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STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1985

State of Minnesota,
Respondent,

vs.

Andy Ralph Garbow,
Appellant.

Filed January 20, 2026

Affirmed in part, reversed in part, and remanded
Schmidt, Judge
Concurring in part, dissenting in part, Bentley, Judge

Mille Lacs County District Court
File No. 48-CR-21-2241

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

Corey Haller, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

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

Considered and decided by Schmidt, Presiding Judge; Bentley, Judge; and Halbrooks, Judge.[*]

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

NONPRECEDENTIAL OPINION

SCHMIDT, Judge

Appellant Andy Ralph Garbow advances five grounds to challenge his convictions of, and corresponding sentences for, first- and second-degree criminal sexual conduct. Garbow argues that (1) his second-degree criminal sexual conduct conviction should be reversed because respondent State of Minnesota failed to produce sufficient evidence to prove his guilt. Garbow also argues that he should receive a new trial because (2) the district court violated his constitutional rights under the Confrontation Clause, and (3) the prosecutor committed misconduct during the rebuttal closing argument by disparaging the defense and inflaming the passions and prejudices of the jury. Garbow also seeks a remand for resentencing, arguing (4) the district court improperly imposed a lifetime conditional release for the second-degree criminal sexual conduct conviction, and (5) the district court improperly calculated his criminal-history score.

Because we conclude that the evidence was sufficient to prove Garbow's guilt for second-degree criminal sexual conduct, any violation of the Confrontation Clause was harmless beyond a reasonable doubt, and the prosecutor's comments did not amount to misconduct, we affirm Garbow's convictions. We also affirm the district court's imposition of a lifetime conditional release. We remand, however, for the district court to recalculate Garbow's criminal-history score.

FACTS

Respondent State of Minnesota charged Garbow with five felony counts of criminal sexual conduct. The complaint alleged that Garbow sexually abused R.A. and N.A. between 2013 and 2017 when the girls lived with their grandparents. Counts I-III related to first-degree criminal sexual-contact charges involving N.A., while Counts IV and V related to second-degree criminal sexual-contact charges involving R.A.

At the jury trial, the mother of R.A. and N.A. testified about learning of Garbow's abuse and subsequently reporting the abuse to law enforcement. Mother testified that, at the time of the abuse 15 people, including Garbow, lived in the same house. Garbow was R.A.'s uncle and N.A.'s cousin.

A law-enforcement officer testified about taking reports of the abuse and scheduling the forensic interviews for R.A. and N.A. Two investigators testified about the forensic interviews they conducted. R.A. and N.A. also testified at trial as follows.

A. The testimony of R.A.

On direct examination, R.A. testified that Garbow sexually abused her when she was 11 years old. R.A. recounted that Garbow touched her vagina area over her clothing while she pretended to be asleep in the top bunk bed. R.A. participated in two forensic interviews during which she recounted the abuse.

Defense counsel's cross-examination of R.A. detailed the inconsistencies between R.A.'s trial testimony and her forensic interviews. The cross-examination focused on such discrepancies as R.A.'s age at the time of the abuse, the number of times she was abused, and where she went after the abuse.

B. The testimony of N.A.

N.A. testified that Garbow repeatedly abused her, putting his penis in her mouth and vagina. N.A. recounted Garbow threatening her if she told anyone about the abuse. N.A. also testified about participating in a forensic interview at which she described the abuse. N.A.'s trial testimony and her statements made during the forensic interview contained discrepancies, which Garbow's defense counsel highlighted during cross-examination.

During her cross-examination testimony, N.A. appeared distressed. Defense counsel asked if N.A. needed a break, she nodded her head, and the court took a recess.

During the break, the prosecutor indicated N.A. could not continue and asked the court to find her unavailable and excuse her from further testimony. After an additional recess, a courthouse security officer testified—outside the presence of the jury—that he observed N.A. lying on the floor, breathing heavily, and unresponsive to voices. Two separate ambulances were dispatched, treated N.A. at the scene, and transported her to the hospital. The district court determined that N.A. would not be able to continue her testimony that day. The court informed the jury that N.A. was temporarily unavailable and the state continued with its case-in-chief.

The next day, the state presented the district court and defense counsel with a note from a doctor at the hospital stating, "Please excuse patient from trial activities/testifying if at all possible due to the detrimental impact it has incited on patient's health." The note stated N.A. would be unavailable from November 1, the date the note was signed, through November 10, 2023. The trial was set to conclude on November 3, 2023. While Garbow did not factually contest the doctor's note or move for a mistrial, defense counsel did request that the district court enter a judgment of acquittal. The district court denied the motion for judgment of acquittal. The court gave the jury instruction defense counsel requested about N.A.'s unavailability for the remainder of trial. And because N.A. could not finish the cross-examination, the district court admitted N.A.'s forensic interview only for impeachment purposes as a "penalty for her inability to finish cross examination."

C. The closing argument, verdicts, and the motion for a new trial.

During closing argument, defense counsel focused extensively on the discrepancies in N.A. and R.A.'s trial testimony as compared to their forensic interview statements. Defense counsel argued the inconsistencies demonstrated that N.A. and R.A. were not telling the truth about the abuse. Defense counsel also highlighted N.A.'s inability to complete her cross-examination, characterizing N.A. as "running away" and "hiding."

During the state's rebuttal closing argument, the prosecutor stated, "[y]ou saw [N.A.] break after being repeatedly called a liar by an adult. It doesn't mean she's lying." Defense counsel objected, which the district court noted for the record.

The jury found Garbow guilty on all counts. Garbow filed motions for judgment of acquittal and for a new trial, which the district court denied.

D. Garbow sentenced and received a lifetime conditional-release term.

The district court sentenced Garbow to 201 months in prison and imposed a ten-year-conditional-release term for the first-degree criminal sexual conduct conviction. The court then sentenced Garbow to 142 months in prison and imposed a lifetime conditional-release term for the second-degree criminal sexual conduct conviction.

This appeal followed.

