STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1549

State of Minnesota,
Respondent,

vs.

Dennis Dean Patzold,
Appellant.

Filed September 10, 2018
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Redwood County District Court
File No. 64-CR-16-598

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Jenna Peterson, Redwood County Attorney, Redwood Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Rodenberg, Judge; and Smith, John, Judge.*

S Y L L A B U S

When, in the course of committing a criminal-sexual-assault offense with force or violence, a specific instance of the defendant's conduct constitutes more than one additional criminal offense, such as when a single incident of domestic assault constitutes

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

both assault-fear and assault-harm, the defendant may be sentenced for only one of those offenses in addition to the criminal-sexual-conduct sentence.

O P I N I O N

RODENBERG, Judge

Appellant Dennis Dean Patzold appeals from his convictions and consecutive sentences for criminal sexual conduct and two counts of domestic assault. He argues that he was denied a fair trial because the district court allowed the state to introduce prejudicial relationship evidence at trial and because the prosecutor committed misconduct. Appellant also argues that the district court erred when it sentenced him for two domestic-assault convictions arising from the course of conduct that included criminal sexual conduct with force or violence. We affirm in part, reverse in part, and remand.

FACTS

M.P. and appellant were in a romantic relationship for six years. They lived together in a mobile home in Eastwood Estates in Redwood County. On August 13, 2016, the Redwood County Sherriff's Office received reports of a sexual assault at Eastwood Estates. After investigation, law enforcement arrested appellant. The state charged him with two counts of first-degree criminal sexual conduct, one count of third-degree criminal sexual conduct, and two counts of domestic assault. The complaint alleged, as to each domestic-assault count, that, on or about August 13, 2016, appellant had "hit [M.P.] repeatedly in the arms and face and kicked her in her pelvic area."

On the first day of trial, before the jury panel was brought in, the district court told the prosecutor:

> I'm going to ask you to share with . . . law enforcement and any witnesses that testify, . . . given the sensitive nature of this case I want to avoid . . . disparaging . . . , accusatory, and derogatory type phrasing. I mean it is . . . a sexual assault, criminal sexual conduct case, it's not a rape case, things like that, and just to urge law enforcement, any lay witnesses you might have to maintain professionalism and decorum on the stand.

In the fourth sentence of the state's opening statement, the prosecutor said, "Ladies and gentlemen this is a case about the Defendant raping [M.P.]." Appellant's trial counsel did not object. The prosecutor used the word "rape" or "raped" several other times during the state's opening statement, including stating that appellant "repeatedly hit [M.P.], held her down, and raped her." Appellant's trial counsel objected to none of these statements.

Three neighbors of appellant and M.P. testified that they were outside when M.P. came out of her residence screaming for help. She was bleeding down her leg, and she appeared scared and distraught. The three neighbors testified that they called 911 and told the dispatcher that M.P. said that she had been raped. Defense counsel did not object to these witnesses' use of the term "raped."

M.P. testified that she picked up appellant from his boss's house on August 12, 2016. They had consensual sex that night. M.P. stated that she drove appellant back to his boss's house the next morning to pick up a paycheck. The couple then drove to a dollar store. M.P. testified that appellant began arguing with her inside the store. She left the store to wait in her car. When appellant came out to the car, he continued arguing. M.P. testified that appellant grabbed her arm while she was driving, causing her pain. She could not call anyone because she had hidden her cell phone in the car's trunk on account of appellant's previous threats to break it.

M.P. stated that she was scared while she drove home. Appellant turned the radio up very loud, and grabbed her hand and legs, causing her pain. When the couple got home, M.P. stated that she sat in her car for a while after appellant went inside the mobile home, then she went inside, changed into pajamas, and lay down on the bed because she had a migraine headache. She left her phone in the trunk of her car for safekeeping.

