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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1237

State of Minnesota,
Respondent,

vs.

Lanell Thaddeus Crenshaw,
Appellant.

Filed August 20, 2018
Affirmed in part, reversed in part, and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CR-16-12176

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

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

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

ROSS, Judge

A mother walked in on her six-year-old son and an older boy engaging sexually. The older boy told her that his uncle, Lanell Crenshaw, had made him perform sex acts on

Crenshaw and the boy's stepsister. The boy and his stepsister then told interviewing officials that Crenshaw had been sexually abusing them for months. A jury convicted Crenshaw of two counts of criminal sexual conduct in the first degree and one count in the second degree, and the district court sentenced him to life imprisonment. Crenshaw argues on appeal that the district court erred by denying his motion for a mistrial, denying his motion for a *Schwartz* hearing, preventing him from introducing evidence of the boy's sexual history, sentencing him to life imprisonment, and entering two convictions of the same degree for the same crime. We affirm the district court's evidentiary decision as harmless error, but reverse Crenshaw's life sentence and remand for a *Schwartz* hearing and, if appropriate, resentencing.

FACTS

Eight-year-old E.H.S. had lived with his aunt, her husband Lanell Crenshaw, and their children during 2015. In April 2016, E.H.S. went to a relative's house to play with six-year-old M.T. M.T.'s mother went into M.T.'s room and "saw [E.H.S.] grabbing [her] son's hips and humping him from the back with their pants down." The boys had set up a tablet computer to record their conduct.

M.T.'s mother, who holds a degree in social work and is a former child-protection worker, recorded an interview with E.H.S. E.H.S. said that Crenshaw had made him touch his penis and "pull" it. He also indicated that Crenshaw made him orally contact the genitalia of E.H.S.'s "little cousin," S.S.V., who was five years old. E.H.S. also said that Crenshaw showed him "men and ladies bumping each other" on his cell phone. Although

it does not appear in the recorded conversation, M.T.'s mother said that E.H.S. also told her that Crenshaw had forced him to perform oral sex on him.

A CornerHouse interviewer met with E.H.S. and recorded the discussion. E.H.S. repeated what he had told M.T.'s mother and said that one time "white stuff" came out of Crenshaw's penis. E.H.S. also said that Crenshaw recorded the conduct. Another CornerHouse interviewer met with S.S.V. S.S.V. said that she had been touched sexually by her stepbrother and by E.H.S. She told the interviewer that she had seen her stepbrother touch E.H.S.'s buttocks and that her parents (meaning Crenshaw and E.H.S.'s aunt) had discovered what happened and that the boys received spankings. S.S.V. denied that anyone touched her vagina with his mouth and said that her parents told her not to talk about the abuse and to forget about it.

After the CornerHouse interview, E.H.S.'s aunt asked S.S.V. if she had something more to say, and S.S.V. replied, "[D]ad told me not to tell you." With some reassurances, S.S.V. disclosed that Crenshaw had urged her "to touch his privacies." She later told E.H.S.'s aunt that Crenshaw had "peed" in her mouth and told her to spit it in the toilet and rinse out her mouth. After she rinsed, Crenshaw let her eat pretzels. S.S.V. also indicated that Crenshaw wanted her to perform oral sex on E.H.S. and wanted E.H.S. to do the same to her, but she said she refused because she was afraid.

Minneapolis police interviewed Crenshaw. Crenshaw claimed to have misplaced his cell phone. Police executed a search warrant that same day and found a computer tablet and a cell phone with a Bluetooth identification of "Mr. Crenshaw." Some photographs had been deleted from the phone, but police found others, including three of a topless ten-

year-old girl in panties and three of a female child's genitalia. Crenshaw denied abusing either child and denied taking the sexually suggestive photographs of young girls that were on his phone.

A grand jury indicted Crenshaw on two counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. Trial jurors heard evidence of the account just described. They also heard from Crenshaw's expert witness, who opined that a child's disclosure is less reliable when it follows immediately after the child is caught and reprimanded for inappropriate behavior and also after the child is interviewed by someone he knows.

