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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1841**

State of Minnesota,
Respondent,

vs.

Anthony James Moore,
Appellant.

**Filed January 27, 2025
Affirmed in part, reversed in part, and remanded
Cleary, Judge***

Hennepin County District Court
File No. 27-CR-22-24121

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

Mary F. Moriarty, Hennepin County Attorney, Asha Jamison-Moreland, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Reyes, Presiding Judge; Worke, Judge; and Cleary, Judge.

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

NONPRECEDENTIAL OPINION

CLEARY, Judge

In this appeal from appellant's convictions of fifth-degree criminal sexual conduct and attempted fourth-degree criminal sexual conduct, appellant argues that he did not knowingly and intelligently waive his right to counsel. He also argues that the district court made several errors at sentencing, including (1) improperly sentencing him using a criminal-history score that included an out-of-state conviction, (2) imposing ten years of conditional release for attempted criminal sexual conduct, and (3) convicting him of both fifth-degree criminal sexual conduct and attempted fourth-degree criminal sexual conduct. Appellant also raises arguments in a pro se supplemental brief to this court. Because appellant knowingly and intelligently waived his right to counsel, the district court properly calculated appellant's criminal-history score, the district court properly convicted appellant of both fifth-degree and attempted fourth-degree criminal sexual conduct, and appellant is not entitled to relief for the issues raised in his pro se supplemental brief, we affirm in part. Because the district court erred by sentencing appellant to ten years of conditional release for attempted fourth-degree criminal sexual conduct, we reverse in part and remand.

FACTS

Respondent State of Minnesota charged appellant Anthony James Moore with gross-misdemeanor fifth-degree criminal sexual conduct (fifth-degree CSC) on December 2, 2022, alleging that he sexually assaulted a coworker while the two of them were cleaning hotel rooms.

The district court initially appointed Moore a public defender, but Moore later requested that the district court discharge his appointed attorney. The district court addressed this request at a hearing on June 2, 2023, at which Moore stated that he had “represented [himself] several times in the state of North Dakota.” An attorney from the public defender’s office assisted Moore with a written petition to proceed pro se, which Moore signed. After an on-the-record inquiry about Moore’s petition to proceed pro se, the district court discharged the public defender’s office.

The parties appeared for trial on June 20, 2023. Before trial began, the state moved to amend the complaint to add a charge of fourth-degree criminal sexual conduct (fourth-degree CSC). The state noted that it had “advise[d] [Moore’s counsel] of the [s]tate’s intention to amend if [the case] proceeded to trial,” and that the state “conveyed to Mr. Moore via email . . . that an amendment to allege felony [fourth-degree CSC] would carry with it registration requirements.” Moore agreed that he understood that the amended charge was a felony, and that “in addition to potential for prison time as opposed to local time in a workhouse, the issue of predatory offender registration arises.” Moore also stated that he had “read the statute[s] for” both fourth-degree and fifth-degree CSC.

The district court told Moore that “the idea that you are going to now face a felony crim[in]al sex charge without a lawyer strikes me as a bad idea, and . . . I’m willing to reconsider the discharge [of the public defender] because now you’re facing a felony.” Moore requested that the district court appoint him counsel but refused to accept the reappointment of his discharged public defender.

Eventually, the district court arranged for Moore to speak with another public defender. After that discussion, the district court asked if Moore wanted “to continue to represent [him]self,” and Moore said, “I have to continue to represent myself.” Moore affirmed that he recalled his written waiver and agreed that he still wanted to waive “all of those things that [he] waived before.” The district court told Moore “I don’t think that’s a good idea,” and Moore once again confirmed that he wished to waive his right to counsel.

The parties appeared for a bench trial on June 22, 2023. Before trial, Moore confirmed that he received a copy of the amended complaint. The state called four witnesses: the victim; the hotel’s housekeeping supervisor; and two law-enforcement officers. Moore did not testify.

