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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1856**

State of Minnesota,
Respondent,

vs.

Peter Michael Dziuk,
Appellant.

**Filed February 3, 2025
Affirmed
Kirk, Judge***

Hennepin County District Court
File No. 27-CR-22-18365

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

Mary F. Moriarty, Hennepin County Attorney, Robert I. Yount, Assistant County Attorney,
Minneapolis, Minnesota (for respondent)

Lynne Torgerson, Minneapolis, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Wheelock, Judge; and Kirk,
Judge.

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

NONPRECEDENTIAL OPINION

KIRK, Judge

In this appeal of his convictions of two counts of third-degree criminal sexual conduct, appellant argues that (1) the evidence was insufficient to support his convictions, (2) the district court infringed on his right to represent himself at trial and his right to a fair trial before an impartial magistrate, (3) the prosecutor committed misconduct during closing argument, (4) he was deprived of his right to a speedy trial, (5) testimony about appellant's other misconduct deprived him of a fair trial, (6) he was deprived of his due-process right to present evidence in support of his theories of defense, and (7) the district court abused its discretion in denying appellant's request for a dispositional departure. We affirm.

FACTS

In September 2022, respondent State of Minnesota charged appellant Peter Michael Dziuk with one count of third-degree criminal sexual conduct by force or coercion under Minn. Stat. § 609.344, subd. 1(c) (2020), and one count of third-degree criminal sexual conduct with a mentally impaired, mentally incapacitated, or physically helpless victim under Minn. Stat. § 609.344, subd. 1(d) (2020). The state alleged that Dziuk sexually assaulted the victim, NC, multiple times in Dziuk's home in April and May of 2021.

According to the state's complaint, NC told police that he met Dziuk around 2017 when NC was "going through a tough time." Dziuk gave NC money and bought him food, alcohol, and drugs. NC then went to prison for a time and Dziuk sent him money. When NC was released, Dziuk allowed him to stay at his home. Dziuk began to make sexual

comments to NC and made NC watch pornography. Dziuk would ask NC for sex, threatening to kick NC out of the house or to call NC's probation officer if he refused.

NC told police that once, when NC was in the shower, Dziuk entered the shower uninvited, "grabbed [NC] by the back of the head and forcefully penetrated [NC's] mouth with his penis." In addition, NC told police that, one time, Dziuk put Xanax in NC's drink, causing NC to pass out. NC "woke up naked and his penis was in pain" with the foreskin "ripped around the edges." When NC confronted Dziuk, Dziuk admitted to adding Xanax to NC's drink and to biting NC's penis. NC stated that there were "numerous other times" when Dziuk "forced [NC] to have oral sex" and that Dziuk once attempted to force anal sex on NC, but NC escaped.

In March 2023, the parties appeared for a jury trial. During jury selection, the state was informed that NC was in the hospital and on medication which gave the prosecutor "concern about his ability to testify." The judge then continued the trial to May 1 on the record, but Dziuk was notified on May 3 that the jury trial was rescheduled for June 12, 2023. On May 3, Dziuk made a speedy-trial demand.

Throughout the proceedings, Dziuk expressed that he wished to represent himself. On June 12, the court provided Dziuk with detailed information on the role of advisory counsel, stating that if Dziuk elected to have advisory counsel, "we would have to put your matter on hold for a short period of time in order to have that attorney get up to speed on your case." Dziuk later confirmed that he understood that the court could appoint advisory counsel, responding "[y]es, I'm very pleased with the word[s] 'advisory counsel.'" The district court stated that "to delay the trial [it] need[s] to have good cause to do so," that "a

just trial is the most important obligation” that the district court has, that the court wanted to ensure “that [Dziuk’s] constitutional rights are upheld,” and that the court wanted “to find out about [Dziuk] having the opportunity to have legal counsel as advisory if at all possible.” The district court appointed advisory counsel.

In August 2023, the parties appeared for a jury trial for the second time. Before voir dire, the district court, the state, and Dziuk went through the PowerPoint slides that Dziuk intended to use in closing argument. With regard to one slide, the parties and the district court had the following exchange:

DZIUK: This one can be taken out. I’ll speak directly to this information during my narrative. So this doesn’t have to be in there. I’ve removed it.

THE COURT: Okay. The objection that was made by the State is that [JVS] has nothing to do with this case.