DECISION

I. The evidence supported the second-degree criminal sexual conduct verdict.

Garbow argues that the state did not produce sufficient evidence to prove that he engaged in sexual contact with R.A. because her testimony was contradictory, and the allegations were uncorroborated. When reviewing a sufficiency-of-the-evidence challenge to a conviction, appellate courts "view the evidence in the light most favorable to the verdict and consider whether the evidence was sufficient to permit the jurors to reach the verdict that they did." *State v. Moore*, 10 N.W.3d 676, 682 (Minn. 2024). The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). A verdict will not be disturbed if a fact-finder "could reasonably conclude, given the presumption of innocence and the requirement of proof beyond a reasonable doubt, that the defendant is guilty of the charged offense." *State v. King*, 990 N.W.2d 406, 416 (Minn. 2023) (quotation omitted). "A defendant bears a heavy burden to overturn a jury verdict." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001).[1]

To be guilty of second-degree criminal sexual conduct, the state had to prove beyond a reasonable doubt that Garbow had sexual contact with R.A., that he had a significant relationship with her, and that she was under 16 years of age. Minn. Stat. § 609.343, subd. 1(g) (2012). Sexual contact means intentional touching of R.A.'s intimate parts or clothing covering the immediate area of her intimate parts. *Id.*

[1] On appeal, Garbow appropriately makes his sufficiency-of-the-evidence argument within the standard of review for direct evidence. We agree and apply that standard to our review.

R.A.'s testimony established the sexual contact and age elements. She testified that Garbow came into the bedroom, went to the top bunk bed where R.A. was sleeping, and touched her vagina over her clothing. R.A. testified that this abuse occurred more than once on different nights when she was 11 years old. The trial evidence also established the statutory "significant relationship" element because testimony established that Garbow was R.A.'s uncle. Viewing this evidence in the light most favorable to the verdict, the evidence permitted the jury to reach the verdict it did. *Moore*, 10 N.W.3d at 682.

Garbow contends that we should reject the verdict because R.A.'s testimony conflicted with her interviews and was not corroborated by any other evidence. Garbow relies upon testimony obtained during R.A.'s cross-examination at which defense counsel impeached R.A.'s trial testimony with inconsistencies from statements made during her forensic interviews. But when a witness makes conflicting statements, it is the exclusive function of the jury to weigh the credibility of that witness. *State v. Gilleylen*, 993 N.W.2d 266, 275 (Minn. 2023). The jury rejected Garbow's trial strategy that R.A. was not believable given the conflicting statements from her trial testimony and her interviews.

In addition, R.A.'s testimony, alone, sufficiently supports the jury's verdict. The legislature has rejected the proposition that the state must corroborate the testimony of a victim of sexual assault. *See* Minn. Stat. § 609.347, subd. 1 (2024) (providing that "the testimony of a victim need not be corroborated" in a prosecution for a criminal sexual conduct crime). *See also State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) ("A conviction can rest on the uncorroborated testimony of a single credible witness.").

Even though corroboration was not required, portions of R.A.'s trial testimony about the abuse was corroborated by statements made during her two forensic interviews:

- R.A. lived in her grandparents' home, where the assault took place;
- Garbow, R.A.'s uncle, also lived in the house;
- R.A. was 11 years old;
- R.A. was on the top bunk bed;
- R.A. was sleeping;
- Garbow touched R.A.'s intimate area while she was on the top bunk;
- R.A. pretended to sleep; and
- R.A. tried to roll over towards the wall.

These corroborated facts further support the jury's reasonable conclusion that Garbow had sexual contact with R.A., the act was committed with sexual intent, R.A. was under the age of 16, and Garbow had a significant relationship with R.A. Minn. Stat. § 609.343, subd. 1(g); *see also King*, 990 N.W.2d at 416. Garbow has not met his heavy burden to overturn the jury's verdict.

II. Garbow is not entitled to a new trial on the first-degree criminal sexual conduct conviction.

Garbow raises two separate arguments to contend that he is entitled to a new trial. First, Garbow argues that the district court violated his constitutional rights under the Confrontation Clause when his cross-examination of N.A. was cut short. Second, Garbow demands a new trial due to alleged prosecutorial misconduct that occurred during the state's rebuttal closing argument. We address each argument in turn.

A. Any violation of Garbow's rights under the Confrontation Clause was harmless beyond a reasonable doubt.

Garbow argues that the district court should have granted his motion for a new trial because his constitutional rights under the Confrontation Clause were violated when the court found N.A. unavailable during cross examination and excused her from further testimony. Whether a defendant's Confrontation Clause rights were violated is a question of law that we review de novo. *State v. Sutter*, 959 N.W.2d 760, 765 (Minn. 2021).

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6 ("The accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"); *State v. Holliday*, 745 N.W.2d 556, 564 (Minn. 2008) (applying same analysis under both the Minnesota and federal Confrontation Clauses). The Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). The "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

"The constitutional right of confrontation guarantees only an opportunity for cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, that defense might wish." *State v. Evans*, 756 N.W.2d 854, 874 (Minn. 2008) (quotations omitted); *see also State v. Holliday*, 745 N.W.2d at 566 (providing that the

Confrontation Clause only guarantees an opportunity for effective cross-examination, not unlimited cross-examination). The Confrontation Clause is not violated when cross-examination is limited "so long as the jury is presented with sufficient information from which to appropriately draw inferences as to the witness's reliability." *Gilleylen*, 993 N.W.2d at 278 (quotations omitted).

The United States Supreme Court has also recognized that a defendant's right to confront an accusing witness "must occasionally give way to considerations of public policy and the necessities of the case." *Craig*, 497 U.S. at 849 (quotation omitted). Protection of child-witnesses from trauma is one of these important public policy considerations. *See id.* at 855 ("we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant."). *See also Coy*, 487 U.S. at 1025 (O'Connor, J., concurring) ("The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such [an important public] policy."). The Supreme Court has further recognized an exception to the Confrontation Clause that allows the "admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

Garbow argues his constitutional right to a face-to-face confrontation with his accuser was violated because N.A. did not complete her cross-examination testimony. Garbow argues that the district court erred in finding N.A. unavailable and violated his confrontation rights because Garbow was not able to fully cross-examine N.A. This issue presents unique circumstances that have not been addressed in Minnesota.

We need not, however, decide whether this unique set of circumstances violated the Confrontation Clause because we conclude that any violation of Garbow's constitutional rights was harmless beyond a reasonable doubt. *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006) (providing that a violation of the Confrontation Clause is subject to the constitutional harmless-error analysis). An error is harmless beyond a reasonable doubt if the jury's decision is "surely unattributable" to the error. *Id.*

In analyzing harmless error when a defendant's ability to cross-examine a witness was impermissibly restricted, we must "assume that the damaging potential of the cross-examination [was] fully realized." *State v. Zielinski*, 10 N.W.3d 1, 16 (2024) (quotation omitted). We also consider several factors, "including: [1] 'the importance of the witness' testimony in the prosecution's case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross-examination otherwise permitted, and, of course, [5] the overall strength of the prosecution's case.'" *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). We address each factor in turn.