The district court made the following written findings based on the trial testimony. On November 7, 2022, D.R., who was a housekeeper at a hotel in Rogers, was assigned to clean hotel rooms with Moore. They cleaned four rooms with no incident, but when they entered the fifth room, Moore “grabbed D.R. between her legs,” touching “her vagina over her clothes with his hand.” Moore “told D.R. he wanted to have sex with her, and D.R. told [Moore] she did not want to have sex with him.” Moore attempted “to kiss D.R. on her lips,” but she pushed him away and said “No.” D.R. then went into the hotel room’s bathroom and Moore closed the door. Moore asked D.R. “how much [she] would cost,” which D.R. believed meant he was asking “how much she would cost to have sex with him.” D.R. told Moore she was not “for sale.” D.R. finished cleaning the bathroom then took a 15-minute break.

After D.R. returned from her break, D.R. and Moore went to clean another hotel room. When D.R. entered the bathroom to clean it, Moore closed the door to the hotel room and entered the bathroom; Moore then “picked [D.R.] up from behind by putting both his arms around her under her arms, and laid her down on a bed.” While D.R. was on the bed, Moore “tried to put his hands down her pants,” and D.R. attempted to “fight[] him off.” D.R. testified that she “thought he was going to rape [her].” Moore eventually stopped, and D.R. left the room. D.R. told her supervisor what happened and contacted the police later that day.

Before calling its last witness, the state moved to amend the complaint to include attempted fourth-degree CSC, which the district court granted after all the witnesses had testified. The district court issued a written order following trial and found Moore guilty of fifth-degree CSC and attempted fourth-degree CSC.

A Pre-Sentence Investigation report (PSI) was prepared prior to sentencing which listed Moore’s previous criminal convictions, including a conviction for gross sexual imposition in Cass County, North Dakota. Moore was convicted in 2002 and sentenced to 20 years in prison. The PSI noted that this was a class A felony and assigned three criminal history points for the offense. Based on a criminal history score of three, the PSI recommended a sentence of 30 months and ten years of conditional release.

The parties appeared for sentencing on December 6, 2023. The district court specified it was sentencing Moore only for attempted fourth-degree CSC and not fifth-degree CSC because they both arose “out of one behavioral incident on the day of the

offense.” The district court then sentenced Moore to 30 months in the custody of the commissioner of corrections and ten years of conditional release.

Moore appeals.

DECISION

I. Moore’s waiver of counsel was knowing and intelligent.

Moore argues that the district court “failed to obtain a knowing and intelligent waiver of counsel” after amending the complaint to include fourth-degree CSC. Moore does not challenge his initial waiver prior to the amended complaint. The state argues that Moore effectively renewed his waiver of counsel after the district court added the charge for fourth-degree CSC because Moore was aware of the change in the maximum penalty for the offense and had an opportunity to consult with counsel.

Appellate courts “will only overturn a trial court’s finding of a valid waiver of a defendant’s right to counsel if that finding is clearly erroneous.” *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998). “A finding is clearly erroneous when there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a mistake occurred.” *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). If “the facts are undisputed, however, the question of whether a waiver-of-counsel was knowing and intelligent is a constitutional one that is reviewed de novo.” *Id.*

Criminal defendants have a right to assistance of counsel. U.S. Const. amend. VI and XIV; Minn. Const. art. 1. § 6. Criminal defendants also have “a constitutional right to proceed *without* counsel when [they] voluntarily and intelligently elect[] to do so.”

Faretta v. California, 422 U.S. 806, 807 (1975). “[I]n order to represent [one]self, the accused must knowingly and intelligently” waive their right to counsel. *Id.* at 835 (quotation omitted). A defendant who waives their right to counsel “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.” *Id.* (quotation omitted). In Minnesota, a waiver of appointment of counsel “shall in all instances be made in writing, signed by the defendant, except that in such situation if the defendant refuses to sign the written waiver, then the court shall make a record evidencing such refusal of counsel.” Minn. Stat. § 611.19 (2022). The Minnesota Rules of Criminal Procedure also require that the district court advise an appellant of certain rights before accepting a waiver. Minn. R. Crim. P. 5.04, subd. 1(4).

“Whether a waiver of a constitutional right is valid depends upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.” *Worthy*, 583 N.W.2d at 275-76 (quotation omitted). The supreme court has concluded that a waiver can be valid “even when a detailed on-the-record colloquy between the defendant and the trial court was absent” if there were “circumstances that demonstrated a valid waiver by the defendant.” *Id.* at 276. In *Worthy*, two defendants “fired” their attorneys just before trial. *Id.* at 274. The supreme court concluded that, even though the district court “did not include a recitation of the charges or potential punishments” in the defendants’ waivers, they were still valid waivers because (1) the defendants had been represented by counsel “for over a month before” waiving their right to an attorney at trial, (2) the district court explained the consequences of proceeding pro

se, and (3) both defendants had multiple felony convictions and court experience. *Id.* at 276. The supreme court noted that “[w]hen a defendant has consulted with an attorney prior to waiver, a trial court could reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel.” *Id.* (quotation omitted).