DZIUK: I don’t see how that’s possible. She was the landlady, and I was having a sexual affair with her there and had known her for 22 years. This whole case is about sex, inappropriate sex, at that house.

THE COURT: I don’t—I still don’t understand the relevance of your relationship with a different person.

DZIUK: She was both [NC’s] and my landlord. She owned the place. I didn’t even want him to come and live there. She decided to do that. You—

THE COURT: Are you going to call her—hold on. Are you going to call her as a witness to testify to that?

DZIUK: You know, if the court would issue it, but I saw a police report that she had been interviewed, and I wasn’t sure if she was going to be a State witness or not.

THE COURT: Well, [the prosecutor's] objection in her letter brief says she's a witness in the case.

And so I assume that has to do with her position as a landlady, right?

PROSECUTOR: That's correct, Your Honor. She was the landlady and roommate. She also—the victim in this case disclosed some of the abuse to her, confided in her about what was happening. So she is a witness in that sense. I don't know if the entire history of the relationship between the defendant and this particular witness is relevant to the proceedings beyond that.

THE COURT: Well, right now, sir, I don't see how your sexual relationship with a different person has any relevance to this case.

DZIUK: That's fine. . . . I would have to be sexually whatever to have had a relationship with [NC] while having a[n] intimate relationship . . .

. . . .

DZIUK: . . . I'm a full heterosexual. I'm not a rainbow warrior. I don't even support LGBT.

. . . .

THE COURT: Okay.

Well, sir, this case is about what happened between you and the alleged victim in this case. We don't need to go into anybody's sexual history outside of that.

DZIUK: Your Honor, it seems that this court assumes everything happens in a vacuum, and that's the only thing that needs to be explained. This—

THE COURT: Well, there are rules of evidence that govern this, sir. And—

DZIUK: They're extremely limited Your Honor. Thank you.

THE COURT: It's not my opinion. It's that—it's my ruling that your relationship—your sexual relationship, as I see it now, with this landlady is irrelevant and not to be gone into unless there's further offer of proof of why it's relevant.

The state called NC as its first witness. NC testified that he is physically and mentally disabled and has had several traumatic brain injuries. He was living with Dziuk at JVS's house in Bloomington in 2021. NC testified that Dziuk would do things that would scare him. He testified that Dziuk jumped in the shower with him twice. He also testified that in one incident, Dziuk gave NC orange juice, and NC "got light-headed" and was not "feeling so good." NC testified that he woke up to Dziuk "wearing his robe, drunk . . . , trying to put his fingers up my butt, trying to . . . make me give him oral sex." NC confirmed that Dziuk "penetrated [his] butt" during that incident and testified that Dziuk put "his penis in [NC's] anus" twice. When the state asked NC about JVS convincing him to go to the police, NC testified, "I don't want him to do this to anybody else. I mean, you know, he already . . . went to trial for shooting it out with Ramsey County police." The district court instructed the jury "to disregard anything regarding Ramsey County and any shooting."

The state also called a Bloomington police detective who had interviewed NC after receiving the police report in his case. She testified that NC had estimated that he was forced to perform oral sex on Dziuk "between 12 and 15 times during that two-month period" from April to May 2021.

Dziuk testified in his own defense. Before he testified, the judge warned him about providing irrelevant, inadmissible testimony:

THE COURT: And you must follow the parameters of the pretrial rulings; in other words, you can't go into character evidence that we've discussed and I told you was inadmissible. It's already happened a few times, and I don't want it to happen again. Okay?

DZIUK: Yes.

THE COURT: So you are not obviously going to question yourself. So I will allow you to testify by way of a narrative, but that narrative should address what happened between April and May of 2021, not the entire course of you knowing [NC] or [JVS] or any of these other people. This is not a historical case. This is about incidences that occurred at a single location during a one-month period.

After the court interrupted Dziuk for “discuss[ing] other cases,” speaking about “the details” of his relationship with JVS, testifying about living with JVS even though it was “not relevant to what we're here for,” and otherwise introducing irrelevant testimony, the district court began to question Dziuk itself. Dziuk denied getting in the shower with NC and attempting to anally penetrate him. On cross-examination, he admitted that he was aware of NC's cognitive disabilities.