After the jurors began deliberating, one juror, J.S., left the jury room for the evening and encountered a man and woman near the door. The man, whom the juror did not recognize, asked if the jury had completed deliberations. The juror shrugged and kept walking. Another juror, M.K., left the jury room and also saw the woman and man. The man was standing, and, after he made eye contact with M.K., he made a throat-slitting gesture with his hand. M.K. continued walking. She also did not recognize the man. The next day, J.S. and M.K. told the other jurors what happened. The other jurors urged J.S. and M.K. to report it to the district court, which they did. The parties asked that J.S. and M.K. be brought into the courtroom individually so they could inquire about the incidents.

J.S. said he found the interaction uncomfortable, but he "felt no intimidation." The district court asked M.K. questions about whether the contact would impact her ability to deliberate. M.K. responded, "It's [a] really, really serious matter." The district court asked, "Are you able to just put it out of your mind and continue with the deliberations or would

it weigh on you in someway?" M.K. answered, "I'll try to just put it out of my mind so we can come to an agreement." The district court asked if the incident would make her "either afraid to vote for a guilty verdict or afraid to vote for a not guilty verdict?" M.K. responded, "I didn't like it, but . . . I want to do the best job possible, and I'm here to do a good job." The district court probed further,

> So I just want to, again, make sure that I understand you correctly, that you want to do the right thing and that you aren't – that you're not concerned, regardless of which way you decide to – what your ultimate conclusion is, as far as a verdict, that you're not concerned about continuing to deliberate towards a verdict?

M.K. replied, "I will continue," and she added, "I can't totally separate that it did happen," and, "[W]e're all working really hard to, you know, seek the truth . . . it's all very important . . . I won't let it get in my way as best I can say." The district court told the jurors to continue deliberating.

The following day the jury found Crenshaw guilty on all three counts. The district court excused the jury. Crenshaw announced that he had filed a motion for a mistrial the previous night based on the unidentified man's throat-slashing gesture. The district court said that it was "satisfied . . . that the jury deliberations were not impacted" by the gesture but that it would defer ruling on the mistrial motion until the state had an opportunity to respond. Crenshaw then moved for a *Schwartz* hearing during which the judge would interview each juror to determine whether the threat affected deliberations. The district court denied the motion.

The state then filed its written response to Crenshaw's mistrial motion. The district court addressed the motion at Crenshaw's sentencing. The court described its interviews of J.S. and M.K. as a "mini *Schwartz* hearing." It recognized that the man made a "slashing motion across his throat," but it denied Crenshaw's mistrial motion because it concluded that the jurors "were not swayed" by the gesture. Crenshaw argued that the district court's refusal to conduct a full *Schwartz* hearing prevented him from determining whether other jurors may have been influenced. The district court sentenced Crenshaw to life in prison for first-degree criminal sexual conduct and to 70 months concurrently for the second-degree criminal sexual conduct conviction.

Crenshaw appeals.

D E C I S I O N

Crenshaw offers four arguments for reversal. His first argument addresses the district court's response to the allegedly threatening gesture. His second argument focuses on the district court's refusal to admit evidence of E.H.S.'s sexual history. His third argument challenges the jury's finding that the statutory "heinous" element is met. And his fourth argument contests the district court's decision to allegedly enter two convictions for the same crime.

I

Crenshaw argues that the district court improperly denied his motion for a new trial and his motion for a *Schwartz* hearing. We review both denials for an abuse of discretion. *State v. Landro*, 504 N.W.2d 741, 745 (Minn. 1993); *State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979). If a jury's verdict is the product of outside influence, a mistrial is required.