According to M.P., appellant came into the bedroom wearing only his boxer shorts. He asked her why she was lying down, then pushed her off the bed, causing her head to hit the dresser. Appellant then threw M.P. back onto the bed and threatened to "treat [her] like a whore." M.P. testified that appellant sat on top of her, restraining her hands, and that he forced her legs open with his knees and forcibly penetrated her with his penis. She stated that she told appellant to stop, but he did not. She testified that appellant tried to sexually penetrate her again, and that he kicked her in the abdomen a few times and continued to throw her onto and off of the bed. M.P. stated that appellant eventually went into the bathroom. When he did, M.P. ran outside. She tried unsuccessfully to get her phone from the trunk of her car, and yelled for the neighbors to call 911 when she heard appellant coming outside. The neighbors called 911. Appellant walked away in the direction of a nearby store. M.P. stated that she had multiple cuts and bruises and that she was bleeding as a result of appellant's sexual assault against her.[1] During M.P.'s direct testimony, M.P. and the prosecutor referred to the incident several times as one in which appellant "raped" M.P., again with no objection from appellant's trial counsel.

[1] M.P. testified that she was close to her monthly menstrual cycle but was not bleeding until appellant assaulted her.

Redwood Falls Police Sergeant Randy Braun testified that he and Officer Anthony Evans, along with two other officers, responded to the 911 calls. Sergeant Braun testified that he had been told that there was a reported sexual assault involving appellant and M.P., both of whom the sergeant knew from prior contacts. The officers looked for appellant when they arrived at Eastwood Estates, but did not see him. About an hour later, law enforcement received a call from one of appellant's neighbors, stating that appellant had returned to his residence. Sergeant Braun obtained and executed a warrant to search appellant's residence. He found appellant sitting in the living room and arrested appellant. Sergeant Braun testified that the officers also found a broken glass and some blood in the kitchen. Officers also found blood on a mattress pad and blanket in the hallway, and on a bed. He also noted that most of the house was very tidy, but the blankets and sheets in the bedroom were in "disarray where it appeared some sort of struggle or something happened."

Officer Evans testified that he responded to a reported sexual assault at Eastwood Estates. He stated that he met with M.P. and three other individuals there. Officer Evans testified that M.P. was crying, bruised, and bleeding on the inside of her legs. He further testified that the other three individuals all told him that they were outside when they heard M.P. yelling for them to call 911. Officer Evans stated that when he spoke to M.P., she told him that "she had been sexually assaulted by [appellant]."

The emergency room doctor testified that, when he treated M.P, she "was in great emotional distress," "her voice was breaking as she was sort of talking to [him]," and it took a long time for M.P. to share information with him. The doctor also testified that M.P.

told him that appellant had physically abused her by punching, kicking, and throwing her against walls, and that when she had gone to take a nap, she was awakened by appellant forcing her to have intercourse. According to the doctor, this report was corroborated by M.P.'s injuries. The doctor also testified that he examined M.P. for sexual assault. He stated that he noticed dried blood near M.P.'s genital area and that M.P. was bleeding internally from her vaginal walls, which was inconsistent with a menstrual cycle but "compatible with forceful penetration." On cross-examination, the doctor agreed that the bleeding could have been caused by consensual sex. The emergency-room nurse testified that M.P.'s heart rate, blood pressure, and respiratory rates were elevated, indicating distress. M.P. also vomited after she described what had happened, another indicator of distress.

The state also called appellant's ex-girlfriend, K.R., to testify about appellant's history of domestic assault against her. Outside of the presence of the jury, K.R. testified that, while she was dating appellant over a ten-year period, the following incidents occurred: appellant threw K.R. across the kitchen floor while she was pregnant, resulting in cracked ribs; appellant opened a cabinet into K.R.'s face, causing her to need stitches; appellant threw K.R. down the front steps of their house, fracturing her wrist; appellant forced K.R. to engage in nonconsensual sex between five and ten times; appellant pushed K.R. in the driveway of their house and K.R. hit appellant back; and K.R. obtained an order for protection against appellant. Appellant's trial counsel argued that the descriptions of these incidents were vague and that testimony to the jury about them would be "far more prejudicial than probative." Over appellant's objection, the district court concluded that it

would allow testimony about appellant throwing K.R. across the kitchen floor, appellant throwing K.R. down the front steps, and appellant pushing K.R. in the driveway and K.R. hitting him back as relationship evidence,[2] but excluded testimony of the other three incidents.