The jury found Dziuk guilty. The district court convicted him of both charges and sentenced him to 62-months' imprisonment and a ten-year conditional-release period for the force-or-coercion offense. The district court did not impose a sentence for the second count “because it was part of the same behavioral incident.”

Dziuk appeals.

DECISION

I.

Dziuk contends that NC's testimony was insufficient to support his convictions, and therefore, both convictions must be reversed.

"A finding of guilt can be based on direct or circumstantial evidence." *State v. Olson*, 982 N.W.2d 491, 495 (Minn. App. 2022). "[D]irect evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without interference or presumption." *Id.* (quotation omitted). A criminal-sexual-conduct victim's testimony constitutes direct evidence. *See State v. Huss*, 506 N.W.2d 290, 292 (Minn. 1993) (stating that the "only direct evidence presented by the state was the testimony of the alleged victim" of criminal sexual conduct); *State v. Coley*, 468 N.W.2d 552, 555 (Minn. App. 1991) ("The victim's uncontradicted testimony constituted direct evidence of [the defendant's] crimes."). "When considering a sufficiency challenge to a guilty verdict based solely on direct evidence, an appellate court carefully analyzes the record to determine whether the evidence, viewed in the light most favorable to the conviction, was sufficient to permit the fact-finder to reach its verdict." *Olson*, 982 N.W.2d at 495. This standard applies if "a disputed element is sufficiently proven by direct evidence alone." *State v. Jones*, 4 N.W.3d 495, 500 (Minn. 2024) (quotation omitted).

Dziuk argues that there was insufficient evidence to convict him of count one because "NC never testified on direct examination that any sexual conduct occurred during the [s]hower [i]ncident" and because "there is no evidence of force or coercion." He also argues that there was insufficient evidence to convict him of count two because NC's

stories regarding “the claimed ‘[s]leeping [i]ncident’” were “radically different.” Dziuk’s arguments are not persuasive.

First, Dziuk’s claim that “NC never testified on direct examination that any sexual conduct occurred during the [s]hower [i]ncident” ignores the fact that the charges were not limited to the “[s]hower [i]ncident.” The state’s case was based on criminal sexual conduct that occurred between April 1, 2021, and May 25, 2021, and was not limited to any specific instance.

Second, the state presented evidence of force and coercion. “Force” is defined as

the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit.

Minn. Stat. § 609.341, subd. 3 (2020). “Coercion” is defined as

the use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the complainant or another, or the use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant’s will. Proof of coercion does not require proof of a specific act or threat.

Id., subd. 14 (2020).

NC testified that Dziuk used force in an attempt to accomplish sexual penetration when NC woke up to find Dziuk “trying to put his fingers up my butt, . . . trying to make me give him oral sex.” NC also testified that Dziuk used confinement and threats to get NC to submit to sexual penetration against his will. He testified that he did not feel he

could leave his living situation or report the abuse; otherwise, he would go to jail or Dziuk would kill JVS as he had told NC he would. Therefore, the record belies Dziuk's argument that "there is no evidence of force or coercion."

Third, Dziuk's argument that NC's stories were "radically different" goes to NC's credibility as a witness. "[W]eighing the credibility of witnesses is the exclusive function of the jury," and we do not do so on appeal. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

In sum, the state presented sufficient evidence at trial to support the convictions.

II.

Dziuk contends that the district court erred by infringing on his rights to represent himself at trial and to appear before an impartial magistrate.

"Criminal defendants have a constitutional right to an attorney and a corollary constitutional right to choose to represent themselves in their own trial." *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998) (citing *Faretta v. California*, 422 U.S. 806, 819-21 (1975)). A defendant's *Faretta* right to self-representation "plainly encompasses certain specific rights to have his voice heard." *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). "The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *Id.* (emphasis omitted). "In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way." *Holt v. State*, 772 N.W.2d 470, 479 (Minn. 2009) (quotation

omitted). Such “[q]uestions of constitutional law are reviewed de novo.” *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009).

Dziuk argues that the district court “took over the proceedings” and therefore infringed on his “right to dignity of directing and controlling his representation of himself” and led the jury to believe that he was not “in control of his self[-]representation.” Specifically, he asserts that the district court erred by (1) asking questions to lay the foundation for Dziuk’s evidence; (2) clarifying Dziuk’s cross-examination; (3) intervening during questioning; and (4) questioning Dziuk during his direct testimony. Dziuk claims that when the district court intervened, it assumed “the role of a prosecutor,” made comments suggesting that “the [district court] believes that [Dziuk] sexually assaulted NC,” and engaged in “hostile questioning.” We are not persuaded.