Factor 1: The importance of N.A.'s testimony to the prosecution's case.

The first factor favors a determination that any violation was not harmless. There can be no dispute about the importance of N.A.'s testimony to the prosecution's case. N.A. was the sole witness who could testify about the abuse she endured. This factor weighs in favor of a determination that any violation was not harmless.

Factors 2 and 3: [2] Whether the testimony was cumulative, and [3] The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points.

The second and third factors both favor a determination that any violation was harmless beyond a reasonable doubt. The record reveals that further cross-examination would have been cumulative of the evidence received, the trial contained evidence contradicting N.A. on material points, and the cross-examination that did occur allowed the jury to assess N.A.'s demeanor and credibility.

The essence of defense counsel's strategy of cross-examining N.A. was to demonstrate that her trial testimony was not consistent with the statements that she had made during her forensic interview.[2] In the cross-examination that Garbow did complete, defense counsel covered four different topics in an attempt to show the jury that her trial testimony was inconsistent with her forensic interview. Defense counsel questioned N.A. about the inconsistencies regarding her age, video games that Garbow allowed her to play after the abuse, how much of N.A.'s clothing was removed during the abuse, and Garbow forcing N.A. to perform oral sex. Defense counsel asked:

> [N.A.'s age] Q. . . . So my question to you is: Why could you remember, then, how old you were, but you couldn't remember now?
>
> . . . .
>
> Q. . . . So you have no reason why your memory has changed?
>
> . . . .

[2] Defense counsel employed the same strategy during the cross-examination of R.A. When cross-examining R.A., defense counsel emphasized the inconsistencies between R.A.'s trial testimony and her forensic interview.

[video games] Q. . . . So why are you saying that to the prosecutor's office? That he let you play video games as a reward, but you never told that to [the forensic interviewer]?

. . . .

[clothing] Q. But you said it was the same thing basically every single time, and it happened multiple times. So how is leaving your clothes on in one version and taking your clothes completely off in a different version—how is that a small detail?

. . . .

[forced oral sex] Q. Not touching him anywhere on his body and having someone's penis in your mouth are two different things, right?

A. Yes.

Q. They are?

A. Yes.

Q. Do you agree with that? So in one version—the version with [the forensic interviewer] or your trial version—one version is untrue. Which version is untrue? The trial version about that he did make you do this, or the version to [the forensic interviewer] that he didn't make you do this?

A. The version of [the forensic interviewer].

Q. Why did you say something to [the forensic interviewer] that was untrue?

A. I thought I told her.

Q. You saw it in there. You didn't. Do you think that's a big detail or a small detail that he made you do that?

A. A small detail.

> Q. It's a small detail about the—about that? Did you just overlook it? Were you wrong? Help me out here. I'm trying to figure it out. Do you need a break?
>
> A. (Witness nods head.)[3]

To remedy defense counsel's inability to complete the cross-examination, the district court admitted evidence contradicting N.A. on material points for the jury's consideration of impeachment purposes: the video of the forensic interview.[4] The impeachment evidence allowed defense counsel to make all the arguments that he intended to elicit through cross-examination of N.A. The district court also allowed defense counsel to reference N.A.'s absence from the trial during his closing argument.

During closing argument, defense counsel extensively argued about the inconsistencies between N.A.'s testimony and her forensic interview, which included inconsistencies that had not been addressed in cross-examination. Defense counsel also liberally refenced N.A.'s absence during closing, characterizing her unavailability as "hiding" and "running away." Although Garbow was unable to complete the cross-

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[3] This is the moment in questioning that the cross-examination of N.A. ended. The district court later found N.A. unavailable, after which defense counsel made the strategic decision to move for judgment of acquittal, which the district court denied. Defense counsel did not move for a continuance of the trial or request a mistrial, which would have been possible appropriate remedies after the court found N.A. unavailable. Instead, defense counsel used the forensic interview and N.A.'s absence to Garbow's advantage and later moved for a new trial—effectively requesting a mistrial—after receiving the guilty verdict. We are concerned by these "wait-and-see" tactics that could be read as invited error, but we do not weigh defense counsel's strategic decisions in our analysis.

[4] The district court instructed the jury that the videos could not be used as substantive evidence. Appellate courts "assume that the jury followed the court's instructions and properly considered the evidence." *State v. Vang*, 774 N.W.2d 566, 578 (Minn. 2009).

examination, defense counsel's closing argument told the jury the reasons to discredit N.A.'s testimony. As the district court determined in the order denying a new trial, Garbow "was given an opportunity for effective cross-examination that allowed him to call the jury's attention to reasons to give 'scant weight' to N.A.'s testimony, including her bias, poor memory[,] and lack of consistency." Thus, additional cross-examination would have been "cumulative" of the impeachment evidence already received. *See Zielinski*, 10 N.W.3d at 16 ("we conclude that the damaging potential of this cross-examination would not have been any greater because the information would have been cumulative.").

Factor 4: The extent of cross-examination otherwise permitted.

The fourth factor also favors a determination that any violation was harmless beyond a reasonable doubt. *Id.* In these unique circumstances, N.A. was subjected to face-to-face confrontation during which the jury was able to assess her demeanor and determine whether she was worthy of belief. And the record indicates that N.A.'s cross-examination took more time than the state's direct-examination.

During cross-examination, defense counsel highlighted discrepancies in N.A.'s trial testimony as compared to her forensic interview. The cross-examination called the jury's attention to N.A.'s bias, poor memory, and lack of consistency in her testimony, including her age, clothing, and whether she was forced to perform oral sex.

At least while N.A. was on the stand, the "central concern" of the Confrontation Clause was, in fact, satisfied. *See Craig*, 497 U.S. at 845 (noting "the central concern" of the Confrontation Clause is to compel the accuser "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and [in] the manner in which he gives his testimony whether he is worthy of belief"). As the district court's order denying a new trial noted, "[t]he jury was able to observe N.A.'s demeanor on the stand and her reaction to questions." Thus, the extent of the cross-examination that occured favors a determination that any violation was harmless beyond a reasonable doubt.

Factor 5: The overall strength of the prosecution's case.