K.R. then testified before the jury to the three admissible instances of domestic conduct. Before K.R. testified, the district court instructed the jury that the relationship evidence that K.R. would provide "is being offered for the limited purpose of demonstrating the nature and the extent of the relationship between [appellant] and family or household members in order to assist you in determining whether [appellant] committed" the charged offenses, and cautioned the jury that appellant is not being tried for behavior beyond the charged offenses, nor should the jury convict appellant on the basis of previous conduct.

The state rested its case, and appellant presented no evidence. In summation, the state argued that the physical evidence and testimony from M.P. and the neighbors who called 911 show that the sexual penetration was nonconsensual and that appellant physically abused M.P. and sexually assaulted her. The prosecutor stated "He raped her" and referred to the sexual assault as "rape," again without objection. Appellant's trial counsel argued that the lack of bruising and the witnesses' inability to tell exactly when the assaults took place indicated that M.P.'s story was not true. Appellant's trial counsel also argued that the sex was consensual. In rebuttal argument, the prosecutor stated:

[2] The state clarified, and defense counsel agreed, that K.R.'s testimony was presented as relationship evidence under Minn. Stat. § 634.20 (2016) and not as *Spreigl* evidence.

> Since when is the word of a rape victim not enough? Since when is [her] word, her under oath coming into the courtroom, taking an oath, facing the man who did this to her, and tell[ing] you in graphic detail what happened to her not enough. Ask yourselves, do you really have any reasonable doubt that [appellant] assaulted and raped her. If you do, if her word isn't enough for you, then look at the physical evidence we have in this case, the bruising, the numerous spots on her body. . . . And then ask yourselves does this look like consensual sex to you?

The district court then asked each attorney whether there were any objections to the other's closing argument. There were none.

The district court then instructed the jury, repeating the limiting instruction that was given earlier concerning the use of relationship evidence. The jury found appellant guilty of all five charged offenses. The district court sentenced appellant to 187 months in prison on one count of first-degree criminal sexual conduct and one year in prison on each count of domestic assault, to be served consecutively.[3]

This appeal followed.

ISSUES

I. Did the district court abuse its discretion by permitting the state to introduce relationship evidence at trial?

II. Did the state commit prosecutorial misconduct that affected appellant's substantial rights?

III. Did the district court err in sentencing appellant for two domestic-assault convictions arising from a single course of conduct?

[3] The additional count of first-degree criminal sexual conduct and the count of third-degree criminal sexual conduct were not formally adjudicated.

IV. Is appellant entitled to relief based on his pro se argument?

ANALYSIS

I. The district court did not abuse its discretion by permitting the state to introduce relationship evidence concerning appellant's alleged domestic conduct toward K.R.

Appellant argues that the district court abused its discretion by permitting the state to introduce relationship evidence concerning appellant's alleged assaults against K.R.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). Relationship evidence is admissible under Minn. Stat. § 634.20 if it is "domestic conduct by the accused against the victim of domestic conduct, or against other family or household members" and its probative value is not "substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury." Minn. Stat. § 634.20. "[E]vidence showing how a defendant treats his family or household members, such as his former spouses or other girlfriends, sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010).

"When balancing the probative value against the potential prejudice, unfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

Minn. Stat. § 634.20 presumes such relationship evidence to be admissible, and such "evidence becomes inadmissible only if its danger for unfair prejudice *substantially* outweighs its probative value." *State v. Andersen*, 900 N.W.2d 438, 442 (Minn. App. 2017). A limiting instruction from the district court "lessen[s] the probability of undue weight being given by the jury to the evidence." *State v. Lindsey*, 755 N.W.2d 752, 757 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. Oct. 29, 2008).

