STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1180

State of Minnesota,
Respondent,

vs.

Robert Howard Nordquist,
Appellant.

Filed August 6, 2018
Affirmed
Florey, Judge

Hennepin County District Court
File No. 27-CR-15-30628

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Reilly, Judge; and Florey, Judge.

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

FLOREY, Judge

Appellant challenges his convictions and sentences for two counts of first-degree criminal sexual conduct. Appellant argues that his convictions must be reversed because

he was denied his constitutional right to present a defense when the district court excluded evidence of the complainant's (C.N.) prior false allegations of sexual abuse, and his federal and state constitutional rights were violated when the district court denied his motion for a mistrial based on the state's failure to disclose an email sent to a county attorney by a family member of a potential witness. Appellant also argues that he cannot receive separate convictions and sentences for both first-degree criminal-sexual-conduct charges because the jury instructions overlapped the time periods for both charges. Alternatively, he argues that the district court erred in departing from the presumptive sentences based on a zone-of-privacy finding erroneously altered by the district court after it made an initial finding. Because the district court did not abuse its discretion in excluding evidence of C.N.'s prior false allegations, appellant was not prejudiced by the state's failure to disclose the email, and because the district court properly adjudicated and sentenced appellant on both counts, we affirm.

FACTS

Appellant Robert Howard Nordquist was charged with two counts of first-degree criminal sexual conduct pursuant to Minn. Stat. § 609.342, subds. 1(a) (2006), (h)(iii) (2012).[1] Count one listed the offense date as February 1, 2007. The charge description for count one alleged that the conduct underlying the offense occurred on that date through January 31, 2013. The offense date for count two was listed as February 1, 2013, with the charge description alleging that the conduct had occurred from that date through January

[1] Appellant was initially charged with two counts of second-degree criminal sexual conduct, but the complaint was later amended.

1, 2015. The complaint alleged that appellant began abusing C.N. when she was seven years old. The state alleged that multiple instances of abuse occurred until C.N. stopped staying at appellant's home when she was fourteen years old.

Prior to trial, defense counsel sought permission from the district court to introduce evidence concerning C.N.'s previous report of her cousin inappropriately touching her as evidence of a prior false accusation of sexual abuse. The district court denied the motion, concluding that any probative value was outweighed by the danger of unfair prejudice.

In her CornerHouse interview conducted on May 13, 2015, C.N. told the interviewer about a number of friends to whom she had disclosed appellant's abuse, one of whom was C.H. Prior to trial, the state served C.H. and another one of C.N.'s friends with subpoenas while they were at school, and a concerned family member of C.H. later emailed Hennepin County Attorney Mike Freeman, stating that C.H. denied C.N. ever having told a group of friends about appellant's abuse. The state did not inform defense counsel about this email until a week later, after trial had already started. At trial, C.N. testified that she told a group of friends, including C.H., about appellant's abuse during a gathering in the choir room at school a few days before the CornerHouse interview. Two of the friends to whom C.N. disclosed this information testified at trial that C.N. had told them about the sexual abuse; one friend testified that C.H. was present during the choir-room disclosure, and the other friend testified that C.H. may have been present, but she did not remember. C.H. did not testify at trial. After learning about the email, defense counsel moved for a mistrial, arguing that the state's failure to disclose the email was a *Brady* violation, and the district court denied the motion.

The state filed a *Blakely* notice, indicating it would seek an upward departure through a bifurcated trial process. It originally cited three aggravating factors but withdrew two and sought to prove that the offense was committed in C.N.'s zone of privacy. Appellant stipulated that the aggravating factor be found by the district court and waived his right to have a jury determine the existence of that factor.

The district court's jury instructions for count one instructed jurors to determine whether appellant's act "took place on or about February 1, 2007 through January 31, 2013." For count two, the instructions asked the jurors to find that appellant's act "took place on or about February 1, 2007 through January 31, 2015," encompassing the same time frame as count one. The jury found appellant guilty of both counts of first-degree criminal sexual conduct. The district court found that the offenses occurred in C.N.'s home, which it later amended to find that the offenses occurred in the victim's bedroom.