The overall strength of the state's case also slightly favors a determination that any violation was harmless beyond a reasonable doubt. *Zielinski*, 10 N.W.3d at 15. The prosecution's case largely rested upon the testimony of N.A. N.A.'s testimony established the elements of the offense. Defense counsel's cross-examination, use of the forensic interview, and closing argument effectively questioned N.A.'s credibility. Although the jury did not see a full cross-examination, they were able to assess her demeanor and credibility for a period of time while she was on the stand. In addition, some of N.A.'s testimony was corroborated, in part, by the testimony of her mother, investigating officer, forensic interviewer, and her sister. Thus, the prosecution's case was strong, but the factor only slightly favors a harmless error determination given the jury's inability to view a full cross-examination. Nonetheless, our thorough review of the record and analysis of the factors leads us to the conclusion that the jury's verdict was "surely unattributable" to any violation of Garbow's rights under the Confrontation Clause. *State v. Trifiletti*, 6 N.W.3d 79, 95 (Minn. 2024); *Zielinski*, 10 N.W.3d at 15 (2024) (articulating harmless error factors).

Recognizing that there are no Minnesota cases on point, Garbow cites a decision from the Kansas Supreme Court addressing the circumstances of a juvenile witness that was unable to complete their testimony during a preliminary hearing. *See State v. Noah*, 162 P.3d 799, 801 (Kan. 2007). The Kansas high court concluded that the admission of the juvenile's statements to others violated the Confrontation Clause, which was not harmless beyond a reasonable doubt. *Id.* at 804-06. *Noah* is distinguishable.

In *Noah*, an 11-year-old witness began crying during cross-examination at a preliminary hearing, the witness could not continue, and the cross-examination ended prematurely. *Id.* at 801. After finding the child could not continue the testimony, the district court found the child unavailable. *Id.* At trial, the court allowed the child's statements to three other individuals to be admitted as evidence. *Id.*

The Kansas Supreme Court concluded that the defendant did not have a sufficient opportunity to effectively cross-examine the witness at the preliminary hearing. *Id.* at 805. The supreme court concluded the Confrontation Clause violation was not harmless beyond a reasonable doubt because the statements were critical to the prosecution's case, were not cumulative, and the "only opportunity for contradicting [the child's] statements came from his testimony and his brief opportunity to cross-examine [the child] at the preliminary hearing before she became emotionally distraught and could not continue." *Id.*

In *Noah*, the child did not testify at trial and the jury never had an opportunity to assess the child's demeanor or credibility because the district court admitted statements the juvenile made to other individuals. *Id.* Here, however, the jury observed N.A.'s trial testimony—during which she recounted the abuse and penetration—and the jury had the opportunity to assess her demeanor and credibility, including during her partial cross-examination. The jury also assessed the contradicting statements of N.A. both during her cross-examination and when the jury viewed the video from the forensic interview that was admitted solely for impeachment purposes. Defense counsel used this evidence to argue that the jury should reject N.A.'s testimony. Additional cross-examination would have been cumulative of the arguments defense counsel was able to make based upon the partial cross-examination and the forensic interview video.

We share, however, many of the concerns articulated by the Kansas Supreme Court:

> [W]e do not grant attorneys license to filibuster, purposely confuse, or harass children or other vulnerable witnesses in an attempt to make an otherwise competent witness unavailable. Nor do we want to give incentive for those same witnesses to be relieved of their obligation to be made 'available' by answering only a few questions on cross-examination because it is uncomfortable or intimidating, and thereby defeating a defendant's right to confrontation.

Id. Our review of this record does not demonstrate that defense counsel purposefully attempted to make N.A. unavailable.[5] The record also does not establish that N.A. made herself unavailable due to merely being uncomfortable or intimidated.[6] Nonetheless, these valid concerns exist and, in a different case may require a different result. But given the unique circumstances of this case, we conclude that any violation of Garbow's constitutional rights was harmless beyond a reasonable doubt.

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[5] But, as the district court noted, "the record supports that the victim was fearful and vulnerable, and the record supports that Defendant's cross-examination technique likely exacerbated those issues[.]"

[6] Garbow neither contested the legitimacy of the doctor's letter noting the impact the testimony had on N.A.'s health, nor factually disputed N.A.'s unavailability following N.A.'s mental health episode that required an ambulance and treatment at the hospital.

B. The prosecutor's statement during the state's rebuttal closing argument did not constitute misconduct and did not affect the verdict.

Garbow next argues that he is entitled to a new trial due to misconduct occurring during the state's rebuttal argument that disparaged the defense and inflamed the jury's passions and prejudices. We disagree.

Prosecutorial misconduct "results from violations of clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). In closing arguments, the state has "the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom." *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). In analyzing a prosecutor's closing arguments, we review the arguments "as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Carridine*, 812 N.W.2d 130, 148 (Minn. 2012) (quotation omitted).

Garbow argues the prosecutor committed misconduct during the state's rebuttal closing argument:

> PROSECUTOR: It happened multiple times. And you saw how the girls responded, and [defense counsel] talks a lot about that. You saw [N.A.] break after being repeatedly called a liar by an adult. It doesn't mean she's lying.
>
> DEFENSE COUNSEL: Hmm? What? I would object to that characterization.
>
> COURT: Okay. Noted.
>
> PROSECUTOR: After being, as [defense counsel] put it, confronted with things she said that were inconsistent that were

> lies. That is not something that is easy for a grown adult to handle, and this is a child that was traumatized. And [R.A.] responded, just not in the same way. She didn't know what to say because of that trauma.

Garbow argues that these statements inflamed the passion and prejudices of the jury because the jurors became aware that N.A. suffered a panic attack. We disagree.

At no point during the state's rebuttal argument did the prosecutor discuss the nature or extent of N.A.'s medical issues that occurred during cross-examination. Garbow points to the statement that the jury saw N.A. "break[,]" but that brief statement was a fair inference and legitimate argument from the trial proceedings. During cross-examination, defense counsel saw that N.A. was visibly distraught and asked if she needed a break. N.A. nodded in the affirmative and the district court took a recess.

In addition, the prosecutor's argument fairly rebutted defense counsel's closing argument. Consistent with the defense theme, defense counsel's closing argument attempted to demonstrate that N.A. and R.A.'s allegations were false. This theme started during opening statements, continued throughout the trial, and culminated during closing argument. Defense counsel's closing argument also repeatedly characterized N.A.'s inability to finish her cross-examination testimony as her running away and hiding. Because the state's argument fairly rebutted defense counsel's closing argument, Garbow has failed to establish that this statement constituted misconduct.

