**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A20-0695**

State of Minnesota,
Respondent,

vs.

Scott Clarence Carrillo,
Appellant.

**Filed June 14, 2021**
**Affirmed**
**Cochran, Judge**

Clay County District Court
File No. 14-CR-19-2755

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

Brian J. Melton, Clay County Attorney, Pamela L. Foss, Chief Assistant County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Gaïtas, Presiding Judge; Larkin, Judge; and Cochran, Judge.

**NONPRECEDENTIAL OPINION**

**COCHRAN**, Judge

In this direct appeal from the judgment of conviction of two counts of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b) (2018), appellant argues that the district court erred by allowing the state to impeach him with three prior

felony convictions. He also seeks review of the district court's decision to require disclosure of some, but not all, of the confidential records that he requested from respondent. Lastly, he contends that the district court erred by entering convictions and imposing sentences on both counts of criminal sexual conduct rather than just one count. We conclude that the district court did not abuse its discretion by admitting appellant's prior convictions for impeachment purposes, did not abuse its discretion by ordering disclosure of only a portion of the confidential records sought by appellant, and properly sentenced appellant. We therefore affirm.

## FACTS

On July 11, 2019, respondent State of Minnesota charged appellant Scott Clarence Carrillo with two counts of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b), following allegations that Carrillo engaged in oral and anal sex with a 14-year-old boy. The complaint alleged that the victim reported to his mother that he had been sexually abused. His mother then contacted the police, who arranged for the victim to be interviewed. During the interview, the victim relayed "two occasions of sexual abuse." The complaint also noted that records show the victim is visually impaired and developmentally delayed.

*Pretrial*

In September 2019, Carrillo moved the district court "for an [o]rder for an in camera review of all documents in the possession of [the county social services department] regarding the alleged victim." By an order dated December 2019, the district court granted the defense's motion for in camera review of the social services records concerning the

alleged victim. After reviewing the social services records in camera, the district court found that certain records were "relevant and material in this case." The district court granted disclosure of those records and ruled that the "remainder of the documents will not be disclosed."

In December 2019, the state filed a motion in limine to admit three of Carrillo's prior felony convictions for impeachment purposes if he chose to testify. The district court held a hearing on the matter. At the hearing, the defense objected to the prior convictions as unfairly prejudicial. After hearing from the parties, the district court granted the motion to admit the three convictions but ruled that the state could not reference the convictions by name and instead could refer only to three unspecified felony convictions.

*Trial*

The following summarizes the evidence received during the jury trial. The victim was born prematurely in 2004, he is legally blind, and he undergoes therapy to address behavioral issues and difficulty socializing. The victim's mother met Carrillo in the summer of 2018 and had a brief sexual relationship with him. The victim "looked up" to Carrillo as a mentor. The victim often rode his bicycle over to Carrillo's apartment. On occasion, the victim would help Carrillo with maintenance work at the apartment building where Carrillo worked as the building manager. Carrillo cooked for the victim, and they often watched TV together. The victim spent the night at Carrillo's one-bedroom apartment without his mother "a couple dozen times."

In June 2019, the victim went to sleep-away camp for visually impaired children. While driving her son home from camp, the victim's mother stopped at a scenic spot where

she received a phone call from a friend. The friend lived next door to Carrillo. The friend informed the victim's mother that the victim should not be going over to Carrillo's apartment. After talking to the friend, the victim's mother spoke with the victim. She asked him if there was anything that she needed to know about what was happening at Carrillo's apartment. The victim told his mother that Carrillo had "made him do oral sex" and that Carrillo had intercourse with the victim.

After returning home, the victim's mother flagged down a passing police officer who was driving through the neighborhood. She told the officer what the victim had reported to her. The officer spoke to the victim. Following the officer's report, the chief of police arranged for the victim to be interviewed at the Child Advocacy Center (CAC). CAC employees are specially trained to interview juveniles who may have been assaulted.

