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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1692

State of Minnesota,
Respondent,

vs.

Mohamed Ali Elmi,
Appellant.

Filed November 27, 2017
Affirmed in part, reversed in part, and remanded
Connolly, Judge

Hennepin County District Court
File No. 27-CR-15-21829

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant was convicted at trial of criminal sexual conduct, aggravated robbery, and

aiding and abetting kidnapping. He challenges the district court's decision to prohibit him from testifying concerning a defense of duress and the sufficiency of evidence for the jury's finding of two or more heinous elements, which resulted in a sentence of life without the possibility of release. Finally, appellant argues that the district court erred by adjudicating him guilty of one first-degree criminal-sexual-conduct count (penetration, causing personal injury and using force or coercion) and one second-degree criminal-sexual-conduct count in addition to one first-degree criminal-sexual-conduct count (penetration and fear of great bodily harm). Because the district court did not err in limiting appellant's testimony and because there was sufficient evidence to find two or more heinous elements, we affirm in part. But, because the district court erred by adjudicating appellant on both counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct, we reverse in part and remand to the district court to vacate the formal adjudication of guilt on one count of first-degree criminal sexual conduct and the count of second-degree criminal sexual conduct.

FACTS

A.D. and K.F. lived in the same apartment complex in South Minneapolis. Shortly after midnight on August 4, 2015, A.D. and K.F. were sitting on a staircase behind their apartments when they noticed two individuals running through the alleyway. Several seconds later, A.D. saw a light from a laser, which he realized was coming from a gun held by appellant Mohamed Ali Elmi. Appellant was running in the same direction as the others, but when he noticed A.D. and K.F., he stopped and pointed the firearm toward them. Appellant demanded A.D. and K.F. give him everything they had. K.F. began to cry, and

appellant told her to stop crying or he would shoot her. K.F. testified that appellant continued "waving [the gun] at our faces and pointing it towards us." Appellant took A.D.'s car keys and K.F.'s debit card, checks, iPod, headphones, cellular phone, and $3 in cash. After appellant became upset with K.F. for not having more cash or a credit card, K.F. told appellant her PIN for her debit card. Appellant demanded K.F. go with him to an ATM to "empty out" her bank account.

A car pulled up in the alley with one man driving and another sleeping in the back seat. A.D. testified that the driver and appellant screamed at each other in a foreign language. K.F. testified that appellant said in English, "[t]his girl is going to take us to an ATM." Appellant pointed the gun at K.F., grabbed K.F.'s arm, and directed her into the car. Appellant told A.D. that they would be back in five minutes and that he would kill K.F. if A.D. called the police. Appellant entered the passenger seat, the driver instructed K.F. to sit on top of the man sleeping in the back seat, and they drove away.

In the car, the two men told K.F. that they were looking for $1,500 and that they would kill her if she tricked them. K.F. testified that the driver said, "I really want to kill someone tonight," and appellant responded, "Me too." Appellant told K.F. that she seemed nice, but it was not her night. K.F. testified that the driver "had the gun at one point, and then the passenger had a gun," but she was "not sure if they were the same gun or different guns." K.F. said the men were drinking from a large liquor bottle and driving dangerously; going the wrong way down one-way streets and hitting cones. K.F. was afraid the police would try to stop the car and she would be killed.

Appellant directed the driver to an ATM. When they arrived, the men told K.F. to get out of the car and, again, threatened to kill her if she tried to trick them. K.F. testified that one of the men placed the gun in his pants. The three of them entered the bank lobby and attempted to withdraw $1,500 from K.F.'s account, but K.F. did not have that much money and the daily maximum withdrawal amount was $300.

The driver told K.F. that he wanted her to "suck his dick," and that "they were going to have a little bit of fun" because they were unable to get the money. Appellant said he "knew the perfect place." Appellant directed the driver to Riverside Park in Minneapolis. K.F. did not know where she was and did not see any other people around. When they arrived, the driver and appellant led K.F. to a park bench, where they sexually assaulted her, including forced vaginal penetration and forced oral sex. K.F. testified, "I just broke down crying because I was so scared that [the driver] was going to knock my teeth out and I didn't know where the guns were and I was still so scared they were going to kill me."

K.F. testified that as the assault ended, the driver said, "I'm going to get your phone and we'll take you home." K.F. responded that she could get herself home and asked that they leave her there, but appellant said he, "wasn't done yet." Appellant made K.F. get on top of him on the ground. K.F. testified that she was "hysterical" and she pleaded with appellant to let her go home. Appellant then tried oral penetration, but was unsuccessful. Appellant said, "I don't want to do anything that you don't want to do" and walked away. The medical examiner also testified that K.F. had told her later that night that "[t]hey told me they'd bring me home. I told them no, I could just walk home."