“[A]s a general rule, a defendant who has knowingly, intelligently, and voluntarily waived his right to counsel need not renew his waiver-of-counsel at subsequent proceedings.” *Rhoads*, 813 N.W.2d at 887. There is an exception to this general rule when the consequences of a criminal conviction are substantially altered. *Id.* at 888. In *Rhoads*, the supreme court concluded that “an amended charge that *doubles* the maximum possible punishment substantially alters the consequences of a criminal conviction.” *Id.*

Moore was initially charged with gross misdemeanor fifth-degree CSC under Minn. Stat. § 609.3451, subd. 1a(1) (2022). An individual convicted of gross misdemeanor fifth-degree CSC “may be sentenced to imprisonment for not more than one year or to a payment of a fine of not more than \$3,000, or both.” Minn. Stat. § 609.3451, subd. 2 (2022). The state amended the complaint to add a charge for felony fourth-degree CSC under Minn. Stat. § 609.345, subd. 1(a) (2022). An individual convicted of fourth-degree CSC, “may be sentenced to imprisonment for not more than ten years or to a payment of a fine of not more than \$20,000 or both” and “is also subject to conditional release.” Minn. Stat. § 609.345, subd. 2 (2022). As in *Rhoads*, the maximum sentence for fourth-degree CSC is more than double that of fifth-degree CSC, and, accordingly, the consequences of conviction were substantially altered. *Rhoads*, 813 N.W.2d at 888. Therefore, the district

court needed to obtain a knowing and voluntary renewed waiver after amending the complaint.

The best practice for the district court in this instance would have been to require Moore to sign a second written waiver, followed by a detailed colloquy as required under Minn. R. Crim. P. 5.04. Moore did not, however, sign a second written waiver of counsel after the complaint was amended, and the district court did not make an on-the-record inquiry about the potential punishments for fourth-degree CSC. Therefore, we must determine whether the waiver was valid based on “the particular facts and circumstances surrounding [this] case, including the background, experience, and conduct of the accused.” *Worthy*, 583 N.W.2d at 275-76.

The state argues that the circumstances in this case support the conclusion that Moore’s renewed waiver of counsel was knowing and voluntary. Specifically, the state argues that (1) Moore had proper notice of the amended charge, (2) the district court “engaged in a lengthy on-the-record colloquy regarding [Moore’s] right to counsel,” (3) Moore spoke with a court-appointed attorney before waiving his right to an attorney, and (4) Moore had experience “representing himself in court proceedings.”

The state argues that it informed Moore of the amended charge in an email, but this email is not part of the record. However, the record contains other evidence indicating that Moore was aware of the amended charge and the associated penalty. Moore stated at the June 20 hearing that he “read the statute for the fourth degree and fifth degree.” The fourth-degree CSC statute states that “a person convicted under subdivision 1 or

subdivision 1a may be sentenced to imprisonment for not more than ten years or to a payment of a fine of not more than \$20,000 or both.” Minn. Stat. § 609.345, subd. 2.

Additionally, during the district court’s colloquy, Moore confirmed that he understood that the amended charge was a felony, and that felony criminal sexual conduct involved the “potential for prison time as opposed to local time in a workhouse” and the potential lifetime “predatory offender registration.” The district court also warned Moore about the consequences of proceeding pro se, stating “I don’t think that’s a good idea.”

Moore also spoke with an attorney before deciding to waive his right to counsel. “When a defendant has consulted with an attorney prior to waiver, a trial court could reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel.” *Worthy*, 583 N.W.2d at 276 (quotation omitted). Like the defendants in *Worthy*, Moore had the opportunity to consult with an attorney who, presumably, informed him of the risks of proceeding without counsel. *Id.*

Also, like the defendants in *Worthy*, Moore had experience representing himself in other criminal cases. *Id.* The defendants in *Worthy* both had several felony convictions. *Id.* Moore stated to the district court that he had represented himself “several times” for cases in another state.