Here, the district court determined that the relevance of three instances of appellant's past domestic conduct against K.R. was not substantially outweighed by the danger of unfair prejudice. Importantly, the district court limited K.R.'s testimony to those three incidents, excluding the other proffered incidents based on its careful and individual consideration of each incident that K.R. claimed had occurred. The district court faithfully applied Minn. Stat. § 634.20. The district court also instructed the jury on the proper use of the relationship evidence, and on the limitation on the use of such evidence. We see no abuse of the district court's discretion.

II. The prosecutor did not commit misconduct and, even if she did, any plain error did not substantially affect the verdict.

Appellant argues that the prosecutor committed misconduct by disregarding a court order and referring to the charged offense as "rape," improperly eliciting testimony from law enforcement concerning prior contacts with appellant, eliciting opinion evidence concerning whether a sexual assault occurred, and rhetorically asking in rebuttal argument, "Since when is the word of a rape victim not enough?"

Because appellant did not object to any of the prosecutor's alleged misconduct, we apply a modified plain-error test. *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014).

To prevail, an appellant must establish that there was an error and that the error was plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If such an error is established, the burden then shifts to the state to show that the plain error did not affect appellant's substantial rights. *Id.* "A prosecutor engages in prosecutorial misconduct when he violates 'clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law.'" *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quoting *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007)).

A. The prosecutor's actions do not constitute misconduct.

1. Disregarding a court order

Appellant argues that the prosecutor violated a court order not to use the term "rape" at trial.

Before trial, the district court said:

> I'm going to ask you to share with . . . law enforcement and any witnesses that testify, . . . given the sensitive nature of this case I want to avoid . . . disparaging . . . , accusatory, and derogatory type phrasing. I mean it is . . . a sexual assault, criminal sexual conduct case, it's not a rape case, things like that, and just to urge law enforcement, any lay witnesses you might have to maintain professionalism and decorum on the stand.

The district court's pretrial comments do not constitute an order. *See State v. Word*, 755 N.W.2d 776, 783 (Minn. App. 2008) (holding that a district court's provisional, qualified, or unclear pretrial rulings are not definitive pretrial rulings). The district court did not prohibit the prosecutor from making any use of the term "rape" at trial. Instead, the district court told counsel in general terms to *instruct witnesses* to be professional and "avoid" derogatory terms. Had appellant sought to prohibit the term "rape" from any use

at trial, he should have sought a clearer order to that effect or objected at trial. *See Word*, 755 N.W.2d at 783 (stating that an attorney "should renew an objection or seek clarification or reversal of a prior ruling" when unsure if evidence offered at trial violates a pretrial order). He did neither. Moreover, the prosecutor characterized the offense using the same word that M.P. used in her testimony, and the term used by the lay witnesses who assisted M.P. by calling the police. *See State v. Leutschaft*, 759 N.W.2d 414, 425 (Minn. App. 2009) (stating that the prosecutor's characterization of an incident as "road rage" was a "proper comment" when that characterization was used by a witness).

The prosecutor did not disregard a court order, and her use of the term "rape" did not violate any directive of the district court.

2. Improper testimony

Appellant also argues that the state improperly elicited testimony from one law enforcement officer that he knew appellant from previous incidents and from two officers that they believed that an assault occurred. There was no objection at trial, so we again apply the modified plain-error standard of review to this claim of prosecutorial misconduct. *Mosley*, 853 N.W.2d at 801.

"The state has a duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). Improper testimony by a state's witness may be considered prosecutorial misconduct and justify reversal. *State v. Mahkuk*, 736 N.W.2d 675, 689-90 (Minn. 2007). We are "much more likely to find prejudicial misconduct when the state intentionally elicits impermissible testimony." *McNeil*, 658 N.W.2d at 232. "[A]n intentional elicitation of

impermissible testimony, although erroneous, will warrant reversal only when it is likely that the impermissible testimony substantially weighed on the jury's decision." *Id.*