State v. Cox, 322 N.W.2d 555, 559 (Minn. 1982). A defendant may challenge a jury verdict through a so-called *Schwartz* hearing. Minn. R. Crim. P. 26.03, subd. 20(6) (2017); *see also Schwartz v. Mpls. Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960). In a *Schwartz* hearing, the district court questions jurors about the identified improper influence and whether it infected their ability to deliberate impartially. *State v. Greer*, 635 N.W.2d 82, 93 (Minn. 2001). On appeal, we must decide whether the district court abused its discretion by refusing to conduct a *Schwartz* hearing. *State v. Benedict*, 397 N.W.2d 337, 340 n.1 (Minn. 1986). If a district court abused its discretion by refusing to conduct a *Schwartz* hearing, we will not reach the issue of whether a new trial is required but instead remand for a *Schwartz* hearing. *See id*.

We hold that the district court abused its discretion by not conducting a *Schwartz* hearing. Any direct or indirect third-party contact with a juror presumably prejudices the outcome and necessitates a *Schwartz* hearing. *See State v. Sanders*, 376 N.W.2d 196, 205 (Minn. 1985); *State v. Jurek*, 376 N.W.2d 233, 237 (Minn. App. 1985). Both direct and indirect juror contact occurred here. The unidentified man directly contacted jurors J.S. and M.K. immediately outside the jury room, asking one about the deliberations and making a throat-slashing gesture to the other. The man indirectly contacted the other jurors when J.S. and M.K. related the encounter to them, and these jurors were so concerned that they convinced J.S. and M.K. to report the contact to the district court.

The parties dispute the meaning of the man's gesture, but, whatever else a throat-slashing motion might convey, it commonly conveys a threat. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) (describing the act of "drawing a finger across one's throat"

as an example of a "terroristic threat"). And threats to a jury are highly prejudicial. *See, e.g.*, *Frank v. Mangum*, 237 U.S. 309, 335, 35 S. Ct. 582, 590 (1915) (citing mob intimidation of the jury as an example of an offense of constitutional gravity). The district court should have conducted a *Schwartz* hearing to explore whether any of the indirectly contacted jurors were influenced by the throat-slashing gesture.

The state fails to convince us that the district court's interview of J.S. and M.K. in the "mini *Schwartz* hearing" sufficiently rebutted the presumption of prejudice. The first problem with the state's position is that the district court questioned only J.S. and M.K., never exploring with the other jurors how they perceived the incident and whether it infected their judgment. We can infer that the episode concerned them to some extent, since it prompted them to involve the judge. The second problem is that juror M.K. never answered whether she could put the episode aside and render an untainted verdict. She told the district court that she could not "totally separate that it did happen," and she responded equivocally to questions by saying that she would "*try*" to put it aside and that she would not "let it get in my way *as best I can say*." The district court never gained a sufficient factual basis to conclude that the jurors were individually or as a group "not swayed" by the gesture. A full *Schwartz* hearing would have permitted the court to explore what the juror saw as a troubling and possibly threatening encounter more precisely with both the directly and indirectly contacted jurors.

The state's reliance on *State v. Olkon*, 299 N.W.2d 89 (Minn. 1980), does not promote a different result. The district court in *Olkon* did not need to inquire with all jurors about suspected misconduct because the testimony of six of them unequivocally

established that no improper remarks had been made. *Id.* at 109. Nor is this case like *State v. Greer*, where no juror gave any "indication that the contacts were improper or that there were any grounds to impeach the verdict." 662 N.W.2d 121, 124 (Minn. 2003). The threatening nature of the direct contact, the relaying of the contact to the entire jury, the jury's apparent concern, and the equivocal responses from a juror who witnessed the gesture all lead us to conclude that a *Schwartz* hearing was necessary before the district court could rely on the jury's verdict. Because the district court might, after a *Schwartz* hearing on remand, be satisfied that the verdict is reliable, we also address Crenshaw's other arguments for reversal.

II

Crenshaw challenges the district court's pretrial denial of his motion to admit evidence that E.H.S. had accused four other adult male family members of sexual abuse. The district court denied Crenshaw's motion, relying on Minnesota Statutes, section 609.347, subdivision 3 (2016), and Minnesota Rule of Evidence 412(1) (2017). We need not decide whether the district court appropriately denied the motion because we are convinced that any error was harmless.