K.F. stayed in the park while the men drove away. K.F. did not know where she was. She saw no other people or cars, so she walked to a gas station on Riverside Avenue and told a man to call 911. When approaching this man, K.F. testified that she was scared that he was also going to be a "bad person." In her 911 call, K.F. said:

> I'm so scared cuz they have guns and they threatened to kill me if I called the police but I just wanna go home . . . . Yeah, and they got mad at me when I could only take $300 out and they, I thought they were gonna kill me . . . . I'm just really scared. They both had guns and I just, they both were like, "I wanna kill someone tonight," and I just don't wanna be that person . . . . I'm just really scared. I'm just really, I've never been this scared in my life.

K.F. also testified that she was afraid the assailants would return, see her calling the police, and kill her.

Law enforcement examined the video that was taken at the ATM and searched the park. A crime lab established appellant as a match for a palm print left on the park bench. Appellant's DNA was also found at the scene. Officers searched a car matching the description by A.D. and K.F., in which they found an iPod and two checks with K.F.'s name. K.F. identified these items as hers. After the investigation, law enforcement was able to identify both appellant and the driver. Appellant was arrested, but law enforcement believed the driver had fled to East Africa.

A grand jury indicted appellant of: two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(c) (2014) (penetration and fear of great bodily harm) (Count I) and § 609.342, subd. 1(e)(i) (2014) (penetration, causing personal injury, and using force or coercion) (Count II); one count of second-degree

criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(c) (2014) (sexual contact and fear of great bodily harm) (Count III); one count of aiding and abetting kidnapping in violation of § 609.25, subd. 1(2) (2014) (removing without consent to facilitate a felony or flight and failing to release victim in a safe place) (Count IV); and two counts of first-degree aggravated robbery in violation of § 609.245, subd. 1 (2014) (based on the actions against two different victims) (Counts V and VI). The three criminal-sexual-conduct charges were subject to a life sentence without release pursuant to Minn. Stat. § 609.3455, subd. 2(1) (2014) (the factfinder determines that two or more heinous elements exist).

During the jury trial and after the state had rested its case, appellant moved the district court to allow him to present a duress defense. The district court denied this motion as untimely because appellant did not provide the state with proper notice pursuant to the Minnesota Rules of Criminal Procedure. The court additionally ruled, "I won't allow [appellant] to testify about pressure he felt from another individual to perform any particular act that was involved here." Appellant then chose not to testify. When asked by the district court whether he understood and was comfortable with that choice, appellant said, "[y]es." Appellant's counsel made an offer of proof as to what appellant would have testified had the court not limited his testimony: he said appellant would have explained that the driver threatened his and his brother's lives if appellant did not obey him and that appellant believed the driver had a gun. The defense did not call any witnesses.

The jury found appellant guilty on all six counts and found three heinous elements. Over appellant's objection and based on the jury's findings, the district court sentenced appellant to life in prison without the possibility of release. This appeal follows.

D E C I S I O N

Appellant first requests a new trial, arguing that the district court's testimony limitation violated appellant's constitutional right to testify in his own defense. Appellant alternatively requests that this court reverse his sentence and remand to the district court to give him the possibility of parole because the state did not prove the existence of two or more heinous elements. Finally, appellant challenges his sentence by asserting that the district court erred in entering convictions on Counts II and III in addition to Count I.

I.

Appellant argues that he is entitled to a new trial. We review whether an evidentiary ruling violates a defendant's constitutional rights de novo. *State v. Wenthe*, 865 N.W.2d 293, 306 (Minn. 2015). "A violation of a criminal defendant's constitutional rights necessitates a new trial unless the violation was harmless beyond a reasonable doubt." *Id.*

Both parties agree that appellant did not provide proper notice of his intent to raise a duress defense. Our rules require that the accused disclose a duress defense prior to the omnibus hearing. Minn. R. Crim. P. 9.02, subd. 1(5)(d). The rules also provide sanctions for violating rule 9.02, including permitting the discovery, granting a continuance, holding counsel in contempt, or "enter[ing] any order as [the court] deems just in the circumstances." Minn. R. Crim. P. 9.03, subd. 8. District courts have broad discretion in imposing sanctions for discovery-rule violations because they are uniquely situated to

make that judgment. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). Thus, this court will not overturn the district court's ruling absent a clear abuse of discretion. *Id.* Minnesota appellate courts have held that the exclusion of evidence is an appropriate sanction for a party's failure to disclose if the district court appropriately considered the *Lindsey* factors:

> (1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors.

Id.; *See In re Welfare of M.P.Y.*, 630 N.W.2d 411, 419 (Minn. 2001) (finding reversible error when the district court precluded defendant's testimony as a sanction for failing to provide notice of its alibi defense because the district court did not consider the feasibility that a continuance could rectify the prejudice.)