During the interview at the CAC, the victim stated that Carrillo forced him to perform oral sex on more than one occasion and anally penetrated him once. The victim told the interviewer that the acts happened in Carrillo's bedroom. During the interview, the victim wrote the words "he made me suck his dick" on a piece of paper. The state called the interviewer to testify, and it introduced the video recording of the interview and the note written by the victim through the interviewer's testimony.

At trial, the victim testified that, when he was 14 years old, Carrillo made him touch Carrillo's penis with his mouth "[t]wice." The victim testified that this conduct occurred in Carrillo's bedroom. He also testified that Carrillo inserted his penis into the victim's anus on more than one occasion. He further testified that the sexual contact "happened in

more than one day." The victim testified that Carrillo told him to not tell anyone about the incidents but that he eventually told his mother.

Carrillo chose to testify. He testified that he knew the victim prior to meeting his mother. According to Carrillo, he met the victim while working at the apartment building where he lived. He testified that the victim would show up at the apartment building while he was working. According to Carrillo, the victim introduced Carrillo to his mother. Carrillo testified that the victim is "[l]ike a son" to him. He testified that he cooked for the victim often. Carrillo testified that mother's friend—who originally alerted the victim's mother—had robbed him twice. He denied the victim's allegations of sexual contact. He described his relationship with the victim as positive and believed that he was a good role model. He testified that he had a positive relationship with the victim's mother until just before the victim went to summer camp, at which point their relationship soured.

Carrillo also admitted on direct examination that he had previously been convicted of three felonies. On cross-examination, the prosecutor confirmed that Carrillo admitted to having been convicted of three unspecified felonies. The district court then informed the jury that the felony convictions were admitted only to assist the jury in considering the credibility of Carrillo's testimony.

At closing, the state argued that the victim testified that he had been abused on more than one occasion and that the abuse involved two types of penetration—oral penetration and anal penetration. The defense emphasized the third-party origins of the report that Carrillo had molested the victim. The jury found Carrillo guilty of both counts.

The district court imposed convictions and sentences on both counts. The district court sentenced Carrillo to concurrent sentences of 168 months' imprisonment on the two counts and to lifetime conditional release on count two. This appeal follows.

## DECISION

Carrillo presents three claims of error. First, Carrillo argues that the district court committed prejudicial error by ruling that his three prior felony convictions were admissible for impeachment purposes. Second, he argues that this court should review the confidential social services records sought by his trial attorney to determine if the district court should have disclosed any additional documents to the defense. Third, he argues that the district court erred by imposing convictions and sentences for both counts because the two offenses stemmed from a single course of conduct. We address Carrillo's arguments in turn.

### I. The district court did not abuse its discretion by determining that Carrillo's prior felony convictions were admissible for impeachment purposes.

Carrillo argues that the district court abused its discretion by determining that his three prior felonies were admissible for impeachment purposes. He further argues that he is entitled to a new trial because he was prejudiced by that error. The state contends that the district court did not abuse its discretion because it ruled that the state could not reference the convictions by name. Instead, the state could refer only to three unspecified felony convictions, which the state contends lessened any prejudicial effect. The state also argues that any potential error was harmless because the district court gave a cautionary instruction.

Evidence that a witness has been convicted of a crime is admissible to impeach the credibility of that witness when the crime is punishable by more than one year in prison and the court determines that the probative value of admitting the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1). "District courts exercise discretion under this evidentiary rule, and in doing so must consider the factors established in *State v. Jones*." *State v. Reek*, 942 N.W.2d 148, 162 (Minn. 2020) (citing *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)). Those factors include: (1) the impeachment value of the prior conviction, (2) the age of the conviction and the defendant's subsequent history, (3) the similarity of the prior conviction and current charge, (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue. *Id.*

We "will not reverse a district court's ruling on the impeachment of a witness by prior conviction absent a clear abuse of discretion." *Id.* (quotation omitted). The district court "should demonstrate on the record that it has considered and weighed the *Jones* factors." *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006). To obtain a new trial, Carrillo must show both that the district court abused its discretion by admitting the prior convictions and that he suffered prejudice as a result. *Reek*, 942 N.W.2d at 162. Before turning to Carrillo's arguments on appeal, we review the context surrounding the district court's decision to admit his felony convictions.