Garbow also failed to establish that any misconduct "likely played a substantial part in influencing the jury to convict." *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (noting harmless error standard for objected-to, but less-serious, allegations of prosecutorial misconduct). The prosecutor's two-sentence statement did not disparage the defense or inflame the jury's passions. Any possible prejudice was minimized by the prosecutor's own recharacterization of the rebuttal closing argument—to closely track defense counsel's closing argument—immediately after defense counsel's objection.

Plus, the district court instructed the jury to "disregard" any statements made by counsel that "differs" from the jury's independent recollection of the evidence. We assume the jury followed the court's instructions. *See Vang*, 774 N.W.2d at 578 ("We assume that the jury followed the court's instructions."). Any possible prejudice from the prosecutor's brief statements was minimal such that Garbow is not entitled to a new trial based upon alleged prosecutorial misconduct.

III. The district court did not err in sentencing Garbow to a lifetime conditional-release term, but we remand for the district court to recalculate Garbow's criminal-history score.

Garbow raises two issues with regard to his release conditions and prison sentences. First, Garbow contends that the district court erred in imposing a lifetime conditional-release term. Second, Garbow argues that the district court erred in calculating his criminal-history score. We take each argument in turn.

A. The court did not err in imposing a lifetime conditional-release term.

Garbow argues that the district court erred when it imposed a lifetime conditional-release term. Garbow contends that the district court simultaneously convicted Garbow of both counts and, therefore, the court could not impose a lifetime conditional-release term because he did not have "a previous or prior sex offense conviction." *See* Minn. Stat. § 609.3455, subd. 7(b) (2024). We disagree.

Whether a sentence conforms to the requirements of a statute or the sentencing guidelines is a question of law reviewed de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). A person convicted of second-degree criminal sexual conduct is subject to a ten-year conditional-release term. Minn. Stat. § 609.3455, subd. 6 (2024). If an offender has a prior sex-offense conviction, the district court must impose a lifetime conditional-release term. Minn. Stat. § 609.3455, subd. 7(b).

A prior sex-offense conviction includes "a conviction for a separate behavioral incident entered before a second conviction, whether at different hearings or during the same hearing." *State v. Nodes*, 863 N.W.2d 77, 82 (Minn. 2015). But when multiple criminal sexual conduct convictions are entered simultaneously, one conviction cannot serve as a prior sex-offense conviction for the other. *Id.*

In support of his argument that the convictions were entered simultaneously, Garbow cites the district court receiving the verdicts from the jury, which the court did simultaneously. But a district court receiving a verdict from the jury is not the same as the court formally accepting and recording the guilty verdict. *See State v. Hoelzel*, 639 N.W.2d 605, 609 (Minn. 2002). A district court records a guilty verdict "when [the] court adjudicates [the] defendant guilty on the record." *Nodes*, 863 N.W.2d at 81.

The district court here did not convict Garbow by receiving the verdicts from the jury. Instead, the district court adjudicated Garbow on the record at the sentencing hearing. And the record at sentencing clearly reflects that the district court adjudicated and sentenced Garbow sequentially. The relevant transcript reads:

> COURT: [O]n the jury's verdict of guilty on Count 1, criminal sexual conduct, first degree, penetration with a victim under 16, and a significant relationship with multiple acts over time, you're adjudicated guilty of that count. As a consequence, I'll sentence you to 201 months in the custody of the Commissioner of corrections.

After the district court entered this conviction, the defense and court engaged in an exchange clarifying jail credit time. The district court then imposed the ten-year conditional-release period. The sentencing transcript continues:

> COURT: On the jury's verdict of guilty, and the Court had accepted those verdicts previously, you're adjudicated guilty of Count 4. That's criminal sexual conduct in the second degree . . . I'll sentence you to 142 months in the custody of the Commissioner of Corrections . . . [B]ecause of the prior conviction it's a lifetime conditional release.

The sentencing record demonstrates that the district court appropriately adjudicated Garbow guilty on one count, entered the disposition, and imposed a ten-year conditional-release term. Then, after a temporal gap, the court separately adjudicated Garbow guilty on a second count, entered the disposition, and imposed the lifetime conditional-release term. The district court did not err in imposing a lifetime conditional-release term.

B. We remand for the district court to calculate the criminal-history score.

Garbow challenges the district court's calculation of his criminal-history score, arguing that three of his prior felony offenses were from a single course of conduct. As such, Garbow contends that only the offense with the highest severity level should have been included in his criminal-history score. Questions on the calculation under the Minnesota Sentencing Guidelines of a criminal-history score presents a question of law that appellate courts review de novo. *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018).

Garbow was assigned a half point each for three convictions for criminal damage to property which arose from the same course of conduct, totaling one-and-a-half points. Garbow did not object to the calculation prior to the sentencing hearing. Because Garbow did not object, the state had no notice that it needed to establish that each offense was properly included in his criminal-history score. Both parties agree this issue must be remanded to the district court to determine the correct criminal-history score. Because the state did not establish that each of the three offenses should receive points, we also agree.

When, as here, a defendant failed to object to the criminal-history score calculation and the presenting invcestigation report was insufficient to prove the criminal-history score, the proper remedy is to remand the matter for an opportunity for the state to "further develop the sentencing record so that the district court can appropriately make its determination." *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *rev. denied* (Minn. July 15, 2008); *see also State v. Gant*, 996 N.W.2d 1, 10 n.4 (Minn. App. 2023) (remanding for further proceedings to determine the defendant's criminal-history score). We, therefore, remand the case to the district court for further proceedings to determine the proper criminal-history score. The court may, within its discretion, allow the state to supplement the sentencing record.

Affirmed in part, reversed in part, and remanded.

BENTLEY, Judge (concurring in part, dissenting in part)

I agree with the opinion of the court in affirming appellant Andy Ralph Garbow's conviction for second-degree criminal sexual conduct, count IV, because the evidence was sufficient to prove his guilt beyond a reasonable doubt with respect to his conduct toward R.A. I therefore join section I of the opinion of the court, and I also join section III(B), which remands for a proper determination of Garbow's criminal-history score. I disagree, however, with respect to Garbow's right to confront N.A. and the court's decision to affirm his conviction on count I. It is my view that Garbow's confrontation rights were violated and that the violation was not harmless beyond a reasonable doubt. I therefore respectfully dissent from section II(A) of the opinion of the court. I would reverse Garbow's conviction for first-degree criminal sexual conduct and remand for a new trial on counts I through III, and I would not reach the issues in sections II(B) and III(A) of the opinion of the court.