“Even where a criminal defendant has chosen self-representation . . . the [district] court still has the responsibility and power to regulate the conduct of the court proceedings.” *State v. Richards*, 552 N.W.2d 197, 205 (Minn. 1996). “The right of self-representation is not . . . a license not to comply with relevant rules of procedural and substantive law” such as the rules of evidence. *Faretta*, 422 U.S. at 834 n.46. The district court has “broad discretion when ruling on evidentiary matters,” *State v. Garland*, 942 N.W.2d 732, 747 (Minn. 2020) (quotation omitted), and it may call and interrogate witnesses itself. Minn. R. Evid. 614; *see Teachout v. Wilson*, 376 N.W.2d 460, 465 (Minn. App. 1985) (concluding that “the purpose of the questioning was to clarify the testimony,” and therefore, the district court’s questioning was “a proper exercise of the power granted by Rule 614”), *rev. denied* (Minn. Dec. 30, 1985). And the district court is permitted to

“exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence” in order to “make the interrogation and presentation effective for the ascertainment of the truth” and “avoid needless consumption of time.” Minn. R. Evid. 611(a). “A pro se defendant must generally accept any unsolicited help or hindrance that may come from the judge who chooses to call and question witnesses” *McKaskle*, 465 U.S. at 177 n.7 (emphasis omitted).

Dziuk had “a fair chance to present his case in his own way.” *Holt*, 772 N.W.2d at 479. He exercised his “specific rights to have his voice heard” by making and arguing a pretrial motion, participating in voir dire, providing an opening statement, cross-examining the state’s witnesses, moving for a directed verdict, calling a defense witness, testifying, and arguing in closing. *McKaskle*, 465 U.S. at 174 (stating that the “pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial” (emphasis omitted)).

When the district court intervened, it merely exercised its “responsibility and power to regulate the conduct of the court proceedings” and ensured that Dziuk was eliciting relevant testimony at appropriate times. *Richards*, 552 N.W.2d at 205. When Dziuk was cross-examining the state’s witnesses, the district court stated that “I’m going to ask that the questions pertain to the charges in this case as opposed to three years earlier,” ruled that “the use of marijuana is irrelevant unless it had something to do . . . with the sexual encounters,” clarified the time frame Dziuk was referring to when he asked about “the last time [the witness] saw [Dziuk] prior to this,” and reminded Dziuk that cross-examination

was an inappropriate time for Dziuk to testify. On direct examination of Dziuk's witness, the district court intervened to ensure that Dziuk did not get into irrelevant testimony regarding his witness's feelings. Finally, when Dziuk was providing narrative testimony, the district court resorted to questioning Dziuk directly after the district court already had instructed Dziuk that "[w]e're not going to discuss other cases" and "[w]e don't need the details of your relationship." In sum, the district court's involvement was an appropriate exercise of its responsibility to regulate court proceedings, and it did not infringe on Dziuk's rights. *See id.*

III.

Dziuk contends that the prosecutor plainly erred by misstating the "force or coercion" element of count one during closing argument.

We apply "the plain error doctrine when examining unobjected-to prosecutorial misconduct." *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Before this court reviews unobjected-to trial error, "there must be (1) error, (2) that is plain, and (3) affects substantial rights." *Id.* at 302. "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotations omitted).

Dziuk assigns error to the prosecutor's statements in closing argument that "coercion can be the threat of some future act against [NC] or somebody else," that "[NC] told you [that Dziuk] told him [that Dziuk] was going to hurt [or] kill [JVS]," and that "[t]his is coercion." He argues that these statements constitute prosecutorial misconduct because the state "did not charge a crime that involved [JVS] in any way," and "the

[Criminal Jury Instruction Guides] also do not reference another person.” Dziuk claims that the “[Criminal Jury Instruction Guides] can talk about threats to the victim or another person,” but the jury instructions in this case did not include references to another person “because that crime was not charged.”

