g Guidelines 1.B.13 (2022). Accordingly, a district court “must pronounce a sentence . . . within the applicable [presumptive] range . . . unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (2022).

If a district court departs from the presumptive sentence, the district court is required to state the reason or reasons for the departure. Minn. Sent’g Guidelines 2.D.1.c (2022). But if the district court does not depart, the district court is not required to state reasons for imposing a presumptive sentence. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *rev. denied* (Minn. Sept. 17, 2013); *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). This court applies an abuse-of-discretion standard of review to a district court’s denial of a defendant’s motion for a downward departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Only in a “rare case” will we reverse a district court’s imposition of a presumptive sentence. *Id.*; *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Before sentencing, Caldwell moved for either a downward dispositional departure or a downward durational departure. He argued in a memorandum that he is particularly amenable to probation because of his age, his lack of criminal history, his remorse, his cooperation, his attitude, and his support from family and friends. His attorney repeated those arguments at the sentencing hearing. The district court stated that it had reviewed the motion and the relevant caselaw and factual materials. The district court referred to the

report of a psycho-sexual examination, which discussed Caldwell's need for services. The district court denied the motion after stating, "I do not find . . . that there are substantial or compelling reasons . . . for a dispositional departure."

On appeal, Caldwell reiterates the arguments that he presented to the district court. He has not established that the district court abused its discretion in finding that there are no substantial or compelling reasons for a downward dispositional departure. Thus, the district court did not err by denying Caldwell's motion for a downward dispositional departure and imposing a presumptive sentence.

VI. *Pro Se* Arguments

Caldwell has filed a *pro se* supplemental brief in which he makes four additional arguments for relief.

First, Caldwell argues that the district court erred by not imposing sanctions on the state for its alleged failure to respond to Caldwell's discovery requests seeking contact information for all persons whom the state intended to call as witnesses. The state argues in response that it served Caldwell with a witness list by the court-ordered deadline and that Caldwell has not established that he was prejudiced by any violation of a discovery rule. Caldwell refers to two persons whom the state called as witnesses at trial. Both witnesses are friends of S.D. who testified about their communications with her and about text messages that the state introduced into evidence. Caldwell has offered nothing more than speculation that his trial attorney was prejudiced by the lack of a more detailed or more timely disclosure by the state. Caldwell has not established prejudicial error arising from a discovery violation. *See State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005).

Second, Caldwell argues that the district court erred by admitting testimony of the state's forensic analyst concerning the results of an alcohol-concentration test of S.D.'s urine, which the forensic analyst had not analyzed. Caldwell argues that the admission of this testimony violated his Sixth Amendment right to confront his accusers. The state responds that Caldwell did not object to the testimony at trial. Consequently, we review only for plain error. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Caldwell does not explain how the testimony about the test result, which was negative for alcohol, affected his substantial rights. Caldwell has not established reversible plain error in the admission of the forensic analyst's testimony.

Third, Caldwell argues that he received ineffective assistance of counsel because his trial attorney did not object to the above-described testimony of the forensic analyst. To establish ineffective assistance of counsel, Caldwell must show, first, that his trial attorney's performance was below an objective standard of reasonableness and, second, that there is a reasonable probability that, but for his attorney's poor performance, the result of the proceedings would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Again, Caldwell does not explain how the result of the proceedings would have been different if his trial attorney had objected to the forensic analyst's testimony. Caldwell is not entitled to a new trial on the ground of ineffective assistance of counsel.

Fourth, Caldwell argues that the prosecutor made improper comments in closing argument that belittled his defense. Caselaw provides that a prosecutor may not denigrate or belittle a particular type of defense in the abstract. *See State v. Griese*, 565 N.W.2d 419, 428 (Minn. 1997); *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994); *State v. Salitros*,

499 N.W.2d 815, 818 (Minn. 1993). But the state is free to make arguments that are based on the evidence presented at trial. *See State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005). In this case, the comments about which Caldwell complains are arguments based on evidence that was introduced at trial. Caldwell is not entitled to a new trial on the ground that the prosecutor made comments belittling the defense.

Thus, Caldwell is not entitled to appellate relief on any of his *pro se* arguments.

Affirmed in part, reversed in part, and remanded.