Appellant argues that the state improperly elicited testimony from Sergeant Braun that he knew appellant from prior contacts. "Eliciting an officer's testimony that he knows the defendant from prior contacts is error if the defendant's identity is not an issue in the case." *Valentine*, 787 N.W.2d at 641. In *State v. Strommen*, the supreme court stated that it was plain error for an officer to testify that he knew the defendant from prior contacts and knew that the defendant had previously killed someone. 648 N.W.2d 681, 686-88 (Minn. 2002). But "*Strommen* did not hold that the officer's comments about prior contacts, on their own, were reversible plain error." *Id.*

Here, the prosecutor asked Sergeant Braun what information he learned on the scene, and Sergeant Braun responded that he got information concerning M.P. and appellant, both of whom he knew from prior contacts. The prosecutor's question did not call for a response concerning whether or how the officer was familiar with appellant. The prosecutor moved on and questioned the officer about the charged offense. "[U]nintended responses under unplanned circumstances ordinarily do not require a new trial." *State v. Hagen*, 361 N.W.2d 407, 413 (Minn. App. 1985), *review denied* (Minn. Apr. 18, 1985). Sergeant Braun's brief and unsolicited comment that he knew both appellant and M.P. does not constitute prosecutorial misconduct.

But even if we were to conclude that Sergean Braun's fleeting and unsolicited comment that he knew both M.P. and appellant amounted to plain error that came about because of improper witness preparation by the prosecutor, appellant would not be entitled

to relief on appeal. Only where such error affects a party's substantial rights do we afford plain-error relief. *Ramey*, 294 N.W.2d at 302. Here, the brief reference by a witness to knowing both of the people with whom he was dealing, without any stated reason why or how he knew them, surely had no effect on appellant's substantial rights.

Appellant also argues that the testimony of Sergeant Braun and Officer Evans that each formed an opinion from investigation that an assault occurred constitutes prosecutorial misconduct. "[A] witness qualified as an expert" can provide opinion testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. Lay witnesses can provide opinion testimony as well, but only to opinions "which are (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge." Minn. R. Evid. 701. Regardless of whether the witness is a lay or expert witness, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704.

"[U]ltimate conclusion testimony which embraces legal conclusions or terms of art" is not considered helpful to the jury. *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990). The district court may also exclude testimony on the ultimate issue "when the testimony would merely tell the jury what result to reach." *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005) (quotation omitted). But the supreme court has allowed police officers to express opinions concerning who killed a victim when the conclusion "was factual rather

than legal and was offered in response to leading questions," and the officer avoided legal terminology. *DeWald*, 463 N.W.2d at 744. We have also held that a 911 operator's lay opinion testimony that the caller was being assaulted was admissible because it "was 'rationally based' on her perceptions and was helpful to the jury." *State v. Washington*, 725 N.W.2d 125, 137 (Minn. App. 2006), *review denied* (Mar. 20, 2007).

The officers here were not qualified as experts and their testimony was not offered as that of experts. The prosecutor asked each officer whether he had formed an opinion from the investigation, and both officers said they concluded that an assault occurred. Both officers testified about the facts and evidence revealed by their investigation that indicated an assault. The jury heard and saw this very same evidence. The prosecutor elicited only lay opinions from the two officers, testimony that was rationally based on each officer's own perceptions. It was not misconduct to elicit such brief testimony.

3. Inflaming Passions

Appellant also argues that the prosecutor inflamed the passions of the jury in rebuttal argument by rhetorically asking, "Since when is the word of a rape victim not enough?" We again apply the modified plain-error standard of review, because there was no objection at trial. *Mosley*, 853 N.W.2d at 802.

Prosecutors have "considerable latitude" during closing arguments and are "not required to make a colorless argument." *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998). Prosecutors also have "the right to fairly meet the arguments of the defendant." *State v. Martin*, 773 N.W.2d 89, 106 (Minn. 2009). But, as a general rule, the state "must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Porter*,

526 N.W.2d 359, 363 (Minn. 1995). "While the state's argument need not be colorless, it must be based on the evidence produced at trial, or the reasonable inferences from that evidence." *Id.* (quotation omitted). In *State v. Cao*, the supreme court recognized that "there is no conclusive statement in our case law prohibiting a prosecutor from stating that a victim's testimony need not be corroborated in a criminal sexual conduct case" so "[i]t [could not] be said that the prosecutor plainly erred by contravening settled law." 788 N.W.2d 710, 717 (Minn. 2010).