The presentence-investigation report recommended a presumptive sentence of 144 months for count one, using a criminal-history score of zero, and 216 months for count two, using a criminal-history score of three and presuming the counts would be sentenced using the *Hernandez* method. The district court entered convictions for both counts. It followed the presentence-investigation report's recommendations and sentenced appellant concurrently to 144 months on count one and 216 months on count two, finding that the *Hernandez* method applied. The district court also provided an alternative rationale for its sentence stating that an upward departure to a 216-month concurrent sentence was justified for both counts because the offenses occurred in the victim's zone of privacy.

This appeal followed.

D E C I S I O N

I. The district court did not abuse its discretion in excluding evidence concerning C.N.'s prior sexual conduct.

We first address appellant's argument that the district court abused its discretion in excluding evidence regarding C.N.'s alleged prior false allegation of sexual abuse.

At a pretrial hearing on the admissibility of the evidence, C.N. testified that at a Thanksgiving family gathering, her cousin touched her butt and then later sat behind her on a chair and straddled her. She said he whispered "over and over" in her ear "you're my b-tch." She stated that this encounter lasted for about a minute. C.N. further testified that she told her mother about the cousin's conduct later that night when they got home. C.N. testified that she also told her therapist, L.G., about the incident. C.N. said she told L.G. that her cousin had touched her vagina when they were little kids, but not at Thanksgiving. C.N. further testified that L.G. called child-protection services in her presence and told them that C.N.'s cousin had touched her vagina "in the past." C.N. testified that she told her mother that, at Thanksgiving, her cousin touched her upper-thigh area but not her vagina. C.N. testified that she stopped seeing L.G because she had "twisted" what C.N. had told her. C.N. testified that she was not accusing her cousin of touching her vagina at Thanksgiving.

C.N.'s mother testified at the pretrial hearing that after the Thanksgiving incident, C.N. told her that her cousin had put his hand on her hip or thigh and whispered in her ear that day. She further testified that C.N. had never accused her cousin of touching her vagina at Thanksgiving and that C.N. denied that she had told L.G. that her cousin had

done so. C.N.'s mother said that she was around C.N. and the cousin at the Thanksgiving event, and she believed it was not possible that the cousin could have straddled C.N. for "an entire minute' without her seeing it, nor did she believe that the cousin whispered in C.N.'s ear for an entire minute without her seeing it.

L.G. also testified at the hearing. She testified that C.N. told her that her cousin reached under the table and touched C.N.'s vagina and that the cousin told C.N. that she was his "b-tch" during this encounter. L.G. stated that C.N. told her that she had told her mother what happened. She further testified that C.N. was present at the time that she called child protection. L.G. testified that C.N. did not correct what she was saying on the phone to child protection.

Defense counsel argued that the testimony established a reasonable probability that C.N. had raised a false allegation of sexual abuse against her cousin. He argued that appellant's defense theory was that C.N. was fabricating the allegations against appellant and that false allegations against her cousin went toward C.N.'s credibility. The state argued that appellant failed to establish that C.N.'s allegations were false, that this evidence was evidence of C.N.'s past sexual history barred by the rape-shield statute, and that the evidence had little probative value.

The district court ruled the evidence pertaining to C.N.'s claims of sexual abuse by her cousin inadmissible. It found that the defense did not meet its burden of proving that the accusation was made or that it was false. It credited C.N.'s testimony that she denied her cousin touched her vagina, as well as her mother's testimony that the touching involved the hip or upper-thigh area. It found that L.G. "got things conflated" concerning C.N.'s

claims and that her testimony was less credible than the testimonies of C.N. and her mother. It further concluded that any probative value of the evidence was outweighed by unfair prejudice and confusion of the issues.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). "A violation of a criminal defendant's constitutional rights necessitates a new trial unless the violation was harmless beyond a reasonable doubt." *State v. Wenthe*, 865 N.W.2d 293, 306 (Minn. 2015) (quotation omitted).

