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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0500

State of Minnesota,
Respondent,

vs.

Darwin Frederick Schauer,
Appellant.

Filed November 24, 2014
Affirmed
Connolly, Judge

Hubbard County District Court
File No. 29-CR-12-287

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Donovan D. Dearstyne, Hubbard County Attorney, Erika Henry Randall, Assistant County Attorney, Park Rapids, Minnesota (for respondent)

Darwin Schauer, Rush City, Minnesota (pro se appellant)

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his convictions of first-degree, second-degree, and third-degree criminal sexual conduct, contending that the district court deprived him of his right to a unanimous verdict, erred by failing to give the jury a limiting instruction with regard to dismissed counts of the complaint, and abused its discretion by allowing a witness to testify because the testimony was protected under attorney-client and clergy privileges. Appellant also argues that he received ineffective assistance of counsel. We affirm.

FACTS

In 2005, C.S. married appellant Darwin Schauer. C.S. lived in the Philippines and moved to Laporte, Minnesota with her four children in 2007 to live with Schauer. R.A. is C.S.'s oldest daughter and was 13 years old at the time that she moved to Minnesota.

In the spring of 2009 when R.A. was 15 years old, she was ill one day and had to leave school. R.A. called Schauer to take her home. After arriving home, Schauer touched R.A.'s breasts under her clothes while she was on the couch. Schauer then moved R.A. to the floor and undressed her and took his clothes off. R.A. was scared. Schauer put his penis into R.A.'s vagina, and she told him that it hurt. Schauer then removed his penis and penetrated R.A.'s vagina with his finger.

After the first incident, Schauer continued to sexually abuse R.A. two to three times per week through March 2012. The abuse happened in either R.A.'s bedroom or Schauer's bedroom in the morning after C.S. left for work. The ongoing abuse involved

Schauer putting his penis and fingers into R.A.'s vagina, forcing R.A. to touch his penis, licking R.A.'s genitals, and putting his penis near R.A's mouth. R.A. saw "white stuff" come out of Schauer's penis several times.

Schauer purchased contraceptive foam for R.A. to use when they had sex, and he tracked R.A.'s menstrual cycle on a calendar. When R.A. was approximately 17 years old, Schauer told R.A. that he would buy her a car if she would have sex with him more frequently. Before R.A. had her driver's license, Schauer bought her a car.

In the summer of 2011, R.A. had a urinary tract infection, and Schauer took her to the doctor. Schauer continued to have sex with R.A., and R.A. had to go to the doctor again later in the year for another urinary tract infection. R.A. did not tell anyone about the abuse or infections because she was scared of what Schauer would do and how it would affect her family. She was also scared because she, her mother, and siblings depended on Schauer for support.

On March 2, 2012, C.S. awoke early in the morning to discover Schauer naked with R.A. in R.A.'s bed. Schauer got out of R.A.'s bed and said, "I'm sorry, honey, this is not [R.A.'s] fault, this is all my fault." C.S. asked R.A. how long Schauer had been sexually abusing her, and R.A. responded that it had been going on since spring 2009.

After the children left for school, Schauer admitted to C.S. that he had sex with R.A. "[m]any times" starting in 2009. Schauer said that he would build a house for her in the Philippines and that C.S. did not need to do anything around the house because he was her "servant." Schauer feared that C.S. would divorce him and suggested sending R.A. to the Philippines.

Two days after learning about the sexual abuse, C.S. told her pastor, D.K., about what she saw and what R.A. told her about Schauer. D.K. called the police. A deputy from the Hubbard County Sheriff's Office spoke to R.A. and C.S. about the sexual abuse. Deputies then went to Schauer's home, and he admitted to having sex with R.A. Schauer told the deputies that he was sexually attracted to R.A. Schauer told the deputies that he did not have sexual contact with R.A. until she was 18 years old and that he had only kissed R.A. before she turned 18. Schauer admitted that he had "bribed" and "manipulated" R.A. by buying her a car "[i]n hopes that there would be a sexual relationship."

During the investigation, deputies found two bottles of contraceptive foam in Schauer's bedroom and several pairs of R.A.'s underwear. Schauer's DNA was matched to semen found on four pairs of R.A.'s underwear.

The state charged Schauer with six counts of first-degree criminal sexual conduct, two counts of second-degree criminal sexual conduct, and six counts of third-degree criminal sexual conduct. *See* Minn. Stat. §§ 609.342, subds. 1(b), 1(g), .343, subds. 1(b), 1(h)(iii), .344, subds. 1(f), 1(g)(iii) (2012).