I

The opinion of the court assumes without deciding that the district court violated Garbow's right to confrontation when it allowed N.A.'s direct testimony to come into evidence even though it had determined that N.A. was unavailable to appear for a full cross-examination. Because I disagree with the opinion of the court's harmless-error conclusion, I would reach this issue and conclude that Garbow's right to confrontation was violated.

Both the Minnesota and U.S. Constitutions guarantee that criminal defendants "shall enjoy the right . . . to be confronted with the witnesses against [them]." Minn. Const. art. I,

§ 6; *accord* U.S. Const. amend. VI.[1] This confrontation right is a "bedrock procedural guarantee," with roots in "[t]he common-law tradition . . . of live testimony in court subject to adversarial testing." *Crawford v. Washington*, 541 U.S. 36, 42-43 (2004). That adversarial testing requires a "full and fair opportunity to probe and expose . . . infirmities through cross-examination." *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985). "Effective cross-examination is essential to a fair trial because '[c]ross-examination is the principal means by which the believability of a witness and the truth of [their] testimony are tested.'" *State v. Ferguson*, 742 N.W.2d 651, 656 (Minn. 2007) (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). Absent a full and fair opportunity to cross-examine a witness in court, testimonial evidence may be admitted only "where the declarant is unavailable, *and* only

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[1] Garbow invokes his confrontation rights under both the Minnesota Constitution and the U.S. Constitution, but he addresses them simultaneously in light of caselaw stating that courts "apply the same analysis under both Confrontation Clauses." *State v. Holliday*, 745 N.W.2d 556, 564 (Minn. 2008); *see also, e.g.*, *State v. Henderson*, 620 N.W.2d 688, 695 (Minn. 2001) (stating that both constitutions "afford[] the same fundamental right, and the analysis is the same under both provisions"). The source of this single-analysis approach can be traced back to two Minnesota Supreme Court cases. The first, *State v. Black*, states: "The right of confrontation is a fundamental right under both constitutions." 291 N.W.2d 208, 213 (Minn. 1980). *Black* cites the second, *State v. Shotley*, 233 N.W.2d 755 (Minn. 1975), to support that proposition. *See Black*, 291 N.W.2d at 213. *Shotley* states: "The Minnesota Constitution, art. 1, § 6, provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. Corresponding provisions of the Federal Constitution apply to criminal prosecutions in state courts." 233 N.W.2d at 758. Neither case states that the analysis under the two constitutions is the same, and neither forecloses a determination that the confrontation right under the Minnesota Constitution might be different in some circumstances from the right under the U.S. Constitution. Further exploration of the extent of the state constitutional right may be warranted. Nevertheless, because the parties do not argue that the nature of the rights are different, I also analyze the rights under both constitutions simultaneously.

where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59 (emphasis added).

The right to confront is not absolute. District courts may limit the scope of cross-examination "[b]ased on concerns about such things as harassment, decision making on an improper basis, confusion of the issues, and cross-examination that is repetitive or only marginally relevant," provided that "the jury is presented with sufficient information from which to appropriately draw inferences as to the witness's reliability." *State v. Glover*, 4 N.W.3d 124, 136 (Minn. 2024). But, "[w]hile the scope of cross-examination is left largely to the district court's discretion, the availability of it is not." *State v. Schloegl*, 915 N.W.2d 14, 19 (Minn. App. 2018); *see Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("[T]he right to confront and to cross-examine . . . may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined." (quotation omitted) (citation omitted)). Here, the district court did not limit the scope of a cross-examination of a present witness—it denied, or at least significantly diminished, the cross-examination of a witness who was declared unavailable. The district court acknowledged on the record that Garbow's confrontation of N.A. was only "partially accomplished" and that cross-examination was "most certainly[] not completely finished or else [N.A.] wouldn't have run out, and [the district court] wouldn't have asked her to come back." The district court also noted how the cross-examination "got to a point where some of the harder questions were being asked, or maybe the hardest question, . . . [a]nd that's where the proceeding got hung up."

At a point like this, when a witness becomes unavailable, several possible options to address the situation are available and consistent with the fundamental principle that testimonial evidence by an unavailable declarant, i.e., N.A.'s direct testimony, may be admitted only "where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59. A district court could continue the trial until the witness is medically cleared and then consider ways to accommodate her appearance;[2] it could

[2] Garbow did not move for a continuance, but he did dispute the district court's determination that N.A. was unavailable. And the record shows that a continuance motion likely would have been futile. The district court explained in its posttrial order denying Garbow's motion for judgment of acquittal or for a new trial that it did not view a continuance as a reasonable option. It said:

> Continuing the trial to allow N.A. to complete her testimony would have required continuing the case by over a week. While a continuance of a week prior to the start of a trial may not be substantially unreasonable, to continue the trial after the jury was impaneled and evidence had been presented would not have been feasible or reasonable. It also would have relied on there being some substantial change to N.A.'s health that would have allowed her to testify. It is possible that had a continuance been ordered, N.A. may have remained unavailable or would become unavailable when subjected further to the cross-examination that prompted her unavailability.

declare a mistrial;[3] or it could strike the direct testimony.[4]

Here, the district court employed an alternative to the right to confrontation when it decided to allow N.A.'s direct examination to stand and to instruct the jury that N.A.'s forensic interview—that the jury had already watched without any limiting instructions—could be considered for impeachment purposes only, not as substantive evidence.[5] The district court did so to prevent the state from "gain[ing] any benefit" from the witness's unavailability and characterized the remedy as a "penalty for [N.A.'s] inability to finish cross-examination." That limitation on the state's ability to use N.A.'s forensic interview

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[3] Garbow did not move for a mistrial during trial, but nothing prevented the district court from declaring a mistrial sua sponte. *See State v. Lerma*, 25 N.W.3d 40, 44-46 (Minn. 2025) (noting that the district court declared a mistrial sua sponte and holding that the effect of the mistrial for double-jeopardy purposes depended on whether the defendant objected to the mistrial and, if the defendant had objected, on whether the manifest-necessity exception to double jeopardy attachment applied); *see also* 1 Charles T. McCormick, *McCormick on Evidence* § 19 (Kenneth S. Broun, et al. eds., 9th ed. 2025) ("The temporary disability of a crucial witness can be sufficient justification for a mistrial declaration, permitting a later retrial.").