Minnesota's rape-shield laws prevent the admission of a complainant's previous sexual conduct, including prior allegations of sexual abuse. *State v. Kowbow*, 466 N.W.2d 747, 750 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). However, this evidence may be admitted where "it is constitutionally required by the defendant's right to due process, his right to confront his accuser, or his right to offer evidence in his own defense." *Id.* Minnesota Rule of Evidence 412 provides that evidence of a complainant's past sexual conduct shall "be admissible only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only" when consent of the complainant is a defense in the case or the prosecution's case "includes evidence of semen, pregnancy or disease at the time of the incident. . . to show the source of the semen, pregnancy or disease."

False accusations of sexual abuse may be admitted to show that the complainant had made previous false accusations and as evidence of the complainant's credibility. *State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). "[P]rior accusations of rape are relevant only to the victim's propensity to be truthful if there has been a determination that the prior accusations were indeed fabricated. *Id*.

Here, the two exceptions to Minn. R. Evid. 412 are not applicable. Defense counsel sought to offer evidence concerning C.N.'s claims about her cousin's conduct to show that C.N. had previously made a false accusation of sexual abuse against a family member. The district court found that the defense did not meet its burden to prove that the accusation was actually made or that it was false. It credited C.N.'s testimony in which she denied that her cousin touched her vagina as well as her mother's testimony that the touching involved the hip or upper thigh area. It found that L.G., who testified that C.N. told her that her cousin had touched her vagina, "got things conflated" and that L.G.'s testimony was less credible than those of C.N. and C.N.'s mother. It also concluded that any probative value of the evidence was outweighed by unfair prejudice and confusion of the issues.

The district court did not abuse its discretion by excluding the evidence of C.N.'s prior sexual conduct. The district court made credibility determinations based on testimony at the pretrial hearing. "The credibility of witnesses and the weight to be given their testimony are determinations to be made by the factfinder." *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (quotation omitted). Further, the district court was well

within its discretion in concluding that the probative value of the evidence surrounding the Thanksgiving incident was "outweighed by unfair prejudice, confusion of the issues, and getting into collateral matters." The admission of C.N.'s statements about her cousin's behavior would likely have led to the jury being presented with a large amount of conflicting testimony regarding the Thanksgiving incident in addition to evidence regarding appellant's conduct, the focus of the criminal trial. The district court did not abuse its discretion in concluding that the admission of this evidence would cause confusion of the issues and force the jury to focus on a collateral matter.

Even if we were to conclude that the district court abused its discretion in excluding evidence of C.N.'s prior sexual contact, which we do not, any error was harmless beyond a reasonable doubt. "Constitutional error does not result in a reversal of a conviction if the verdict actually rendered was surely unattributable to the error." *Wenthe*, 865 N.W.2d at 308. Evidence regarding a false accusation of sexual abuse from C.N. goes towards C.N.'s credibility, as appellant argues. However, the jury was given ample evidence with which to assess her credibility. It was presented with evidence regarding C.N.'s history of drug and alcohol abuse and mental-health treatment. It was further presented with evidence that C.N. gave different accounts of appellant's abuse to different people at different times. The jury had an opportunity to find that C.N. was not a credible witness. It did not do so. We see no reasonable possibility that the verdict might have been different following the admission of this evidence.

II. Appellant was not prejudiced by the state's failure to disclose evidence about its communication from a concerned family member of C.H.

We next address appellant's argument that the district court erred in denying his motion for a mistrial based on the state's failure to disclose an email from a concerned family member of a potential witness. Appellant also argues that he is entitled to a new trial in the interests of justice.