D.K., the pastor of C.S.'s church, visited Schauer in jail after he was arrested. Schauer was a pastor of his church until he retired in 2008, and D.K. took over as pastor after Schauer retired. In addition to being a pastor, D.K. is also an attorney. D.K. told Schauer that he was only visiting him to learn how the church allowed Schauer to be a pastor again after a 1983 conviction for having sex with his minor stepdaughter. D.K. specifically informed Schauer that he was not visiting him in the capacity as Schauer's

attorney or pastor and that another pastor had been chosen to give counseling services to Schauer. Before trial, Schauer moved the district court to suppress D.K.'s testimony at trial, claiming that his communications with D.K. at the jail were protected under attorney-client privilege and clergy privilege. The district court denied Schauer's motion.

The district court held a jury trial in November 2012. R.A., C.S., D.K., police investigators, and a forensic scientist from the Bureau of Criminal Apprehension testified. Before instructing the jury, the district court dismissed eight counts because they were duplicative of the remaining six counts.

The jury convicted Schauer of two counts of first-degree criminal sexual conduct, two counts of second-degree criminal sexual conduct, and two counts of third-degree criminal sexual conduct. Minn. Stat. §§ 609.342, subds. 1(b), 1(g), .343, subds. 1(b), 1(h)(iii), .344 subds. 1(f), 1(g)(iii). The district court imposed sentences of 312 months' imprisonment on one count of first-degree criminal sexual conduct and 48 months' imprisonment on one count of third-degree criminal sexual conduct, to be served consecutively.

Schauer filed a timely appeal to this court, and we granted Schauer's motion to stay the appeal and to remand the matter to the district court for postconviction proceedings. The district court held a postconviction hearing and denied Schauer's request for the reversal of his convictions and a new trial. Schauer then moved this court to reinstate his appeal, and we granted his motion.

D E C I S I O N

I. Unanimous Verdict

Schauer contends that the district court deprived him of his right to a unanimous verdict because the "course of conduct" charges allowed the jury to convict him without determining that he committed discrete acts. The state responds, and we agree, that the right to a unanimous verdict does not include the right to have the jury agree on "the precise manner in which a defendant committed a crime."

Because Schauer did not object at trial or move the district court to instruct the jury to make findings on specific acts, we review for plain error. *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012). "Under this standard, we may review an unobjected-to error only if there is (1) error; (2) that is plain; and (3) that affects substantial rights." *Id.* at 655-56. If these prongs are met, "we then decide whether we must address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (quotation omitted).

"Jury verdicts in all criminal cases must be unanimous." *State v. Pendleton*, 725 N.W.2d 717, 730 (Minn. 2007) (citing Minn. R. Crim. P. 26.01, subd. 1(5)). A district court must avoid jury instructions that "are unclear and potentially raise doubt about the unanimity of the jury verdict." *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001).

A jury does not need to agree on the method by which an element of a crime may have been committed. *State v. Rucker*, 752 N.W.2d 538, 547 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008); *see also Richardson v. United States*, 526 U.S. 813, 817,

119 S. Ct. 1707, 1710 (1999) (holding that a jury need not unanimously decide "which of several possible sets of underlying brute facts make up a particular element" or "which of several possible means the defendant used to commit an element of the crime."). "Generally, specific dates need not be proved in cases charging criminal sexual conduct over an extended period of time." *Rucker*, 752 N.W.2d at 547. A jury need only agree that the state proved each element of the offense beyond a reasonable doubt. *Richardson*, 526 U.S. at 818, 119 S. Ct. at 1710.

Schauer specifically objects to his conviction for third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(g)(iii). He reasons that this count must have been necessarily included in the count of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(b).

Minn. Stat. § 609.344, subd. 1(g)(iii), states:

> A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if . . . the actor has a significant relationship to the complainant, the complainant was at least 16 but under 18 years of age at the time of the sexual penetration, and: . . . the sexual abuse involved multiple acts committed over an extended period of time.

Minn. Stat. § 609.342, subd. 1(b), explains:

> A person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if . . . the complainant is at least 13 years of age but less than 16 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant.

Because these counts of the complaint do not have overlapping periods of time, as one count alleges conduct that happened when R.A. was between the ages of 13 and 16 and the other count alleges conduct that occurred when R.A. was between the ages of 16 and 18, Schauer's argument fails.