Before trial, the state moved the district court to admit three of Carrillo's prior felony convictions under rule 609(a)(1). These convictions included an aggravated assault from 2017, a felony domestic assault from 2011, and a burglary from 2011. The state argued that all three offenses were admissible under a weighing of the *Jones* factors. In

support of its motion, the state provided a separate *Jones* factor analysis for each of the three convictions. The state admitted that the third factor—the similarity of the prior conviction to the crime charged—weighed against admission for the two assault convictions but argued that the remaining factors weighed in favor of admission for each of the convictions.

At a hearing on motions in limine, defense counsel objected to the admission of the prior convictions on the ground that they were prejudicial. The district court then went through the five *Jones* factors on the record and concluded that all three convictions were admissible. In analyzing whether the probative value of the convictions outweighed their prejudicial effect, the district court concluded that the greatest risk of prejudice came from the names of the offenses. To address this risk, the district court decided to "sanitize the three prior felony convictions and require that the [s]tate identify them as unspecified felony convictions." With this in mind, we turn to Carrillo's arguments on appeal.

Carrillo argues that the district court abused its discretion by deciding that the probative value of his three prior felonies outweighed their prejudicial effect. First, Carrillo argues that the district court abused its discretion by considering the three convictions "as a class" instead of considering each conviction individually. Carrillo is correct that the district court applied the *Jones* factors to the three felonies as a group. But it also noted differences between the convictions where appropriate in conducting its analysis. The record reflects that the district court meaningfully considered each of the *Jones* factors before admitting the convictions.

Second, Carrillo argues that the district court underestimated the prejudicial effect of allowing impeachment with all three convictions because the jury could have been tempted to consider Carrillo's prior convictions "as evidence of propensity, rather than for assessing credibility." We are not persuaded. To limit any potential prejudice from the use of the prior convictions, the district court specifically ordered the state to refer to the convictions as "unspecified felony convictions." The risk that the jury would infer propensity was greatly diminished given that the jury did not know what prior conduct Carrillo had engaged in that resulted in the convictions. In addition, the district court gave a cautionary instruction to the jury on the use of the impeachment evidence. The district court specifically instructed the jury that "evidence concerning prior convictions of [Carrillo] . . . [is] admitted only for your consideration in deciding whether [Carrillo] is telling the truth in this case. You must not consider these convictions as evidence of the defendant's character or conduct, except as you may think it reflects on credibility." We presume that the jury followed the instructions given by the district court. *State v. Matthews*, 779 N.W.2d 543, 550 (Minn. 2010). Accordingly, we discern no basis for concluding that the district court abused its discretion by determining that the probative value of admitting the prior convictions for impeachment purposes outweighed the prejudicial effect.

## II. The district court did not abuse its discretion by declining to disclose certain confidential records after in camera review.

Prior to trial, Carrillo's attorney requested that the district court conduct an in camera review of certain confidential social services records in the possession of the state

to determine if the records should be provided to Carrillo's attorney. The district court undertook the requested review. After doing so, the district court required disclosure of some, but not all, of the records.

Carrillo requests that this court conduct its own in camera review of the confidential records to determine whether the district court abused its discretion by requiring disclosure of only a portion of the records. The state contends that such a review is not necessary.

Criminal defendants have a broad right to discovery to prepare for trial, but requests to discover confidential records require a district court to balance this right against the victim's right to privacy. *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987). "On appeal, we review the limits placed by the district court on the release and use of protected records for an abuse of discretion." *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012).