The prosecutor did not plainly err. “Coercion” as used in Minn. Stat. § 609.344, subd. 1(c) includes the “use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the complainant *or another*.” Minn. Stat. § 609.341, subd. 14 (emphasis added); *see* Minn. Stat. § 609.341, subd. 1 (2020) (stating that “the terms in this section have the meanings given them” for sections 609.341 to 609.351). Under the plain language of the statute, coercion occurred if the defendant’s words led the victim to reasonably fear the infliction of bodily harm on a third party. The prosecutor followed the plain language of the statute when stating that “coercion can be the threat of some future act against [NC] *or somebody else*” and that Dziuk telling NC that “[that Dziuk] was going to hurt [or] kill [JVS]” constitutes coercion. (Emphasis added.) This was not plain error.

IV.

Dziuk contends that the district court erred in denying him his right to a speedy trial.

“This court generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure.” *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Failure to raise an issue “before the district court at trial precludes its litigation on appeal.” *Id.* This court may, at its discretion, “deviate from this rule when the interests of justice require consideration of such issues and doing so would

not unfairly surprise a party to the appeal.” *Id.*; see Minn. R. Crim. P. 28.02, subd. 11 (“On appeal from a judgment, the court may review any order or ruling of the district court or any other matter, as the interests of justice may require.”).

Dziuk did not raise the speedy-trial issue in district court, and we do not make an exception to review this issue in this case. The record indicates that Dziuk made a speedy-trial demand on May 3, 2023. At the June 12, 2023 hearing, the district court recognized that “to delay the trial [it] need[s] to have good cause to do so,” that “a just trial is the most important obligation” that the district court has, that the court wanted to ensure “that [Dziuk’s] constitutional rights are upheld,” and that the court wanted “to find out about [Dziuk] having the opportunity to have legal counsel as advisory if at all possible.” Dziuk was not in custody while awaiting trial. The trial occurred within the 120-day time frame allowed by rule 11.09 of the Minnesota Rules of Criminal Procedure. We do not consider Dziuk’s speedy-trial argument.

V.

Dziuk contends that NC’s testimony that Dziuk “went to trial for shooting it out with Ramsey County police” constituted other-misconduct evidence, was inadmissible and prejudicial, and deprived Dziuk of a fair trial.

Under Minn. R. Evid. 404,

[e]vidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Minn. R. Evid. 404(b)(1). Furthermore,

[i]n a criminal prosecution, such evidence shall not be admitted unless the prosecutor, consistent with the rules of criminal procedure, gives notice of its intent to offer the evidence. The notice must include a summary of the evidence and the specific purpose(s) for which the evidence will be offered. Such evidence shall not be admitted in a criminal prosecution unless (a) the proffered evidence is relevant to an identified material issue other than conduct conforming with a character trait; (b) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; and (c) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Minn. R. Evid. 404(b)(2).

Dziuk did not object to the witness's statement at trial; therefore, the issue is forfeited. *State v. Vasquez*, 912 N.W.2d 642, 649 (Minn. 2018) ("Appellate review of an evidentiary issue is forfeited when a defendant fails to object to the admission of evidence."). Appellate courts "review forfeited issues for plain error." *Id.* at 650. "In order to meet the plain error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights." *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotations omitted). "With respect to the substantial-rights requirement, [the defendant] bears the burden of establishing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted)

Admission of NC's statement regarding a shooting with Ramsey County police was plain error. This is "[e]vidence of another crime, wrong, or act," the admissibility of which is governed by Minn. R. Evid. 404. Minn. R. Evid. 404(b)(1). Because NC testified to the shooting when stating that he did not "want [Dziuk] to do this to anybody else," it seems that NC testified about the shooting to demonstrate that Dziuk's alleged criminal sexual conduct was an "action in conformity" with his character. *See id.* Therefore, the testimony was inadmissible under Minn. R. Evid. 404(b)(1). The state concedes that the evidence was inadmissible. Because the error contravenes a rule, it is plain error. *See Webster*, 894 N.W.2d at 787.

Although admission of NC's statement was plain error, Dziuk does not meet his burden in demonstrating that the error affected his substantial rights. After NC's testimony, the district court stopped the witness and instructed the jury, "You're to disregard anything regarding Ramsey County and any shooting." There is a "presumption that juries follow the district court's instructions." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). Dziuk does not provide any argument to suggest that the jury did not follow the district court's instructions, and he therefore has not established that this error reasonably affected the jury's verdict.