Schauer also asserts that the count dealing with third-degree criminal sexual conduct "necessarily could not have been proven without juror agreement on the specific acts which form the series of multiple acts." The state presented evidence that Schauer sexually penetrated R.A. and had sexual contact with R.A. multiple times between 2009 and 2012 when R.A. was between the ages of 15 and 18 years old. The district court was not required to instruct the jury to make findings on which specific acts Schauer committed under this count, only that Schauer committed "multiple acts" of sexual penetration on R.A. when she was between the ages of 16 and 18 years old. *See* Minn. Stat. § 609.344, subd. 1(g)(iii); *State v. Becker*, 351 N.W.2d 923, 926-27 (Minn. 1984) (holding that a defendant can be convicted of sexual abuse if the prosecution proves abuse occurred within a reasonable period of time; specific dates of abuse need not be proven); *Rucker*, 752 N.W.2d at 547 (explaining "specific dates need not be proved in cases charging criminal sexual conduct over an extended period of time."); *State v. Poole*, 489 N.W.2d 537, 543 (Minn. App. 1992) (providing "specific dates need not be charged or proven in a sexual abuse case"), *aff'd*, 499 N.W.2d 31 (Minn. 1993). Because the district court did not err, much less plainly err, by allowing the jury to convict him of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(g)(iii), without making findings on specific acts, we are not persuaded by Schauer's argument.

II. Limiting Instruction on Dismissed Counts

Schauer contends that the district court plainly erred because it did not give a limiting instruction to the jury sua sponte regarding the counts it dismissed because "a limiting instruction was required to ensure that the jurors only considered evidence relating to remaining counts." Because the dismissed counts were duplicative of the remaining counts, we disagree and hold that the district court properly excluded a limiting instruction on the dismissed counts.

Because Schauer did not object to the jury instructions, we review the district court's failure to give a limiting instruction for plain error. *See State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006) (stating that on appeal, "an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights."). Under that standard, Schauer must first demonstrate error that is plain. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "An error is plain if it was clear or obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotations omitted). District courts are allowed considerable latitude in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002).

The district court dismissed eight counts from the complaint as "identical, carbon copy, duplicative counts" of the remaining counts, believing that "it would be error if [the court] were to submit them as they are presented and charged out." As the state points out in its brief, counts one through three were identically charged under Minn. Stat. § 609.342, subd. 1(b), counts four through six were identically charged under Minn. Stat. § 609.342, subd. 1(g), and counts 10 through 14 were identically charged under Minn.

Stat. § 609.344, subd. 1(f). We hold that the district court properly excluded a limiting instruction to the jury regarding the dismissed counts because the acts alleged in the remaining and dismissed counts were identical.

III. Attorney-Client and Clergy Privileges

Schauer asserts that the district court committed reversible error by allowing D.K. to testify about his conversation with Schauer at the jail because D.K.'s testimony "violated both the attorney-client privilege and the clergy privilege under Minn. Stat. § 595.02." The state disagrees, contending that the district court properly allowed D.K. to testify because the conversation was about "church business" and D.K. specifically told Schauer that he was not acting as his attorney or pastor. We are unpersuaded by Schauer's argument.

"The availability of a privilege established under statutory or common law is an evidentiary ruling to be determined by the [district] court and reviewed based on an abuse of discretion standard." *State v. Gianakos*, 644 N.W.2d 409, 415 (Minn. 2002). "Whether a communication, oral or recorded, is privileged is a question of fact." *State v. Lender*, 266 Minn. 561, 563, 124 N.W.2d 355, 357-58 (1963). But the interpretation of a statute is a legal question that is reviewed de novo. *State v. R.H.B.*, 821 N.W.2d 817, 820 (Minn. 2012).

A. Attorney-Client Privilege

Minn. Stat. § 595.02, subd. 1(b) (2012), explains:

> An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in

> the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

"The purpose of the privilege is to encourage the client to confide openly and fully in his attorney without fear that the communications will be divulged and to enable the attorney to act more effectively on behalf of his client." *National Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979).

The classic explanation of attorney-client privilege in Minnesota caselaw is:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Kobluk v. Univ. of Minn., 574 N.W.2d 436, 440 (Minn. 1998) (quotation omitted). The existence of an attorney-client relationship is "usually a question of fact dependent upon the communications and circumstances." *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265 (Minn. 1992).