We first address whether it is appropriate for this court to conduct our own in camera review of the records. The state argues that Carrillo has no basis to request this court to review the records because Carrillo did not explicitly claim in his brief that the district court abused its discretion by not disclosing certain records. The state's argument misses the mark. Where a district court performs in camera review of confidential records, an appellant in a criminal matter is not required to claim an abuse of discretion by the district court with regard to the undisclosed documents to be entitled to a subsequent in camera review by an appellate court. *See Hokanson*, 821 N.W.2d at 349-50 (conducting in camera review on appeal of confidential social services documents previously reviewed in camera by district court without requiring appellant to claim that district court abused its discretion). Requiring an appellant to claim or demonstrate an abuse of discretion by the

district court would impose an impossible burden on the appellant because the appellant has not had the opportunity to view the documents in question—only the state and district court have reviewed the documents. Therefore, we conclude that it is appropriate for this court to review the undisclosed documents to determine whether the district court properly exercised its discretion by ordering the release of only a portion of the documents.

Based on our own independent, careful review of the undisclosed, confidential social services records, we conclude that the district court did not abuse its discretion by limiting access to certain records. The district court disclosed the relevant social services records to Carrillo. The undisclosed documents would not have aided Carrillo in his defense. We therefore conclude that the district court did not abuse its discretion by deciding to disclose some documents to Carrillo but not others.

## III. The district court correctly convicted and sentenced Carrillo on both counts of third-degree criminal sexual conduct.

Carrillo argues that the district court erroneously convicted him and sentenced him for both counts of third-degree criminal sexual conduct. He contends that the district court should have imposed a conviction and sentence for just one count. Because the state proved that Carrillo engaged in multiple acts of criminal sexual conduct against the victim on more than one day, the district court did not err by imposing convictions and sentences for both counts.

Carrillo raises arguments challenging the district court's decision under Minn. Stat. § 609.04 (2018) and Minn. Stat. § 609.035 (2018). Both statutes govern dispositions for multiple offenses, but the statutes concern different matters and require separate

inquiries. Section 609.04 concerns whether a district court can impose multiple *convictions*, while section 609.035 concerns whether a district court can impose multiple *sentences*. *Compare* Minn. Stat. § 609.04 *with* Minn. Stat. § 609.035. The relevant inquiry under section 609.04 is whether the multiple offenses constituted separate acts. *State v. Spears*, 560 N.W.2d 723, 726 (Minn. App. 1997), *review denied* (Minn. May 28, 1997). The relevant inquiry under section 609.035 is whether the offenses were committed as part of a "single course of conduct." *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). Thus, even where multiple convictions are permissible under section 609.04 because a defendant engaged in multiple, separate acts, the district court may not impose multiple sentences if the separate acts constituted a single course of conduct. *State v. Papadakis*, 643 N.W.2d 349, 357-58 (Minn. App. 2002).

We review de novo whether section 609.04 precludes multiple convictions. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012). A defendant may not be sentenced both for an offense and "a crime necessarily proved if [that offense] were proved." Minn. Stat. § 609.04, subd. 1(4). To determine whether an offense is necessarily proved, we examine "the elements of the offense." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). Here, both of Carrillo's convictions contain identical elements because the state charged him twice under the same statute. But section 609.04 does not preclude multiple convictions if the two offenses constitute separate criminal acts. *Id.* And "[t]he inquiry into whether two offenses are separate criminal acts is analogous to an inquiry into whether multiple offenses constituted a single behavioral incident under Minn. Stat. § 609.035." *Id.*

A defendant whose multiple offenses occurred as part of a single course of conduct generally may be sentenced for only one of those offenses. Minn. Stat. § 609.035, subd. 1. Whether "offenses occurred as part of a single course of conduct is a mixed question of law and fact." *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020) (quotation omitted).[1] When an issue presents a mixed question of law and fact, we will "review the district court's findings of fact for clear error and its application of the law to those facts de novo." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). When reviewing findings for clear error, we will not overturn a district court's findings "if there is reasonable evidence in the record to support the court's findings." *State ex rel. Young v. Schnell*, 956 N.W.2d 652, 668 (Minn. 2021) (quotations omitted).