VI.

Dziuk contends that the district court violated his due-process right to present evidence in support of his theories of defense.

"The Due Process Clauses of the United States and Minnesota Constitutions mandate that criminal defendants be treated with fundamental fairness."

State v. Thompson, 617 N.W.2d 609, 612 (Minn. App. 2000). “This standard of fairness requires that criminal defendants be afforded a meaningful opportunity to present a complete defense.” *Id.* (quotations omitted). The district court “may impose reasonable limits on the testimony of each defendant,” but there is a “need to scrutinize with the greatest care any restrictions on a defendant’s testimony offered in that defendant’s own behalf as to his or her intent and the motivation underlying that intent lest we jeopardize the federal and state constitutional right to a fair trial.” *State v. Rein*, 477 N.W.2d 716, 719-20 (Minn. App. 1991), *rev. denied* (Minn. Jan. 30, 1992).

“We review a district court’s evidentiary rulings under an abuse-of-discretion standard even when it is claimed that excluding the evidence deprived the defendant of the constitutional right to present a complete defense.” *State v. Grigsby*, 806 N.W.2d 101, 112 (Minn. App. 2011), *aff’d*, 818 N.W.2d 511 (Minn. 2012). “If this court determines that the district court’s evidentiary ruling denied the defendant the right to present a complete defense, reversal is required unless the error is harmless beyond a reasonable doubt.” *Id.* An error is harmless if this court is “satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (i.e., a reasonable jury) would have reached the same verdict.” *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994) (emphasis omitted) (footnote omitted).

Dziuk argues that the district court’s rulings precluded him from presenting evidence to support his theories of defense that (1) he is heterosexual and “would not suddenly, at the age of 68, engage in homosexual sexual activity,” and that (2) Dziuk “had long been helping people down and out” and had done so “without any sexual activity,

which would thereby impeach the prosecution’s theory that he helped NC so that he could have sex with him.” Dziuk’s arguments are unpersuasive.

First, the district court did not abuse its discretion in ruling that evidence of his sexual relationship with JVS and of his sexual orientation was irrelevant. Dziuk had an opportunity to demonstrate that his sexual relationship with JVS was relevant. The district court’s ruling was subject to whether “there’s further offer of proof of why it’s relevant.” But Dziuk did not submit additional proof.

On appeal, Dziuk does not provide any Minnesota caselaw ruling that it is an abuse of discretion to prohibit a defendant from introducing evidence of his own sexual history with a third party as a defense to a criminal-sexual-conduct charge. In fact, several jurisdictions have explicitly held that evidence of an appellant’s sexual orientation is irrelevant. *See People v. Garcia*, 177 Cal. Rptr. 3d 231, 241 (Ct. App. 2014) (“[W]e do not believe the evidence of appellant’s sexual orientation was relevant to her prosecution. Period.”); *Turenne v. State*, 321 A.3d 697, 717 n.16 (Md. 2024) (stating that “both counsel seemed to be of the view that [appellant’s] sexual orientation could shed light on whether the photos of the children were sexual in nature” and “[w]ithout data to support a correlation of this sort, litigants should avoid eliciting such evidence and making such arguments, regardless of the defendant’s particular sexual orientation and regardless of the genders of the defendant and victim”); *State v. Ellis*, 820 S.W.2d 699, 702 (Mo. Ct. App. 1991) (“The sexual preferences of the defendant are irrelevant to the question of consent, actual or statutory.”).

Although we are unaware of a case in Minnesota regarding the defendant's sexual history, this court has held that a victim's sexual history is of "general irrelevance." *State v. Crims*, 540 N.W.2d 860, 867 (Minn. App. 1995), *rev. denied* (Minn. Jan. 23, 1996) (stating that "the rape shield statute serves to emphasize the general irrelevance of a victim's sexual history, not to remove relevant evidence from the jury's consideration"). This court has also held that "evidence of sexual activity with third persons cannot withstand a rule 403 weighing unless special circumstances enhance its probative value." *Id.* at 868. "Such circumstances include situations in which the evidence explains a physical fact in issue at trial, suggests bias or ulterior motive, or establishes a pattern of behavior *clearly* similar to the conduct at issue." *Id.* No such circumstances apply here. Therefore, under analogous caselaw regarding a victim's sexual history, Dziuk's sexual relationship with JVS was irrelevant.