In response to Schauer's motion to suppress D.K.'s testimony under attorney-client privilege, the district court stated:

> [R]egarding the attorney[-]client privilege, I will find that it does appear that [D.K.] is a licensed, practicing attorney in the state of Minnesota. That one of the elements is that the communication was, in fact, confidential. And that element is established in that their conference was over at the jail, in the visitation room over the phone, a confidential communication between those two gentlemen. The other element . . . includes that the conference must be with a lawyer. That is present. But the other factors . . . That the consultation must be for the purpose of seeking professional advice. And I'm

> going to find that that element was not satisfied. That the subject conversation between [D.K.] and Mr. Schauer was not one that was initiated by Mr. Schauer in terms of seeking professional legal advice. Rather it was initiated by [D.K.], whose purpose was not to legally represent Mr. Schauer but to inquire, confront about the situation with the church. And note that at the start of their conference that [D.K.] advised Mr. Schauer that he was not his attorney nor his minister. So the attorney[-]client privilege I think . . . is not established.

The record shows that Schauer requested to have D.K. represent him as his attorney at his arraignment, but D.K. declined to represent him. When D.K. went to the jail to visit Schauer, D.K. told Schauer, "I am not here as your attorney." Schauer did not ask D.K. to visit him. D.K. explained to Schauer that he wanted to know how Schauer was able to serve as a pastor after being convicted of felony criminal sexual conduct against a minor in 1983. Nothing in the record suggests that Schauer received or attempted to receive legal advice from D.K. during D.K.'s visit to the jail. Without evidence in the record to show that Schauer and D.K.'s conversation was for the purpose of Schauer receiving legal advice from D.K., Schauer cannot make a showing that the attorney-client privilege applies to the conversation. *See* Minn. Stat. § 595.02, subd. 1(b); *Kobluk*, 574 N.W.2d at 440. Based on this record, we conclude that the district court properly ruled that Schauer's conversation with D.K. at the jail was not for the purpose of obtaining legal advice and did not abuse its discretion by allowing D.K. to testify.

B. Clergy Privilege

Minnesota law provides that:

> A member of the clergy or other minister of any religion shall not, without the consent of the party making the confession, be allowed to disclose a confession made to the member of the clergy or other minister in a professional character, in the course of discipline enjoined by the rules or practice of the religious body to which the member of the clergy or other minister belongs; nor shall a member of the clergy or other minister of any religion be examined as to any communication made to the member of the clergy or other minister by any person seeking religious or spiritual advice, aid, or comfort or advice given thereon in the course of the member of the clergy's or other minister's professional character, without the consent of the person.

Minn. Stat. § 595.02, subd. 1(c) (2012).

The purpose of the clergy privilege is to allow individuals freedom to unburden themselves by seeking spiritual healing without the threat of incriminating themselves. *In re Swenson*, 183 Minn. 602, 605-06, 237 N.W. 589, 591 (1931). An assertion of the clergy privilege "requires proof of the following: (1) the potential witness is a religious minister; (2) the communicant intended the conversation to be private; and (3) the communicant was seeking religious or spiritual help." *State v. Orfi*, 511 N.W.2d 464, 469 (Minn. App. 1994) (citing *Lender*, 266 Minn. at 564, 124 N.W.2d at 358), *review denied* (Minn. Mar. 15, 1994). "In determining whether the privilege applies, the [district] court should look to the circumstances leading up to the communication." *Id.* "The burden is on the party asserting the clergy privilege to show he was seeking spiritual aid in a confidential conversation when he spoke with a member of the clergy." *State v. Rhodes*, 627 N.W.2d 74, 85 (Minn. 2001).

When denying Schauer's motion to suppress D.K.'s testimony under the clergy privilege, the district court explained:

> The party asserting the privilege has the burden of establishing the elements, and they are not all present. First element is that [D.K.] was a minister. And I'm going to find that he was. That even though he attempted to unilaterally end that relationship that [D.K.] could not do that on his own. And actually he discussed the subsequent church meeting. Apparently the congregation needs to vote . . . to remove someone from their church roster or membership, and that occurred after the conference between [D.K.] and Mr. Schauer. . . . Again, one of the other elements was that Mr. Schauer intended that the communication be confidential. And [D.K.], again, at the start of their conference announced to Mr. Schauer that he was not there as his minister and I think communicated to Mr. Schauer that their conference was not going to be a [sic] confidential. And then the final element is that, again, that communication would have been on Mr. Schauer's part to seek ministerial advice or comfort or spiritual healing. And again, . . . he did not initiate it, it was [D.K.] who initiated it. And that that communication, again, was not made for Mr. Schauer to seek religious or spiritual advice or aid or comfort, it was, again [D.K.] inquiring, confronting about the situation.