Although the district court failed to obtain a written waiver of counsel and the district court’s inquiry did not address the increased possible punishment for the fourth-degree CSC charge, the record shows that Moore was aware of the increased punishment, had the opportunity to discuss continuing pro se with counsel, understood the

consequences of proceeding pro se, and had previous experience with criminal litigation. Therefore, like the court in *Worthy*, the district court did not err by determining that Moore knowingly and voluntarily waived his right to court-appointed counsel.

II. The district court did not abuse its discretion in calculating Moore’s criminal history score.

Moore also argues that the district court abused its discretion “by including a North Dakota conviction for Gross Sexual Imposition in Moore’s criminal history score because the [s]tate did not prove that the conduct for that conviction would have been a felony in Minnesota.” The state argues that “the record adequately supports the calculation of [Moore’s] felony criminal-history score.”

“A sentence based on an incorrect criminal-history score is an illegal sentence” and can be corrected at any time. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007); Minn. R. Crim. P. 27.03, subd. 9. Appellate courts review a district court’s calculation of a defendant’s criminal history score for an abuse of discretion. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006).

A criminal history score is a “sum of points from eligible [] prior felonies; [] custody status at the time of the offense; [] prior misdemeanors and gross misdemeanors; and [] prior juvenile adjudications.” Minn. Sent’g Guidelines 2.B. (2022). “The basic rule for computing the number of prior felony points . . . is that the offender is assigned a particular weight for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing.” Minn. Sent’g Guidelines cmt. 2.B.101.

Convictions from jurisdictions other than Minnesota are considered when calculating an offender's criminal history score. Minn. Sent'g Guidelines 2.B.5.a. "An offense may be counted as a felony only if" (1) it would "be defined as a felony in Minnesota," and (2) "the offender received a sentence that in Minnesota would be a felony-level sentence."¹ Minn. Sent'g Guidelines. 2.B.5.b. To determine whether an offense would be defined as a felony in Minnesota, a "sentencing court should compare the definition of the foreign offense with the definitions of comparable Minnesota offenses but also may consider the nature of the foreign offense and the sentence received." *Hill v. State*, 483 N.W.2d 57, 58 (Minn. 1992). The statutes need not be "perfectly parallel," but should be "sufficiently close to each other." *Id.* at 62 (quotations omitted).

A "district court may not use out-of-state convictions to calculate a defendant's criminal-history score unless the state lays foundation for the court to do so." *Maley*, 714 N.W.2d at 711. "The state must establish by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota." *Id.* (citing *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983)). "Fair preponderance of the evidence means that it must be established by greater weight of the evidence" meaning it is "more likely that the claim is true than not true." *Id.* at 12 (quotations omitted).

¹ "'Felony' means a crime for which a sentence of imprisonment for one year or more may be imposed." Minn. Stat. § 609.02, subd. 2 (2022). Moore does not argue on appeal that he did not receive a felony-level sentence for his North Dakota conviction.

The PSI states that “[a]ccording to file records, [Moore] was charged in 2001 in Cass County, ND with two counts of sexual assault involving two separate adult female victims. It was alleged these assaults occurred four or five days apart and each involved physical force and threats of death.” Moore was convicted of one count of felony gross sexual imposition in Cass County, North Dakota in 2002 and sentenced to 20 years in prison. The PSI assigned Moore three criminal history points based on the North Dakota conviction.

Moore argues that “[t]he [s]tate did not prove what Moore was convicted of doing” and, therefore “did not meet the requirements to include the out-of-state conviction.” The state had the burden to prove by a fair preponderance of the evidence that (1) the prior conviction was valid, (2) Moore was the person convicted, and (3) the crime would be a felony in Minnesota. *Maley*, 714 N.W.2d at 711. The PSI shows by a preponderance of the evidence that Moore had a valid prior conviction and that Moore was the person involved by noting information about the sexual assaults, the victims, and Moore’s prison sentence.