An error in excluding evidence is harmless if, assuming it had been admitted and its defense-favoring potential fully realized, the verdict would have remained the same. *State v. Olsen*, 824 N.W.2d 334, 340 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013). Crenshaw does not contend that E.H.S.'s other reports were false but that "the trial would have been fundamentally different had the jury heard that E.H.S. was abused by someone other than" him. But at most, the rejected evidence of E.H.S.'s sexual history would have

informed the jury that E.H.S. had been abused by others before he accused Crenshaw of also abusing him. The jury may have inferred that those prior abuses provided the child knowledge on sexual matters, but this inference, fully realized, would do nothing to undermine the strength of the evidence of Crenshaw's guilt. This includes the consistency of E.H.S.'s thrice repeated description of his sexual encounters with Crenshaw, S.S.V.'s independent corroboration of E.H.S.'s account, and E.H.S.'s recollection of details about the encounters that had no direct relation to sexual matters, including the time and location of the abuse, the smell, the lighting, and the position and color of the cell phone Crenshaw used to photograph and record the abuse. Because the evidence of Crenshaw's guilt is weighty and the potential counterbalancing force of the excluded evidence of E.H.S.'s sexual history is faint, we hold that any error in excluding the evidence was harmless.

III

Crenshaw argues generally that "the life sentence represents unjust double punishment" because, according to Crenshaw, the conduct that made E.H.S. a victim and allegedly made S.S.V. a victim was the same conduct. He is mistaken. The state's theory, supported by trial evidence, included three different occurrences. The prosecutor summarized to the jury that the evidence established three separate offenses: "the acts with [E.H.S.], the acts with [S.S.V.], and the acts with [E.H.S. and S.S.V.]" together. The state introduced evidence to support its theory that Crenshaw forced E.H.S. to perform oral sex on Crenshaw, that Crenshaw forced S.S.V. to perform oral sex on Crenshaw, and that Crenshaw forced E.H.S. to put his mouth on S.S.V.'s vagina. This is not the "same conduct."

Crenshaw also argues that his life sentence must be reversed based on the statute the district court relied on to authorize the sentence. We review de novo a sentence to determine whether it is consistent with statutory requirements. *State v. Ivy*, 902 N.W.2d 652, 664 (Minn. App. 2017). First-time offenders who are convicted of first-degree criminal sexual conduct *must* be sentenced to life in prison if the fact-finder determines that a "heinous" element exists. Minn. Stat. § 609.3455, subd. 3 (2016). Crenshaw contends specifically that the jury's finding that the statutory "heinous" element existed is defeated by the nature of the charges.

The statute lists eight "heinous elements." *Id.* at subd. 1(d)(1)–(8) (2016). The element the district court relied on here required the state to prove that "the offense involved sexual penetration or sexual contact with more than one victim." *Id*. at subd. 1(d)(6). We begin by observing that "the offense" is the conduct involved in Count 1 only. This observation derives from our reasoning in *Ivy*, 902 N.W.2d at 664–67, which dealt with a similar statute. The district court in *Ivy* had enhanced a sentence based on a similar statute that was triggered if "the offense involved more than one sex trafficking victim." Minn. Stat. § 609.332, subd.1(b)(4) (2016); *Ivy*, 902 N.W.2d at 664. We observed that the multiple-victim aggravating factor was limited to "the offense," and we treated each count as its own "offense" to parallel the state's charging strategy. *Ivy*, 902 N.W.2d at 664–67. We explained that, because "each individual count alleged a single victim" and because the statutory term "offense" referred to "each individually charged offense, not the general sex trafficking scheme," the aggravating factor could not legally apply to any of the defendant's seven convictions. *Id.* at 666. Like the multiple-victim factor in *Ivy*, the

"heinous" element here applies where "*the offense* involved sexual penetration or sexual contact with more than one victim." Minn. Stat. § 609.3455, subd. 1(d)(6) (emphasis added). And the offense of Count 1 is Crenshaw's first-degree criminal sexual conduct against E.H.S.