When D.K. went to the jail to speak with Schauer, D.K. told Schauer, "I'm not here as your pastor," and that another pastor would be "rendering pastoral care" to him. As explained above, D.K. went to speak with Schauer because he wanted to know how Schauer was allowed to be a pastor after his 1983 felony conviction of criminal sexual conduct against a minor. D.K. initiated the conversation with Schauer, and nothing in the record indicates that Schauer sought pastoral guidance from D.K. while they spoke at the jail. Because Schauer cannot make a showing that his conversation with D.K. was for the purpose of receiving religious or spiritual guidance, we hold that the district court

properly ruled that the conversation was not protected by clergy privilege and did not abuse its discretion in allowing D.K. to testify. *See* Minn. Stat. § 595.02, subd. 1(c); *Orfi*, 511 N.W.2d at 469.

IV. Ineffective Assistance of Counsel

Schauer states that he received ineffective assistance of counsel "when his trial counsel admitted, without his prior knowledge or consent, an essential element of the charges against him" because the "admission was not trial strategy, but rather deficient performance and presumptively prejudicial." We disagree.

We review claims of ineffective assistance of counsel de novo. *Dobbins v. State*, 788 N.W.2d 719, 728 (Minn. 2010). Defendants are guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. To show that he did not receive effective assistance of counsel, Schauer must demonstrate "that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for his counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Nissalke*, 801 N.W.2d 82, 111 (Minn. 2011) (quotation omitted). Objective reasonableness is "representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (quotation omitted). We presume that trial counsel's performance was reasonable and defer with respect to matters of trial strategy. *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007).

Defense counsel is responsible for trial strategy, but the decision of whether to admit guilt at trial is for the defendant. *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984). "We have repeatedly stated that we generally will not review attacks on counsel's trial strategy." *Opsahl*, 677 N.W.2d at 421. "[I]f a defense counsel impliedly admits a defendant's guilt without the defendant's permission or acquiescence, the defendant should be given a new trial even if it can be said that the defendant would have been convicted in any event." *Id.* But an attorney may as part of trial strategy concede that the defendant acted poorly or committed an uncharged crime. *See State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003) ("Counsel's admission to an undisclosed, noncharged crime is not a concession of guilt so as to entitle [appellant] to a new trial."). To constitute an impermissible concession of guilt, defense counsel must concede that his client committed the charged criminal offense. *State v. Moore*, 458 N.W.2d 90, 96 (Minn. 1990) ("We hold that defendant was denied a fair trial and effective assistance of counsel entitling him to a new trial when his attorney conceded, without defendant's permission, that defendant was guilty of [the charged offense].").

During his opening statement, Schauer's counsel stated:

> Yes, the facts will show that Darwin Schauer had sex with [R.A.]. Absolutely, it's true. That's a fact. It was wrong, it was immoral, it was unfaithful to his wife, it hurt his family and it has him here in a lot of trouble. But folks, remember, this is not morality court, this is criminal court, and you are here to decide whether Mr. Schauer's actions are illegal under Minnesota law. I'm sure you won't condone what he did. No one here will. But the question is do the facts that are presented to you fit the crimes charged. Because during this trial you're going to learn that it is not illegal for a man to

> have consensual sex with his eighteen year old stepdaughter. Period.
>
> . . . .
>
> Folks, the evidence will also show that the sex between Mr. Schauer and [R.A.] was consensual. [R.A.] never said no. Mr. Schauer never used force, he never used threats of any kind. She will come in here and admit it.

Because Schauer's trial counsel did not concede Schauer's guilt on any of the charged offenses, we conclude that Schauer's counsel stating that Schauer had sex with R.A. when she was 18 years old was a matter of trial strategy. In a recorded statement to the police, Schauer admitted to having sexual intercourse with R.A. after she turned 18 years old. The district court admitted this recording into evidence, and the state published it to the jury. The district court also admitted forensic evidence showing that Schauer's semen was found on R.A.'s underwear. No evidence was presented at trial to show that Schauer did not have sexual intercourse with R.A. The fact that Schauer's trial counsel did not concede Schauer's guilt on any of the charged offenses, combined with the evidence presented at trial, demonstrates that the statement from Schauer's counsel that Schauer had consensual sex with R.A. after she was 18 years old was a matter of trial strategy. *See Lopez-Rios*, 669 N.W.2d at 614 (holding that defense counsel's admission of an uncharged crime was not an admission of guilt, but rather permissible trial strategy). Because this court generally does not review matters of trial strategy, we hold that Schauer's ineffective-assistance-of-counsel claim is without merit. *Opsahl*, 677 N.W.2d at 421.

Affirmed.