Appellant argues that the district court went beyond its discretion to deny his duress defense and violated his constitutional right to testify when it did not allow him to "testify about pressure he felt from another individual to perform any particular act that was involved here." We disagree. A criminal defendant's due process rights include a defendant's right to explain to the jury his version of events. *See M.P.Y.*, 630 N.W.2d at 416 ("[T]he Fourteenth Amendment protects a defendant's right to testify in his own defense."). However, "[t]he right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock v. Arkansas*, 483 U.S. 44, 55-56, 107 S. Ct. 2704, 2711 (1987). Restrictions on the right to testify must "not be arbitrary or disproportionate to the purposes they are designed to serve." *State v. Richardson*, 670 N.W.2d 267, 282 (Minn. 2003) (quoting *Rock*, 483 U.S. at 55-56, 107 S. Ct. at 2711).

We see no difference in asserting a defense of duress and one of "pressure." The duress evidence that the district court excluded necessarily also excluded appellant's testimony regarding any pressure he felt to act the way he did. Here, the district court considered all the *Lindsey* factors before ruling that the duress defense was precluded and, necessarily, that appellant could not testify about any pressure he felt to commit certain acts. The district court determined that the reason for appellant's untimely disclosure was unjustifiable and inexcusable. "There's no excuse for not bringing this up earlier, whatever the reason for not bringing it up." The district court also examined the extent of the prejudice that allowing appellant to introduce a duress defense would have on respondent and determined that the prejudice was extensive because the state would have to recall its witnesses and reshape its case to address a duress defense. A continuance was not feasible since the parties were in the middle of a trial. Finally, we reject the contention that the district court prohibited appellant from testifying. He could have testified. He simply could not have testified about a duress defense.

Additionally, we conclude that any error the district court committed by limiting defendant's testimony would have been harmless beyond a reasonable doubt because of the evidence against appellant and because appellant's proffered testimony would not have established a defense or invalidated the heinous elements. For an evidentiary error "[t]o be harmless beyond a reasonable doubt, the jury's verdict must be surely unattributable to the error." *State v. Lilienthal*, 889 N.W.2d 780, 787 (Minn. 2017) (quotation omitted). Here, the state introduced overwhelming evidence that appellant was a willing participant

in the events rather than acting under duress. Thus, appellant's inability to testify about pressure that he felt surely would not have altered the jury's verdict.

Additionally, appellant's offer of proof only suggested appellant would have presented testimony relevant to a duress defense. Nothing in the offer of proof was relevant to the heinous elements that the jury found. Indeed, the district court did not preclude appellant from testifying about the heinous elements in any way. Appellant's choice not to testify about the facts relevant to the heinous elements was not causally connected to the district court's ruling.

II.

Appellant next argues that this court must remand to the district court with instructions to impose a life sentence with the possibility of release under Minn. Stat. § 609.3455, subd. 3(a) (2014) because there was sufficient evidence to support the finding of only one heinous element. To the extent appellant challenges the district court's interpretation of a statute, such as the heinous-elements statute, our review is de novo. *See State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013). This court gives statutory words and phrases their ordinary and plain meaning. *State v. Fleming*, 883 N.W.2d 790, 795 (Minn. 2016). "If the Legislature's intent is clear from the plain and unambiguous statutory language, we do not engage in any further construction." *Id.* The jury found that the state proved the following three heinous elements of those listed in Minn. Stat. § 609.3455, subd. 1(d) (2014):

> (5) the offender was armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and used or

> threatened to use the weapon or article to cause the complainant to submit . . . (7) the offense involved more than one perpetrator engaging in sexual penetration or sexual contact with the complainant; or (8) the offender, without the complainant's consent, removed the complainant from one place to another and did not release the complainant in a safe place.

The district court adopted the jury's findings and sentenced appellant to life without the possibility of release pursuant to Minn. Stat. § 609.3455, subd. 2(a)(1) (2014) (providing mandatory life sentence without release if the factfinder determines that two or more heinous elements exist). Appellant argues that the state did not provide sufficient evidence pertaining to heinous elements (5) and (8). We disagree.

Appellant argues that the state failed to present sufficient evidence as to whether he possessed a dangerous weapon during the sexual assault and whether he used or threatened to use a dangerous weapon during the sexual assault. Minn. Stat. § 609.3455, subd. 1(d)(5), in relevant part, requires the state prove that "the offender was armed with a dangerous weapon" and "used or threatened to use the weapon . . . to cause the complainant to submit." Appellant's insertion of the word "during" into Minn. Stat. § 609.3455 subd. 1(d)(5) contradicts the statute's plain meaning; therefore, the state did not have to prove appellant was armed with a dangerous weapon during the sexual assault.