From this premise we agree with Crenshaw that S.S.V. was not a "victim" under the statute based on Crenshaw's charged first-degree offense against E.H.S. in Count 1. Focusing specifically on the life-sentence-enhancement statute, S.S.V. could be a "victim" in the Count-1 offense only if "sexual penetration or sexual contact" with her occurred. Minn. Stat. § 609.345, subd. 1(d)(6). Under the state's theory, she was a victim because Crenshaw used E.H.S. to subject her to cunnilingus. But the statute strongly implies that it covers only the offender's own "sexual penetration or sexual contact with more than one victim," except in third-party circumstances involving details not occurring here. Under those third-party circumstances, for example, although "sexual penetration" includes cunnilingus, unless it involves genital or anal intrusion, that form of sexual activity is not included in the specified sexual activity for which a person might become criminally liable for committing the act through means of "any part of the body of *another* person." Minn. Stat. § 609.341, subd. 12 (emphasis added). And in this case, the testimony establishes only that Crenshaw forced E.H.S. to put his mouth on S.S.V.'s vagina for a prolonged period, not that this contact involved genital intrusion. The state's third-party theory also cannot rest on the alternative, "sexual contact" option, because mouth-on-genitalia sexual activity involving a minor does not establish a first-degree sexual-contact offense. *See* Minn. Stat. §§ 609.342, subd. 1, 609.341, subd. 11(c) (2016) (defining "sexual contact" for the

purposes of a first-degree offense to involve genitalia-to-genitalia or genitalia-to-anal touching). We certainly do not suggest that Crenshaw's forcing E.H.S. to put his mouth on S.S.V.'s vagina did not make S.S.V. the secondary victim of his pedophilic victimization of E.H.S. in the common use of the term "victim." Nor do we minimize the harm this caused S.S.V. or imply that the district court cannot account for Crenshaw's behavior significantly in his sentence in some other fashion. But constrained by the statute, we hold only that, for the purpose of supporting the life-imprisonment enhancement based on the multiple-victim element of section 609.3455, subdivision 1(d)(6), the state did not offer the necessary proof.

We are not persuaded to a different conclusion by the state's reliance on *State v. Fleming*, 883 N.W.2d 790 (2016). The question decided in *Fleming* was whether the district court properly imposed an upward departure for the defendant's felon-in-possession conviction based on the conduct underlying the defendant's assault conviction. *Id.* at 793–94. We are not dealing with a sentencing departure here, which involves a discretionary decision by the district court, but a mandatory life sentence. *See* Minn. Stat. § 609.3455, subd. (3) ("[T]he court *shall* sentence a person to imprisonment for life if the person is convicted under section 609.0342, subdivision 1, paragraph (c), (d), (e), (f), or (h), . . . and the fact finder determines that a heinous element exists.") (emphasis added). *Fleming* is inapplicable. Because we conclude that the jury's finding of the heinous element is invalid, we do not address Crenshaw's other arguments for why his life sentence is invalid.

IV

Crenshaw last argues that the district court improperly imposed two convictions for the same degree for the same crime. The state appropriately concedes the point. A person "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2016). The district court entered convictions on two counts of first-degree criminal sexual conduct crime for the same conduct. It sentenced Crenshaw on Count 2 under a warrant of commitment saying that this sentence is "combined with Count 1." We recently clarified that "[a] 'merged' or 'combined' conviction or sentence is not a permissible disposition under Minnesota law." *State v. Walker*, 913 N.W.2d. 463, 465 (Minn. App. 2018). We do not disturb the findings of guilt but reverse Crenshaw's Count 2 first-degree criminal sexual conduct conviction.

In summary, we remand for the district court to conduct the appropriate *Schwartz* hearing and to make findings, to leave its judgment of conviction undisturbed only if the hearing establishes that the presumption that the verdict was tainted by the unidentified man's apparently threatening gesture is rebutted, and, if the conviction stands, to resentence Crenshaw de novo consistent with this opinion.

Affirmed in part, reversed in part, and remanded.