On the first day of trial, the state prosecutor indicated to defense counsel that he had not been able to contact C.H. and that he had previously sent a deputy to serve her with a subpoena. The prosecutor told defense counsel that C.H.'s parents were obstructing access to C.H. and were upset about the subpoena. The prosecutor informed defense counsel that he had a conversation with C.H.'s mother but had not spoken with C.H. directly and would not call C.H. as a witness because he had not been able to talk to her. C.H.'s name again came up days later because one of the jurors indicated to the district court that he knew someone by that name. The prosecutor said that he did not intend to call C.H. as a witness, because he attempted to contact C.H. to no avail and "she has disavowed any knowledge of this and her parents basically didn't want me to talk to her because of that."

The state then disclosed to defense counsel that one of C.H.'s relatives had emailed Mike Freeman three days before the trial started. The email indicated that the relative was upset about C.H. being served with a subpoena at school. The email also stated that C.H. had ended her association with C.N. many months prior and that C.H. denied that C.N. told her and a group of friends about appellant's abuse. The email further stated that "[C.H.] is not a material witness because she would not support the claims of [C.N.] in this case."

The state provided the email to defense counsel that day, a week after the state received it. After receiving this email, defense counsel attempted to contact C.H. and did not receive a response.

Defense counsel moved for a mistrial, arguing that the state's failure to disclose the email was a *Brady* violation. The district court denied the motion for a mistrial. It concluded that the email had no impeachment value because the only information it contained was hearsay, and it was not a statement from the witness that she had never heard C.N. accuse appellant of abuse. It noted that defense counsel knew about C.H. from C.N.'s CornerHouse interview and could have made its own attempts to contact C.H. along with the other witnesses that C.N. knew from school. It concluded that there was no prejudice to appellant as a result of the late disclosure because nothing was preventing the defense from contacting C.H. and attempting to bring her in as part of its case.

"Whether a discovery violation occurred is an issue of law which this court reviews de novo." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). But we review a district court's decision to impose discovery sanctions for an abuse of discretion. *Id.* The reviewing court should not order a new trial to remedy a discovery violation unless there is a reasonable probability that the evidence would have affected the outcome of the trial. *State v. Clobes*, 422 N.W.2d 252, 255 (Minn. 1988).

Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), intentional or unintentional suppression of evidence by the state, of material evidence favorable to the defendant, violates the constitutional guarantee of due process. *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010). The three elements of a *Brady* violation are:

> (1) the evidence must be favorable to the defendant because it would have been either exculpatory or impeaching; (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and (3) the evidence must be material—in other words, the absence of the evidence must have caused prejudice to the defendant. *Id.*

Minnesota law requires the state to disclose "[m]aterial or information in the prosecutor's possession and control that tends to negate or reduce the defendant's guilt." Minn. R. Crim. P. 9.01, subd. 1(6). Minnesota appellate courts have "followed a harmless error analysis for undisclosed evidence, not granting a new trial where the evidence could not in any reasonable likelihood have affected the judgment of the jury" when determining whether the nondisclosure of evidence violates the Minnesota Constitution. *State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000).

Here, the evidence contained in the email from a concerned family member of C.H.—that she would deny that C.N. told her or a group of friends about appellant's abuse—is evidence that is favorable to appellant. For the first prong of *Brady* to be satisfied, "the evidence must be favorable to the defendant because it would have been either exculpatory or impeaching." *Walen*, 777 N.W.2d at 216. While the statement contained in the email that C.H. denied that C.N. told her and a group of friends about appellant's abuse was inadmissible as hearsay at trial, it would nonetheless have been useful to defense counsel as a line of inquiry during cross-examination of C.N. and C.N.'s two friends who testified at trial that C.N. told them about appellant's abuse. The email would have put defense counsel on notice that there may be evidence to further develop. The first prong of *Brady* is satisfied.