In summation, appellant's trial counsel attacked M.P.'s credibility and invited the jury to question M.P.'s testimony. In rebuttal, the prosecutor asked, "[S]ince when is the word of a rape victim not enough?" But the prosecutor also asked the jury to "look at the physical evidence we have in this case" and consider the testimony of the medical experts. The prosecutor did not rely on this potentially inflammatory rhetorical question to persuade the jury; rather, she emphasized that, even if the jury did not believe M.P.'s testimony, there was sufficient other evidence to corroborate her story. The state's argument was tailored to meet the arguments made by appellant's trial counsel, and does not constitute misconduct.

B. Any error, even if plain, did not affect appellant's substantial rights.

Plain error does not warrant reversal when there is "no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). At trial, M.P. gave detailed testimony about the assault. The state also provided photographs and other evidence of the injuries that M.P. sustained, corroborated by the testimony of police officers, neighbors, and nurses.

Importantly, the state called witnesses who provided detailed testimony explaining the medical reasons why M.P.'s injuries appeared as and when they did, and that the injuries not having been visible initially did not mean that they were not sustained when and how M.P. claimed. The jury's verdict shows that it credited the testimony of M.P. and the medical professionals. It seems very doubtful, in light of the overwhelming evidence of appellant's guilt, that the prosecutor's use of the term "rape," Sergeant Braun's undefined familiarity with M.P. and appellant, the officers' brief lay opinion testimony, or the prosecutor's rebuttal argument, or all of those things in combination, had any substantial effect on the verdict.

III Despite appellant's criminal-sexual-conduct conviction having involved force or violence, the district court could not properly sentence appellant on both domestic-assault convictions because both of those offenses were based on the same conduct by appellant.

Here, the jury found appellant guilty of three criminal-sexual-conduct crimes arising from his sexual assault of M.P. The district court correctly noted that, because the criminal-sexual-conduct crimes were all part of the same course of conduct, it could only adjudicate and sentence appellant for one of them. The district court also sentenced appellant for two assaults, and made both of those sentences consecutive to the criminal-sexual-conduct sentence.

Appellant argues that the district court erred in sentencing him on both domestic-assault convictions because they arose out of the same behavioral incident as the first-degree criminal-sexual-conduct conviction.[4]

[4] Appellant does not argue on appeal that only one domestic-assault conviction was proper under Minn. Stat. § 609.04 (2016). We therefore do not consider that question.

"Whether an offense is subject to multiple sentences under Minn. Stat. § 609.035 is a question of law, which we review de novo." *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012). "Whether a defendant's offenses occurred as part of a single course of conduct is a mixed question of law and fact. We review the district court's findings of historical fact under the clearly erroneous standard, but we review the district court's application of the law to those facts de novo." *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014) (citation omitted). "Whether a defendant's multiple offenses occurred during a single course of conduct depends on the facts and circumstances of the case. Offenses are part of a single course of conduct if the offenses occurred at substantially the same time and place and were motivated by a single criminal objective." *Id.* (citation omitted). *See also State v. Johnson*, 273 Minn. 394, 404, 141 N.W.2d 517, 525 (1966) (stating that "the essential ingredient of any test is whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective").

Minn. Stat. § 609.035 (2016) prohibits the imposition of multiple sentences for offenses arising from a single behavioral incident in most cases. But "a prosecution or conviction for committing" first- through fourth-degree criminal sexual conduct "with force or violence is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct." Minn. Stat. § 609.035, subd. 6. The supreme court has recognized that "the legislature has created a number of exceptions to the single-behavioral-incident rule," including criminal-sexual-conduct offenses. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). "As a result, if a defendant commits one of these offenses, he or she may be convicted and sentenced for other offenses that arise out of the

same behavioral incident." *Id.* This is because "the legislature did not intend section 609.035 to immunize offenders in every case from the consequences of separate crimes intentionally committed in a single episode." *Ferguson*, 808 N.W.2d at 589.