The statute requires that the offender was armed with a dangerous weapon and that he used or threatened to use the weapon to cause submission. Proving the offender "was armed" does not require proving the defendant displayed a dangerous weapon during the exact moment of the sexual assault. Appellant was holding a firearm from the outset of his encounter with K.F. K.F. testified that appellant and the driver repeatedly threatened to

kill her. K.F. also testified that although she did not know where the gun was during the sexual assault, she remained scared that appellant and the driver were going to kill her. The evidence to support this heinous element is more than sufficient.

Appellant also argues that the state failed to establish the heinous element in subdivision 1(d)(8), which requires finding that he removed K.F. from one place to another without her consent and subsequently failed to release K.F. in a safe place. Appellant concedes that the state provided evidence that he removed K.F. from her apartment building and brought her to Riverside Park, but contends the state failed to prove that K.F. was not released in a safe place.

Appellant first argues the state failed to prove that Riverside Park was not a safe place because (1) K.F.'s choice to stay in the park rather than return to the car with appellant and the driver establishes that the place was safe, (2) the state presented no evidence that the place was unsafe, and (3) Riverside Park is located in a residential area. This argument is not persuasive.

First, the fact that a victim would rather take her chances in an unknown area than continue to be in the presence of people who kidnapped, robbed, raped, and repeatedly threatened to kill her does not establish that the area was safe. Additionally, there was evidence that K.F. was left in an unlit Minneapolis park, in the middle of the night, at a location unknown to her, and in an area where no other people or cars were present. When K.F. approached a man's truck to ask for help, the gas station was closed, and she was worried that he might also be "a bad guy." This court defers to the credibility determinations made by the jury because juries are "in the best position to weigh the

credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony." *State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008). The reviewing court assumes the jury believed respondent's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "[A]ll inconsistencies in the evidence are also resolved in favor of the [respondent.]" *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990). When the inconsistencies are resolved in favor of the state, the jury's finding that the place where appellant left K.F. was unsafe for purposes of subdivision 1(d)(8) was reasonable.

Appellant alternatively argues that, even if Riverside Park were an unsafe place, this court "must find that it is an *absurd* result to impose the most serious sentence in the State of Minnesota—life without the possibility of release—where K.F. was offered a ride from Riverside Park to her apartment, but voluntarily declined the offer." (emphasis added).

We are simply astounded by this argument. After appellant and the driver had sexually assaulted K.F., it comes as no surprise to us that she declined the driver's "generous" offer for a ride back to her apartment. No doubt K.F. was afraid that, once back at the privacy of her apartment, appellant would have killed her, as he repeatedly threatened to do.

Appellant and the driver intentionally took K.F. to the park. After the driver said he wanted K.F. to "suck his dick," appellant stated that he knew the "perfect place," then directed the driver to the park. Appellant then forced K.F. out of the car and onto the park bench. Appellant was a willing participant throughout this incident. He took K.F. to the

park and he left her there. Finding that these actions fulfilled subdivision 1(d)(8) is not an absurd result.

III.

Appellant was convicted of first-degree criminal sexual conduct in Counts I and II and second-degree criminal sexual conduct in Count III. Appellant argues that the district court erred by entering formal adjudications of guilt on Count II and Count III because Count II is a necessarily proved offense and Count III is a lesser-included offense. The state agrees that the convictions on Count II and Count III should be vacated if those convictions were improperly entered.

Under Minn. Stat. § 609.04, subd. 1 (2014), a criminal defendant "may be convicted of either the crime charged or an included offense, but not both." A conviction is the district court's formal adjudication of the verdict through the filing of the official judgment of conviction. *See State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999) (directing courts issuing conviction orders to be "very clear" about the offense of which the defendant is formally adjudicated guilty). "When the defendant is convicted on more than one charge for the same act the court is to adjudicate formally and impose sentence on one count only." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quotation omitted). "An offense is 'necessarily included' in a greater offense if it is impossible to commit the greater offense without committing the lesser offense." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). "[A] defendant may not be convicted of two counts of criminal sexual conduct (different sections of the same statute or different subsections) on the basis of the same act or unitary course of conduct." *State v. Folley*, 438 N.W.2d 372, 373 (Minn. 1989).

> We hold that the proper procedure to be followed by the [district] court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated and sentence imposed, with credit, of course, given for time already served on the vacated sentence.

State v. LaTourelle, 343 N.W.2d 277, 284 (Minn. 1984). Counts II and III are necessarily proved if Count I is proved. Entry of formal adjudication of guilt for Counts II and III was error.

Accordingly, we reverse appellant's convictions only on Counts II and III and remand with instructions to the district court to vacate the formal adjudication of guilt on those counts, but to leave the jury's guilty verdict in place. *See State v. Crockson*, 854 N.W.2d 244, 248 (Minn. App. 2014), *review denied* (Minn. Dec. 16, 2014). All other convictions and the prison sentence of life without the possibility of release are affirmed.

Affirmed in part, reversed in part, and remanded.