To satisfy the second *Brady* prong, "evidence must have been suppressed by the prosecution, intentionally or otherwise." *Id.* The state was in possession of the email three days before trial started. Defense counsel did not receive the email until a week later, after the state first acknowledged that one of C.H.'s family members had informed them C.H. denied having knowledge of appellant's conduct. The prosecutor told the district court that he "decided not to disclose the inner workings of the subpoena process" and chose not to disclose the email because he concluded that the email "was someone stepping in for a family member and trying to have them released from the subpoena" rather than evidence he was required to disclose. Regardless of the state's reasoning behind its decision not to disclose the email to defense counsel, it failed to disclose evidence with exculpatory value to defense counsel for a week after it was received. The second *Brady* prong is satisfied.

The third *Brady* prong is satisfied if "the evidence [is] material—in other words, the absence of the evidence must have caused prejudice to the defendant." *Id.* To make a materiality determination, we "consider[] the effect the undisclosed evidence would have had in the context of the whole trial record." *Id.* Here, defense counsel was already on notice that C.H. might have information regarding appellant's abuse, because C.N. identified C.H. as someone to whom she had disclosed the abuse in her CornerHouse interview. While the state received the email on March 17, the email was disclosed to defense counsel on March 24, which gave defense counsel an opportunity to attempt to contact C.H. and time to issue its own subpoena. Defense counsel did attempt to contact C.H. and her family and received no response at the time it moved for a mistrial. To our view, it is unlikely that having the email a week earlier would have increased defense

counsel's chances of receiving a response from C.H. and her family. And, the record suggests the district court offered defense counsel an opportunity to request a continuance after it denied defense counsel's motion for a new trial. No continuance was requested.

Further, although the evidence in the email may have provided some impeachment value, defense counsel nonetheless had a significant opportunity to impeach the state's witnesses. *See State v. Miller*, 754 N.W.2d 686, 706 (Minn. 2008) (concluding that, despite the state's failure to disclose impeachment evidence, the defendant was not prejudiced by the nondisclosure when the witness was otherwise "successfully impeached at trial"). Although the state's case here did rest largely on C.N.'s testimony, her credibility was successfully impeached at trial. Defense counsel used multiple opportunities to impeach C.N. regarding how she disclosed the sexual abuse, her drug and alcohol issues, and her mental-health issues. The evidence contained in the email only went towards whether C.N. disclosed the abuse at one point to a group of friends in the choir room at school. This case is distinguishable from *Hunt*, on which appellant relies, where the supreme court ruled that a suppressed competency exam that went towards a witness's ability to "accurately and honestly relate facts" was material evidence because the state's case "rested largely" on the testimony of that witness. 615 N.W.2d at 301. Here, the information contained in the email could have been used to impeach C.N. on whether she disclosed appellant's abuse to C.H. and others in the choir room but did not reflect on C.N.'s ability to "accurately and honestly relate facts" the way a competency exam would. *Id.*

Appellant also argues that the information that C.H. would deny C.N.'s disclosure to friends about the abuse could also have been used to impeach C.N.'s two friends who

testified that C.N. told them about the abuse in the choir room at school. Defense counsel also had an opportunity to impeach these two witnesses regarding their ability to clearly recall events and one's failure to disclose the choir-room conversation to law enforcement.

Because appellant had an opportunity to contact C.H. and had a significant opportunity to successfully impeach witnesses without the information contained in the email, we conclude that the third *Brady* prong is not satisfied here, and appellant's federal due-process rights were not violated.