[4] *See* McCormick, *supra*, § 19 (noting that, when a witness has "become, or purport[ed] to become, sick or otherwise physically or mentally incapacitated[] before cross-examination is begun or completed . . . courts often strike the [witness's] direct examination"); *see also, e.g.*, *United States v. Stalnaker*, 571 F.3d 428, 434 (5th Cir. 2009) (striking direct testimony of witness who suffered a panic attack during direct examination and could not sit for a cross-examination).

[5] The district court initially admitted the forensic interview in evidence as a prior consistent statement, and the video of N.A.'s interview was played to the jury without any limiting instructions. After the state and defense rested the next day, the district court instructed the jury that the interview "is not substantive evidence" and "can be used . . . for only one purpose, to test the credibility of the trial testimony [N.A.] provided on the witness stand." The district court continued, "Put simply, you may only use the recording of [N.A.] to determine whether she testified honestly or dishonestly at the trial here in the courtroom, not to determine whether the statements she made are accurate accounts of what the State alleges happened."

as substantive evidence, while leaving her direct testimony intact, was no substitute for the "[f]ace-to-face confrontation [that] is 'the core of the values furthered by the Confrontation Clause.'" *State v. Conklin*, 444 N.W.2d 268, 272 (Minn. 1989) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988)); *see also Coy*, 487 U.S. at 1017 ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution." (quotation omitted)).

To be sure, the district court faced a challenging situation. A 16-year-old witness, who was an alleged victim of sexual abuse had left the stand and experienced a medical emergency. We have instructed courts to take steps to protect child-witnesses from trauma, which may, at times, mean that aspects of the confrontation right must give way to accommodate a witness's testimony at trial. *See, e.g.*, *In re Welfare of E.J.C.L.*, ___ N.W.3d ___, ___, 2025 WL 3264104, at *4 (Minn. App. Nov. 24, 2025) (noting that "the confrontation clause must occasionally give way to considerations of public policy and the necessities of the case," such as the "[p]rotection of child-witnesses from trauma" (quoting *Maryland v. Craig*, 497 U.S. 836, 849 (1990)). And yet, no precedent supports the district court's decision here to admit a witness's direct testimony into evidence, forgo a full and fair cross-examination of the witness, and remedy the confrontation problem by instructing the jury to consider other out-of-court testimonial statements for impeachment purposes only. To the contrary, in a related context, the United States Supreme Court has held that "we cannot accept limiting instructions as an adequate substitute for [a defendant's] constitutional right of cross-examination." *Bruton v. United States*, 391 U.S. 123, 137 (1968) (rejecting the argument that "clear instructions to the jury to disregard" evidence admitted in violation of the confrontation clause could substitute for the right to confrontation).

The district court deprived Garbow of a "full and fair opportunity" to confront the witness against him. *Fensterer*, 474 U.S. at 22. His constitutional rights were, therefore, violated.

II

It is well-settled that Confrontation Clause violations are subject to a harmless-error analysis and that we must reverse if the violation was not harmless beyond a reasonable doubt. *See State v. Courtney*, 696 N.W.2d 73, 79 (Minn. 2005); *Chapman v. California*, 386 U.S. 18, 24 (1967). A reviewing court's analysis begins by "assuming that the damaging potential of the cross-examination were fully realized." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). Then, in considering whether the denial of the cross-examination was harmless, we balance "a host of factors," including: "[1] the importance of the witness's testimony in the prosecution's case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross-examination otherwise permitted, and, of course, [5] the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684; *see also Schloegl*, 915 N.W.2d at 20 (applying the *Van Arsdall* factors).

I begin, as we must, by "assuming that the damaging potential of the cross-examination were fully realized." *Van Arsdall*, 475 U.S. at 684. In a case involving the unconstitutional admission of direct testimony of a witness not subject to cross-examination, this court explained, "By assuming that the full potential of cross-examination would have been realized, we must infer that [the witness's] credibility would have been impeached and that the jury would have developed reasonable doubts about the most relevant particulars in her version of events." *Schloegl*, 915 N.W.2d at 20. The same reasoning applies here. Even though there was a partial cross-examination in this case, making it a closer call than *Schloegl*, the record reveals a reasonable possibility that, had N.A. been subject to a full and fair cross-examination, her credibility would have been impeached and the jury would have developed reasonable doubts about her version of events. The district court acknowledged that the cross-examination was only "partially accomplished" and "most certainly, not completely finished," and that the cross-examination stopped when "some of the harder questions were being asked, or maybe the hardest question." The jury did not have a full opportunity to observe N.A.'s response to those difficult questions and "judge by [her] demeanor upon the stand and the manner in which [she] gives [her] testimony whether [she] is worthy of belief." *Craig*, 497 U.S. at 845. Moreover, Garbow's counsel identified the other topics about which he intended to ask the witness, stating, "I basically was just starting my cross-examination, and she's gone." And even the district court acknowledged on the record that it was hard to estimate how much more time would have been needed for the cross-examination because "the next question could have opened Pandora's box to another hour of cross-exam." On this record, there is at least a reasonable possibility that further questioning could have affected the jury's perception of the N.A.'s credibility. I therefore consider the factors relevant to our harmless-beyond-a-reasonable-doubt analysis under the assumption that the damaging potential of a full and fair cross-examination would have been realized and N.A.'s credibility would have been impeached.

As to the first factor, the importance of the testimony to the state's case, N.A.'s testimony was critical. Her words were the only direct evidence supporting material elements of Garbow's first-degree criminal sexual conduct convictions. No physical evidence was introduced, and the district court had directed the jury not to consider N.A.'s forensic interview as substantive evidence. In closing arguments, the state relied solely on N.A.'s direct testimony to establish that it met its burden to prove the elements of the first-degree criminal sexual conduct charges. In other words, to find Garbow guilty of the counts attributable to N.A., the jury needed to conclude that N.A. was credible. This factor weighs against harmlessness.