The state argues that it met its burden to show that Moore’s previous conviction would be a felony in Minnesota. Moore was convicted of gross sexual imposition under N.D. Cent. Code § 12.1-20-03, which is categorized as a “Class A Felony” in the PSI. The text of the statute is as follows:

1. A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if:
 - a. That person compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;

b. That person or someone with that person's knowledge has substantially impaired the victim's power to appraise or control the victim's conduct by administering or employing without the victim's knowledge intoxicants, a controlled substance . . . or other means with intent to prevent resistance;

c. He knows that the victim is unaware that a sexual act is being committed upon him or her;

d. The victim is less than fifteen years old; or

e. He knows or has reasonable cause to believe that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct.

2. A person who engages in sexual contact with another, or who causes another to engage in sexual contact, is guilty of an offense if:

a. The victim is less than fifteen years old;

b. He compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being.

3. An offense under this section is a class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim or if his conduct violates subdivision a or d of subdivision 1. Otherwise the offense is a class B felony.

N.D. Cent. Code § 12.1-20-03 (1997). When the conduct leading to Moore's conviction occurred, North Dakota defined a "sexual act" as "contact between the penis and the vulva . . . [or] anus, the mouth and the penis . . . [or] vulva, or any other portion of the human body and the penis, anus, or vulva; or the use of an object which comes in contact with the victim's anus, vulva, or penis." N.D. Cent. Code § 12.1-20-02.3 (1997). Sexual contact "occurs upon penetration, however slight." *Id.*

The state argues that "[t]he applicable section of the North Dakota statute is sufficiently close to the Minnesota offense of first-degree criminal sexual contact." The Minnesota statute for criminal sexual conduct in the first-degree states that

A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the first-degree if any of the following circumstances exists:

(a) circumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;

(b) the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit;

(c) the actor causes personal injury to the complainant, and any of the following circumstances exist:

(i) the actor uses coercion to accomplish the act;

(ii) the actor uses force, as defined in section 609.341, subdivision 3, clause (2); or

(iii) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

(d) the actor uses force as defined in section 609.341, subdivision 3, clause (1); or

(e) the actor is aided or abetted by one or more accomplices within the meaning of section 609.05, and either of the following circumstances exists:

(i) the actor or an accomplice uses force or coercion to cause the complainant to submit; or

(ii) the actor or an accomplice is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant reasonably to believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit.

Minn. Stat. § 609.342, subd. 1 (2022). Minnesota statutes define “sexual penetration” as “sexual intercourse, cunnilingus, fellatio, or anal intercourse, or . . . any intrusion however slight into the genital or anal openings” by a body part or an object. Minn. Stat. § 609.341, subd. 12 (2022). First-degree criminal sexual conduct is a severity level A felony, which is assigned three criminal-history points. Minn. Sent’g Guidelines 5.B, 2.B.1.b (2022).

The state argues that these statutes are substantially similar, specifically the language about causing “a reasonable fear of imminent great bodily harm,” and the use of force or coercion. Minn. Stat. § 609.342, subd. 1(a), (d)-(e). The state also notes that Moore was sentenced to 20 years in prison, which “demonstrates the severity of the offense.” The state’s argument is persuasive. While the statutes are not identical, they are substantially similar, especially in their references to threats, force, and coercion. Additionally, North Dakota’s definition of a “sexual act” is sufficiently similar to Minnesota’s definition of “sexual penetration.”

While Moore’s 20-year sentence for his North Dakota conviction is not determinative of whether gross sexual imposition would be a felony in Minnesota, it supports the district court’s determination that Moore engaged in the equivalent of first-degree criminal sexual conduct, which is a felony in Minnesota. Therefore, the state met its burden of showing by a fair preponderance of the evidence that Moore’s North Dakota conviction would have been a felony in Minnesota, and, accordingly, the district court did not abuse its discretion by assigning the conviction three criminal history points.²

² We note that the state argues that, if this case were remanded for resentencing “the district court should have discretion to allow additional arguments related to a custody status point.” Moore argues that, if the case is remanded, “the district court cannot impose a sentence any greater than the 30-month prison sentenced already imposed because *State v. Prudhomme* prohibits the imposition of a greater sentence for a previously sentenced conviction.” 228 N.W.2d 243, 246 (Minn. 1975). We do not address this issue, given that the district court did not abuse its discretion in determining Moore’s criminal history score.