We further conclude that appellant is not entitled to a new trial under the Minnesota Constitution. Appellate courts apply a harmless-error analysis to undisclosed evidence and only grant a new trial where there is a reasonable likelihood the evidence could have affected the judgment of the jury. *Hunt*, 615 N.W.2d at 299. We acknowledge that the state violated Minn. R. Crim. P. 9.01, subd. 1(6), by withholding evidence which would have put defense counsel on notice that further development of evidence may be necessary and went toward the credibility of C.N. and the other witnesses. *See* Minn. R. Crim. P. 9.01, subd. 1(6) (providing the state is required to disclose evidence that "tends to negate or reduce the defendant's guilt"). However, as we did under the third prong of *Brady*, we conclude that appellant suffered no prejudice as a result of this nondisclosure, and there is not a reasonable likelihood that the evidence could have affected the judgment of the jury.[2]

[2] Appellant also argues that he is entitled to a new trial in the interests of justice. However, "[t]he function of the court of appeals is limited to identifying errors and then correcting them." *Sefkow v. Sefkow*, 427 N.W.2d 203, 2019 (Minn. 1988). Accordingly, we do not have the authority to grant relief without a finding of prejudicial error.

Because appellant suffered no prejudice under *Brady* or Minnesota law we conclude that the district court did not abuse its discretion in denying appellant's motion for a mistrial.

III. The district court properly adjudicated and sentenced appellant on both counts of criminal sexual conduct.

We next address appellant's arguments that he was improperly adjudicated and sentenced on both counts in violation of Minn. Stat. § 609.04 (2016) and Minn. Stat. § 609.035 (2016), because count two, as submitted to the jury and described by the state in its closing arguments, encompassed the same time frame as count one.

The state's amended complaint charged appellant with two counts of first-degree criminal sexual conduct over two distinct time periods. Count one covered the time period of February 1, 2007 through January 31, 2013. Count two covered the time period of February 1, 2013 through January 31, 2015. The time period for count two began on C.N.'s 13th birthday. Later, the jury was presented with a time frame for count two which overlapped and extended two years later than the time frame for count one.

The jury found appellant guilty of both counts. The state sought to prove that the offense occurred in the C.N.'s zone of privacy, an aggravating factor, and the district court found that the state proved that both counts occurred in C.N.'s home. However, at sentencing, the district court amended its finding to specify that the zone of privacy in which appellant sexually penetrated C.N. was her bedroom, after recognizing that it was not sufficient that the offense occurred in C.N.'s home for a zone-of-privacy finding because appellant resided in the same household as C.N.

A defendant may not receive multiple convictions for "the same offense or of one offense and a lesser included offense on the basis of the same conduct" under Minn. Stat. § 609.04, subd.1. *State v. Holmes*, 778 N.W.2d 336, 340 (Minn. 2010). "The statute bars a court from entering two convictions for one act simply because a defendant's single act violated multiple provisions of a statute." *State v. Spears*, 560 N.W.2d 723, 726 (Minn. App. 1997) (quotation omitted), *review denied* (Minn. May 28, 1997). Additionally, an offender may not receive multiple sentences for crimes occurring during a single behavioral incident. Minn. Stat. § 609.035. "When a single behavioral incident results in the violation of multiple criminal statutes, the offender may be punished only for the most severe offense." *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008). To determine whether multiple offenses arose from only a single behavioral incident, a court must consider whether the offenses arose from a "continuous and uninterrupted course of conduct;" "occurred at substantially the same time and place;" and "manifested an indivisible state of mind, or were motivated by a single criminal objective." *Id.*

Minnesota Statute Section 609.04 does not bar separate convictions for counts one and two. Count one requires a single incident of sexual penetration or contact with a person under the age of 13, with the actor being greater than 36 months older. Minn. Stat. § 609.342, subd.1(a). Count two requires multiple instances of sexual penetration over time, with a complainant under the age of 16 and the actor having a significant relationship with the complainant. Minn. Stat. § 609.342, subd.1(h)(iii). The evidence in this case covers incidents of sexual abuse spanning both the time period of count one and the