Second, the district court did not abuse its discretion when it ruled that the defense witness's testimony regarding Dziuk's character for generosity was irrelevant. Under Minn. R. Evid. 404(a)(1), evidence of an accused's "pertinent trait of character" may be admissible. "Pertinent traits" are "those involved in the offense charged." *State v. Miller*, 396 N.W.2d 903, 906 (Minn. App. 1986). Generosity is not a trait pertinent to third-degree criminal sexual conduct. *See* Minn. Stat. § 609.344, subd. 1(c), (d).

In sum, the district court did not violate Dziuk's due-process right to present evidence in support of his theories of defense.

VII.

Dziuk contends that the district court abused its discretion by not granting him a dispositional departure.

“The sentences provided in the [Minnesota Sentencing Guidelines] Grids are presumed to be appropriate for the crimes to which they apply.” Minn. Sent. Guidelines 2.D.1 (2020). The “sentencing court can exercise its discretion to depart from the guidelines only if aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (citations and quotations omitted). “When factors that may justify departing from the presumptive sentence are present, a court must exercise its discretion and consider the factors.” *State v. Kier*, 678 N.W.2d 672, 677 (Minn. App. 2004), *rev. denied* (Minn. June 15, 2004).

“A defendant’s particular amenability to probation justifies a district court’s decision to stay the execution of a presumptively executed sentence.” *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). “Numerous factors, including the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

“This court will not generally review a district court’s exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range.” *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *rev. denied* (Minn. July

20, 2010). This applies “even if there are grounds that would justify departure.” *State v. Abeyta*, 336 N.W.2d 264, 265 (Minn. 1983). It is “a rare case which would warrant reversal of the refusal to depart.” *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Dziuk argues that he is particularly amenable to probation because he has the support of friends and family, he “would follow the terms of probation and be successful on it,” he “always had a good attitude in court,” and “he is not a danger to the community.” He also argues that the district court “erroneously stated that ‘age’ is not a basis for departure.”

This is not “a rare case which would warrant reversal of the refusal to depart.” *Kindem*, 313 N.W.2d at 7. The district court imposed the presumptive sentence because Dziuk did not express “any compassion for the victim or remorse” and had “been violent in the past couple of years to the extent of firing weapons in the presence of police.” The district court acknowledged that it had received two letters from Dziuk’s friends. Finally, the district court heard Dziuk’s arguments on other factors: Dziuk argued that “any parole requirements will be adhered to to the T”; that he would “never appear in court again for a similar charge”; that “I am necessarily at my age of 70 a lower risk than, say a man of 20, 30, 40, 50, 60”; that others “talk about how they’ve been [in jail] over and over in there and over again. But it just isn’t me”; that “I live now in a safe community where I have many friends that still believe in me and trust me”; that “I’m 70, I’m not going anywhere”; and that NC “will never find himself looking over his shoulder in fear of me.” Dziuk does not cite to authority suggesting that this was an inadequate consideration of the factors.

Dziuk is correct that the district court erred in stating that “[a]ge is not a basis for departure.” *See Trog*, 323 N.W.2d at 31 (“Numerous factors, including the defendant’s age . . . are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting.”). However, despite its incorrect statement, the district court did seem to consider Dziuk’s age in imposing the presumptive sentence:

THE COURT: All right. Mr. Dziuk, you argued your case today but you’ve already been found guilty.

DZIUK: I understand.

THE COURT: And you do not show any amenability to probation because you focus entirely on yourself and the wrongs done against you, as opposed to having any compassion for the victim or remorse or anything that would be a basis for a departure. Age is not a basis for a departure.

In addition, I am disturbed by the fact that you have been violent in the past couple of years to the extent of firing weapons in the presence of police, and getting into extensive conflicts involving violent behavior with individuals.

And yes, *people’s behavior does change as they get older, not necessarily consistent with their lifelong behavior. Other things happen. In your case there seems to be a correlation with substance abuse, but that’s something that can be looked into further.* I am not in any way -- I do not see any basis for a departure in any of the arguments that you made today.

(Emphasis added.)

In sum, the district court did not abuse its discretion in sentencing Dziuk to the presumptive sentence.

Affirmed.