III. The district court erred by sentencing Moore to conditional release.

Both Moore and the state agree that we should remand this matter for resentencing to vacate Moore’s sentence of ten years of conditional release. A court may correct an unauthorized sentence at any time. Minn. R. Crim. P. 27.03, subd. 9. While district courts have broad discretion when imposing a sentence, they cannot impose an unauthorized sentence. *State v. Olson*, 325 N.W.2d 13, 18 (Minn. 1982); Minn. Stat. § 609.095(a) (2022). A sentence is unauthorized if it is “contrary to law or applicable statutes.” *State v. Borrego*, 661 N.W.2d 663, 666 (Minn. App. 2003) (citation omitted).

In *State v. Noggle*, the supreme court concluded that a district court could not impose a ten-year conditional release term for an attempted criminal sexual conduct offense. 881 N.W.2d 545, 550 (Minn. 2016). The supreme court noted that the applicable statute required conditional release for a *violation* of the criminal sexual conduct statute. *Id.*; see Minn. Stat. § 609.3455, subd. 6 (2022) (stating that there is a mandatory ten-year conditional release term for “a violation of” several sections, including 609.344 and 609.345). Since an “attempted” crime is an “uncompleted offense” and therefore not a “violation,” the supreme court concluded that the criminal sexual conduct statute “does not authorize a [ten]-year conditional release term for” attempted criminal sexual conduct.³ *Noggle*, 881 N.W.2d at 550-51.

³ The appellant in *Noggle* was convicted of third-degree criminal sexual conduct under Minn. Stat. § 609.344 (2022). *Noggle*, 881 N.W.2d at 546, 551. The statute addressing conditional release for criminal sexual conduct is the same for both third- and fourth-degree criminal sexual conduct. Minn. Stat. § 609.3455, subd. 6.

The district court convicted Moore of fifth-degree CSC and attempted fourth-degree CSC but sentenced him only for attempted fourth-degree CSC. Moore was sentenced to 30 months of incarceration, and ten years of conditional release. Because the district court imposed conditional release as part of a sentence for attempted criminal sexual conduct, this portion of his sentence is unauthorized, and the district court abused its discretion. Accordingly, we reverse and remand for the district court to resentence Moore.

IV. The district court did not err by convicting Moore for both fifth-degree CSC and attempted fourth-degree CSC.

Moore argues that “[t]his [c]ourt must vacate Moore’s conviction for” fifth-degree CSC, because it is an included offense of attempted fourth-degree CSC and arose from the same behavioral incident. The state argues that the district court “appropriately adjudicated both counts because the convictions involved different elements and different conduct.”

“Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04 subd. 1 (2022). The supreme court has held that this statute prohibits “multiple convictions . . . for a single criminal act.” *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). Whether a sentence violates Minn. Stat. § 609.04 is “a legal question [appellate courts] review de novo.” *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

A. Fifth-degree CSC is not an included offense of attempted fourth-degree CSC.

An included offense can be “a lesser degree of the same crime,” or “a crime necessarily proved if the crime charged were proved.” Minn. Stat. § 609.04, subd. 1(1), (4). While fifth-degree CSC is a lesser-degree of fourth-degree CSC, it is not a lesser-degree

of *attempted* fourth-degree CSC because attempt is a separate crime under Minn. Stat. § 609.17 (2022).

Fifth-degree CSC is also not a crime necessarily proved if attempted fourth-degree CSC is proved. To determine “whether one offense is necessarily included in the other, [appellate courts] compare the statutory elements of the two offenses.” *State v. Degroot*, 946 N.W.2d 354, 364 (Minn. 2020) (quotation omitted). Fifth-degree CSC, under Minn. Stat. § 609.3451, subd. 1a(1), occurs when “the person engages in nonconsensual sexual contact.” Fourth-degree CSC is governed by Minn. Stat. § 609.345 (2022). Minnesota Statute § 609.17, subd. 1 states that “[w]hoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime.” Accordingly, attempted fourth-degree CSC under Minn. Stat. § 609.345, subd. 1(a), occurs when a defendant *attempts* to engage “in sexual contact with another person” using “coercion to accomplish the sexual contact.” Because attempted fourth-degree CSC does not require actual sexual contact, and fifth-degree CSC does, fifth-degree CSC is not necessarily proved if fourth-degree CSC is proved and is therefore not an included offense of attempted fourth-degree CSC.