extended time period covered by count two. The jury was presented with evidence regarding appellant's sexual conduct toward C.N. before she reached the age of 13, which was required for count one, as well as multiple instances of abuse occurring after C.N. turned 13, which was only applicable to count two. This case is distinguishable from *State v. Spears*, where the defendant was convicted of six offenses for only three separate acts of criminal sexual conduct, 560 N.W.2d at 726 (stating that Minn. Stat. § 609.04, subd.1, "bars a court from entering two convictions for one act simply because a defendant's single act violated multiple provisions of a statute."), *review denied* (Minn. May 28, 1997), and *State v. Folley*, where a defendant was convicted of criminal sexual conduct toward a complainant when she was under the age of 13 and when she was under the age of 16 based on "the same evidence and the same acts" occurring before the complainant turned 13, 438 N.W.2d 372, 373. (Minn. 1989). Here, the jury did not inevitably rely on the same evidence in finding both counts proven. Accordingly, appellant may be convicted of both counts.

Minnesota Statute Section 609.035 also does not prohibit appellant from being sentenced for counts one and two. Multiple acts of sexual abuse, occurring on a regular basis, over an extended period of time do not constitute a single behavioral incident. *Suhon*, 742 N.W.2d at 24 (concluding that, where days passed between incidents of sexual abuse, and where the incidents occurred in "many different rooms and at different times," the incidents did not combine to form a continuous course of conduct). Here, C.N. testified that appellant digitally penetrated her over a five-year period between the ages of eight and 13 and penetrated her with his penis when she was between the ages of 13 and 14. C.N. testified that the abuse occurred at various intervals and occurred in appellant's bedroom

and once in C.N.'s bedroom. Even though the time period charged for count two includes the time period charged for count one, the jury was presented with evidence of incidents occurring outside of the time period for count one, when C.N. was over the age of 13. The jury found at least one incident occurred before CN turned 13 in order to find appellant guilty of count one. Under *Suhon*, the incidents occurring after C.N. turned 13 do not combine with any incident occurring before C.N. turned 13 to form a continuous course of conduct.

The district court did not err in entering separate convictions and sentences for counts one and two. The district court correctly applied the *Hernandez* method[3] to sentence appellant using a criminal-history score of zero in calculating his presumptive sentence for count one and a score of three in calculating his presumptive sentence for count two. Appellant also argues that the alternate rationale provided by the district court for appellant's sentences—that appellant committed the crime in the complainant's zone of privacy, supporting an upward departure on both counts—is erroneous. Because we affirm

[3] Pursuant to *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981), when a defendant is sentenced for multiple convictions on the same day for separate offenses not part of a single behavioral incident, it is proper for the district court to include an earlier-sentenced conviction when calculating the appropriate criminal-history score for a later-sentenced conviction. *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997).

appellant's separate convictions and sentences for both counts one and two, we need not reach appellant's arguments on the district court's alternative-sentencing rationale.[4]

Affirmed.

[4]Appellant raises a number of pro se issues in this appeal. Appellant's arguments concerning the Thanksgiving incident and the email from C.N.'s family member are adequately addressed by the principal briefs. We conclude, after careful review of the record, that the additional evidentiary and trial-management issues appellant raises concerning other allegedly false reports of sexual abuse from C.N., the disclosure of C.N.'s medical records, his right to a speedy trial and the district court's courtroom management, and extraneous matters heard by jurors are without merit or inadequately briefed. *See State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (providing that an assignment of error in a brief not supported by argument or authority is waived (unless prejudicial error is obvious on mere inspection)), *aff'd* 728 N.W.2d 243 (Minn. 2007). Evidentiary and trial-management rulings are within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Reese*, 692 N.W.2d 736, 742 (Minn. 2005); *State v. Lindsey*, 632 N.W.2d 652, 657 (Minn. 2001). Appellant asks that we consider the 20 letters testifying to his character that were submitted in the record. However, credibility determinations are the province of the district court. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). Appellant also raises a challenge concerning the jury-selection process. We decline to review appellant's jury-selection argument because we have not been provided with a transcript of the jury-selection proceedings. *State v. Heithecker*, 395 N.W.2d 382, 382 (Minn. App. 1986) (providing that we may decline to review an issue when an appellant does not fulfill his responsibility to provide us with a transcript).