With respect to the second factor, whether the witness's testimony was cumulative of other evidence admitted at trial, the testimony that N.A. provided before the district court determined that she was unavailable was not cumulative.[6] Again, the evidence of Garbow's

[6] In its discussion of factors two and three, the opinion of the court addresses whether additional cross-examination would have been cumulative of the testimony already admitted. It is my understanding that factors two and three ask us to consider the cumulative nature of unconstitutionally admitted testimony of the witness who was not subject to cross-examination, vis-à-vis other evidence admitted at trial. *See Van Arsdall*, 475 U.S. at 684 (directing consideration of the "importance of *the witness's testimony* . . . [and] whether *the testimony* was cumulative," and "the presence or absence of evidence corroborating or contradicting *the testimony of the witness*" (emphasis added)). Then, factor four addresses "the extent of cross-examination otherwise permitted." *Id.* Indeed, the case on which the court relies in its discussion of factors two and three turned on a discussion only of factor four. *See State v. Zielinski*, 10 N.W.3d 1, 16 (Minn. 2024) (concluding "the jury's verdict was surely unattributable to the error because of the extent of cross-examination that was permitted"). For these reasons, I consider the cumulative

guilt turned almost entirely on N.A.'s testimony. There was no other substantive evidence that the jury could have considered regarding Garbow's sexual conduct toward N.A. Assuming, as we must, that the "damaging potential of the cross-examination [would have been] fully realized," *Van Arsdall*, 475 U.S. at 684, and that N.A.'s "credibility would have been impeached," *Schloegl*, 915 N.W.2d at 20, there was scant other evidence on which the jury could have relied to convict Garbow. For that reason, N.A.'s testimony was not cumulative, and this factor also weighs against harmlessness.

Looking to factor three, whether there was evidence corroborating or contradicting N.A.'s testimony on material points, there was some evidence corroborating aspects of N.A.'s testimony, but no corroborating evidence on key elements of the charges. Regarding count I, the charge on which Garbow was convicted, the state had to prove, *inter alia*, (1) that Garbow engaged in sexual penetration or sexual contact with N.A., (2) that Garbow had a significant relationship with N.A., (3) that N.A. "was under 16 years of age at the time of the sexual penetration," and (4) that "the sexual abuse involved multiple acts committed over an extended period of time." Minn. Stat. § 609.342, subd. 1(h)(iii) (2012). N.A.'s mother corroborated N.A.'s testimony only regarding her age at the time of the allegations and N.A.'s significant relationship with Garbow. The forensic interviewer who interviewed N.A. and the officer who investigated Garbow each testified to statements N.A. made during the forensic interview, but the corroborative value of those statements is seemingly foreclosed by the district court's limiting instruction regarding the forensic

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nature of N.A.'s testimony in my discussion of factors two and three and I address the cumulative nature of the cross-examination within my analysis of factor four.

interview.[7] This leaves two material elements—sexual penetration or sexual contact, and multiple acts over an extended period of time—uncorroborated by any witness and supported by only N.A.'s direct testimony. *See* Minn. Stat. § 609.342, subd. 1(h)(iii). Also, there was evidence contradicting some aspects of N.A.'s testimony in the forensic video, which was admitted for impeachment purposes. Because there was little evidence corroborating N.A.'s testimony and some evidence contradicting it, this factor further weighs against a finding of harmlessness.

Factor four—the extent of cross-examination otherwise permitted—requires closer scrutiny, but in my view still weighs against harmlessness. I respectfully disagree with the opinion of the court that additional cross-examination would have been cumulative of the evidence already received and that the jury had sufficient opportunity to observe the witness's demeanor. To begin, those conclusions do not appear to account for the fact that we must presume for purposes of our harmless-error analysis that the "damaging potential of the cross-examination [would have been] fully realized." *Van Arsdall*, 475 U.S. at 684. Instead, the opinion of the court appears to presume the opposite—that the jury's impression of the witness would not have changed with additional questioning. But it is the cross-examination itself that "is the principal means by which the believability of a

[7] Again, the district court instructed the jury that "the information from that interview that was presented to you can be used . . . for only one purpose, to test the credibility of the trial testimony she provided on the witness stand, here in court." On appeal, "[w]e assume that the jury followed the court's instructions and properly considered the evidence." *State v. Vang*, 774 N.W.2d 566, 578 (Minn. 2009). As a result, we cannot consider N.A.'s statements in the forensic interview as corroborating substantive evidence in our harmless-error analysis, including statements she made that came in through the testimony of other witnesses.

witness and the truth of [their] testimony are tested." *Ferguson*, 742 N.W.2d at 656 (quoting *Davis*, 415 U.S. at 316).

Moreover, as noted, Garbow's counsel identified specific topics about which he intended to ask the witness but did not have a chance. And the district court acknowledged that "the next question could have opened Pandora's box to another hour of cross-exam." We cannot assume that the inconsistencies between the forensic interview and the direct testimony are the only issues that would have been addressed in a full cross-examination.

The facts of this case also are materially distinguishable from the circumstances in *State v. Zielinski*, 10 N.W.3d 1 (Minn. 2024), on which the opinion of the court relies. In *Zielinski*, the Minnesota Supreme Court considered the harmlessness of a limitation on the scope of a cross-examination, 10 N.W.3d at 14-15, not the harmlessness of a witness's unavailability for a complete cross-examination. There, the district court did not permit defense counsel to ask a witness, who was an accomplice to the crime, about the content of a letter he wrote that explained his remorse for agreeing to testify against the defendant in exchange for a lesser sentence. *Id.* at 10-11, 14. The supreme court determined that, because the defendant was still able to inquire during cross-examination about the witness's "state of mind and motivations for accepting the plea deal" and the district court had "provided the jury a sanitized version of the plea agreement," the jury had been "provided meaningful information on [the witness's] plea agreement in the cross examination that was permitted." *Id.* at 16. As a result, the supreme court concluded "that the damaging potential of [the] cross-examination" about details in the letter "would not have been any greater because the information would have been cumulative." *Id.* That is materially different from the situation here, where the cross-examination was cut short and the jury did not have the opportunity to consider the witness's demeanor when responding to topics that had not yet been raised.

Turning to the fifth and final factor of in our harmless-error review—the strength of the state's case—I would conclude that it weighs against harmlessness for many of the reasons already discussed. N.A.'s testimony was the only evidence supporting material elements of the first-degree criminal sexual conduct charges. Assuming that Garbow's cross-examination reached its full, damaging potential and undermined N.A.'s credibility, the state's case was weak. I cannot say beyond a reasonable doubt that the jury would have returned a guilty verdict on the counts involving N.A. based on the modest corroborating evidence of N.A.'s mother, the investigating officer, and the forensic interviewer, while at the same time disbelieving the testimony of N.A. herself.

In sum, considering the factors relevant to our harmless-error review and assuming that the damaging potential of a full and fair cross-examination would have been realized, I would conclude that the confrontation violation was not harmless beyond a reasonable doubt. I would therefore reverse the first-degree criminal sexual conduct conviction and remand for a new trial on counts I through III.

Respectfully, I dissent.