B. Moore committed two acts of criminal sexual conduct.

Moore also argues that the district court erred by convicting him of both fifth-degree CSC and attempted fourth-degree CSC because both convictions arose out of the same criminal act and behavioral incident. The state argues that the district court did not err because the two convictions did not arise out of the same incident.

We first note the difference between the prohibitions in Minn. Stat. § 609.035 (2022) and Minn. Stat. § 609.04. Minnesota Statute § 609.035, subd. 1 prohibits multiple *sentences* for “more than one offense” arising from the same instance of *conduct*. Minnesota Statute § 609.04, on the other hand, prohibits multiple *convictions* “for a single criminal *act*.” *LaTourelle*, 343 N.W.2d at 284 (emphasis added); *see also* Minn. Stat. § 609.035, subd. 6 (“Notwithstanding subdivision 1, a . . . conviction for committing a violation of sections 609.342 to 609.345 . . . is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct.”). Accordingly, an offender can receive multiple convictions for multiple acts that occur as part of a single behavioral incident but cannot receive multiple sentences. *State v. Papadakis*, 643 N.W.2d 349, 358 (Minn. App. 2002).

The record evidence shows two separate acts of criminal sexual conduct. The first act occurred when Moore “grabbed D.R. between her legs” and “touched her vagina over her clothes with his hand.” D.R. then “took a 15-minute break.” The second act occurred after D.R.’s break when Moore “picked her up from behind putting both his arms around her under her arms, and laid her down on a bed” then “tried to put his hands down her pants.”

These two acts took place at different times and in different rooms. And, most importantly, the first act can be characterized as fifth-degree CSC because it involved nonconsensual sexual contact given that Moore touched D.R.’s genital area, and the second act can be characterized as attempted fourth-degree CSC because it involved attempted

sexual contact using force or coercion, but no actual sexual contact. These are clearly two separate criminal acts.

Therefore, while Moore's offenses may have been committed as part of one behavioral incident under Minn. Stat. § 609.035, he committed two separate criminal sexual acts under Minn. Stat. § 609.04. Accordingly, the district court complied with both statutes by convicting Moore of both counts but sentencing him for only one of the offenses.

V. Moore is not entitled to relief based on the arguments in his pro se supplemental brief.

Moore raises several additional arguments in a pro se supplemental brief. Moore argues that (A) “[t]he district court erred by sentencing [him to] 30 months in prison instead of 24 months,” (B) “the evidence is insufficient for the felony conviction,” (C) “[t]he sentencing transcript has been falsified,” and (D) “[t]he complaint was illegally amended before a verdict or finding of guilt.” Moore also argues that “[t]he district court erred by” convicting him “of multiple counts extending from a single behavioral incident,” which is addressed above.

A. The district court did not abuse its discretion by sentencing Moore to 30 months.

Moore argues that he should not have been sentenced to more than 24 months. Under Minn. Stat. § 609.17, subd. 4, “[w]hoever attempts to commit a crime may be sentenced . . . to not more than one-half of the maximum imprisonment or fine or both provided for the crime attempted.” Moore asserts that his criminal history score should have been one and a half or two, rather than three. He argues that, based on a criminal

history score of two and the sex offender grid in the Minnesota Sentencing Guidelines, his presumptive sentence for a completed offense would have been 48 months and, therefore he should not have been sentenced to more than 24 months for an attempt.

Appellate courts “afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). “A district court abuses its discretion when its decision is based on 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). Whether a sentence conforms to the requirements of a statute, or the sentencing guidelines is a question of law that appellate courts review de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

Because, as stated above, the district court did not err in treating Moore’s North Dakota convictions as first-degree criminal sexual conduct, the district court properly assigned Moore three criminal history points. Minn. Sent’g Guidelines 5.B, 2.B.1.b. The presumptive sentence for completed fourth-degree CSC with a criminal history score of three is 60 months. Minn. Sent’g Guidelines 4.B. Thirty months’ incarceration is half of the presumptive sentence for the completed offense. Therefore, the district court did not abuse its discretion because it properly applied the law by sentencing Moore to 30 months.