When determining whether multiple offenses were committed during a single course of conduct, we consider "whether the offenses occurred at substantially the same time and place" and "whether the conduct was motivated by an effort to obtain a single criminal objective." *Barthman*, 938 N.W.2d at 265 (quotations omitted). "The [s]tate bears the burden of proving, by a preponderance of the evidence, that a defendant's offenses were not part of a single behavioral incident." *Bakken*, 883 N.W.2d at 270. With this background in mind, we consider Carrillo's arguments in turn.

First, Carrillo argues that his two convictions violate section 609.04 because the jury could have "found that [he] committed one act and returned both verdicts as alternative theories of guilt." But the record does not support his assertion. By imposing two

[1] The phrases "a single course of conduct" and "a single behavioral incident" are interchangeable. *Jones*, 848 N.W.2d at 531 n.1.

convictions, the district court implicitly found that the state proved that Carrillo committed two separate acts. Carrillo has not shown that the district court clearly erred in that regard. The record shows the following. The victim testified that Carrillo orally penetrated him "[t]wice." The victim also testified that Carrillo anally penetrated him "[m]ore than one time." And he testified that the acts happened on "more than one day." Because the record contains evidence of separate criminal acts committed by Carrillo at different times, the state met its burden under section 609.04 to support two separate convictions of third-degree criminal sexual conduct.

Second, Carrillo argues that the state failed to meet its burden under Minn. Stat. § 609.035 to show that Carrillo's offenses were not part of a single course of conduct. He notes that the victim stated during the CAC interview that the oral and anal sex acts happened on the same day. We are not persuaded because his argument fails to consider the record as a whole.

Offenses that occur at "substantially the same time and place" and are "motivated by an effort to obtain a single criminal objective" are part of a single course of conduct. *Bakken*, 883 N.W.2d at 270. Carrillo focuses on some of the victim's statements made during the interview to support his argument that the acts were part of a single course of conduct. But later in the interview, the victim stated that Carrillo made him perform oral sex twice. And at trial, the victim testified that two different types of penetration happened "[m]ore than one time" and on "more than one day." The victim's testimony about multiple acts of penetration on more than one day satisfies the state's burden to show that the offenses did not occur at substantially the same time.

The victim's testimony is also sufficient to show that the offenses were not committed to attain a single criminal objective. "[T]he mere fact that [defendant] committed multiple crimes over time for the *same* criminal objective does not mean he committed those crimes to attain a *single* criminal objective." *Bakken*, 883 N.W.2d at 271. Carrillo's separate acts of third-degree criminal sexual conduct were not in furtherance of the successful completion of any of his other acts, and therefore were not committed to attain a single criminal objective. Consequently, the record supports the conclusion that Carrillo's acts were not part of a single course of conduct.

Finally, Carrillo contends that the prosecutor "did not specify which count went with which act." Carrillo's characterization of the prosecutor's closing argument is inaccurate. The prosecutor argued that "[t]he reason that there are two counts is that [the victim's] testimony was that this has happened to him more than once . . . and there were two types of penetration, . . . anal penetration and . . . oral sex." And the prosecutor clarified that although the two counts looked the same, "one count would refer to the anal penetration. Another count would refer to the oral penetration." Carrillo has not demonstrated that the state failed to show that his two offenses were not committed as part of a single course of conduct because the victim testified about multiple acts of penetration occurring at different times.

*Conclusion*

In sum, Carrillo has not shown that the district court abused its discretion by determining that Carrillo's prior felony convictions were admissible for impeachment purposes because the district court sufficiently evaluated the *Jones* factors. We have

reviewed the confidential records sought by Carrillo and find no abuse of discretion by the district court in its decision to order the release of only a portion of the records to the defense. And the district court properly convicted and sentenced Carrillo for both counts of third-degree criminal sexual conduct because his two offenses were separate acts, not committed as part of a single course of conduct.

**Affirmed.**