B. The evidence was sufficient to convict Moore of attempted fourth-degree CSC.

Moore argues that there was not sufficient evidence to convict him of attempted fourth-degree CSC. When reviewing for sufficiency of the evidence, “appellate courts

carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the [fact-finder]⁴ to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). Appellate courts view the evidence “in the light most favorable to the verdict” and assume “that the fact-finder disbelieved any evidence that conflicted with the verdict.” *Id.*

The state had to prove that Moore attempted to use “coercion to accomplish . . . sexual contact.” Minn. Stat. § 609.345, subd. 1(a). The crime of attempt is defined as “an act which is a substantial step toward, and more than preparation for” the crime, done “with intent to commit [the] crime.” Minn. Stat. § 609.17, subd. 1. Coercion is defined as “use by the actor of words or circumstances that cause the complainant reasonably to fear the infliction of bodily harm upon the complainant or another, or the use by the actor of confinement, or superior size or strength, against the complainant to accomplish the act.” Minn. Stat. § 609.341, subd. 14 (2022). Sexual contact is defined above. Minn. Stat. § 609.341, subd. 11.

D.R.’s testimony provided evidence sufficient to convict Moore of attempted fourth-degree CSC. She testified that, while cleaning a hotel room after her break, Moore closed the hotel room door, “[put] both his arms around her,” and “picked her up.” He then moved her to the bed and tried to put his hands down her pants. Generally, a victim’s

⁴ Appellate courts “use the same standard of review in bench trials and in jury trials in evaluating the sufficiency of the evidence.” *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011).

testimony in a sex crime case “need not be corroborated.” *State v. Blair*, 381 N.W.2d 908, 910 (Minn. App. 1986).

Moore’s conduct indicates that he intended to touch D.R.’s genitals, which is sexual contact, because he attempted to reach down her pants. Minn. Stat. § 609.341, subd. 11 (sexual contact includes “the intentional touching by the actor of the complainant’s intimate parts”). He did so by using coercion because, by picking up D.R. and putting her on the bed, he used “confinement, or superior size or strength against” her. Minn. Stat. § 609.341, subd. 14. By engaging in this conduct, he took a substantial step towards committing fourth-degree CSC. Therefore, there was sufficient evidence for the district court to convict Moore of attempted fourth-degree CSC.

C. Moore fails to show any error related to the sentencing hearing transcript.

Moore argues that the transcript from the sentencing hearing “has been falsified to reflect statements never made by [him] to verify the tape recorder to the sentencing transcripts” and claims that the transcript reflects statements “he never made.” He states in his brief to this court that “[t]here is always a tape machine used in court proceedings recording verbal statements made by the parties” and “[t]his recording must be presented to the Minnesota Court of Appeals. If they do, they are in trouble and if they do not then they are still in trouble.”

“An assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.” *State v. Yang*, 774 N.W.2d 539, 552

(Minn. 2009) (quotation omitted). Accordingly, appellate courts do not consider arguments when a party “cites no authority and provides no further argument to support [an] assertion.” *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015).

Moore appears to assert that the transcript is falsified and reflects statements that he did not make. He does not provide further argument or authority to support his allegation that this is reversible error. No prejudicial error is obvious upon mere inspection. Therefore, we do not consider this argument.

D. The district court did not err by granting the state’s motion to amend the complaint at the close of trial.

Moore argues that the district court erred by amending the complaint to include attempted fourth-degree CSC after the close of evidence at trial. He cites to Minnesota Rule of Criminal Procedure 17.05, which states that “[t]he court may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if the defendant’s substantial rights are not prejudiced.” Moore argues that his substantial rights were prejudiced because the complaint was amended after the witness testimony ended.

“The interpretation of the Minnesota Rules of Criminal Procedure is a question [appellate courts] review de novo.” *Reynolds v. State*, 888 N.W.2d 125, 129 (Minn. 2016). At trial, the state moved to amend the complaint to include attempted fourth-degree CSC prior to calling its last witness, and the district court took the motion under advisement. The district court granted the motion after all witnesses had testified. After the parties made closing arguments, the district court informed them that a verdict would be released in

seven days, then issued findings of fact, conclusions of law, and a verdict on June 29, 2023. The district court did not violate Minn. R. Crim. P. 17.05 by granting the state's motion to modify the complaint at the close of evidence at trial because the amendment was granted before the verdict was issued.

Therefore, Moore is not entitled to relief based on the arguments raised in his pro se supplemental brief.

Affirmed in part, reversed in part, and remanded.