But a defendant may not be adjudicated and sentenced "twice [for] the *same* offense or of a greater and a lesser-included offense on the basis of the same act or course of conduct." *State v. Dudrey*, 330 N.W.2d 719, 721 (Minn. 1983) (interpreting Minn. Stat. § 609.04 (1982)) (emphasis added). If a jury has convicted a defendant of more than one offense from a single course of conduct, "the court [is] to adjudicate formally and impose sentence on one count only." *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999).

A criminal-sexual-conduct conviction involving force or violence is not a bar to "punishment for *any other* crime committed by the defendant as part of the same conduct." Minn. Stat. § 609.035, subd. 6 (emphasis added). The word "any" is given broad application and recognized that it generally means "every" or "all." *State v. Watson*, 829 N.W.2d 626, 633 (Minn. App. 2013), *review denied* (Minn. June 26, 2013).[5] The statute permits additional convictions for "*any* other crime committed by the defendant," not merely "another" or "one other" crime. Minn. Stat. § 609.035, subd. 6 (emphasis added). The statute likewise discusses the effect of consecutive sentences when the defendant "is punished for *more than one crime*." *Id.* (emphasis added). The plain language of Minn. Stat. § 609.035, subd. 6, allows for the conviction of and sentence for "any other crime,"

[5] *Watson* discussed the firearm exception, contained in Minn. Stat. § 609.035, subd. 3, which has identical language to that at issue in subdivision 6.

including a crime committed during the same behavioral incident as a criminal-sexual-conduct offense involving force or violence.[6]

However, Minn. Stat. § 609.035, subd. 1, provides that when "a person's *conduct* constitutes more than one offense . . . the person may be punished for only one of the offenses." While a criminal defendant who is convicted of a criminal-sexual-conduct offense involving force or violence may be convicted of and sentenced for "any other crime" committed during the same course of conduct as the sex offense, separate and distinct conduct must underlie each of the additional offenses to warrant conviction and sentencing. The state may charge a number of additional offenses based on identical conduct. *See* Minn. Stat. § 609.035, subd. 1 ("All the offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts."). But punishment for each additional offense is only proper if the underlying conduct is not identical to another offense for which the defendant has already been sentenced. *Id.*

Here, the jury found appellant guilty of several criminal-sexual-conduct crimes involving force or violence, and of two counts of domestic assault. The complaint identified the two counts of domestic assault as occurring "on or about August 13, 2016," the same date as the sexual assault. The first domestic-assault charge alleged appellant to have committed "an act with intent to cause fear in another of immediate bodily harm or death" (assault-fear), and the second alleged that appellant "intentionally inflict[ed] or

[6] We have reached this same result in at least one unpublished case that presented a nearly identical legal issue. *State v. Huffman*, No. A14-1363, 2015 WL 1757966, *6 (Minn. App. April 20, 2015), *review denied* (June 30, 2015). There, we cited *Williams* as permitting adjudication and sentencing for two different crimes arising from the same course of conduct as a sexual assault. *Id.*

attempt[ed] to inflict bodily harm" (assault-harm). The district court properly instructed the jury on the elements of each of those charges. The jury, through its guilty verdicts, found that the state proved both.

But, while the state charged appellant with two types of domestic assault—one based on intent to cause fear and the other on intent to inflict bodily harm—the record reflects that both charges arose from the exact same conduct, described in the complaint as: "[appellant] hit [M.P.] repeatedly in the arms and face and kicked her in her pelvic area." The jury found that this conduct by appellant amounted to both assault-fear and assault-harm. In other words, the jury determined that one incident of conduct constituted two different assault crimes. Because the domestic assault was part of the same course of conduct as the sexual assault, Minn. Stat. § 609.035, subd. 6, permits the district court to impose punishment for domestic assault. But because the same conduct was charged in the complaint and tried to the jury in two counts of domestic assault, Minn. Stat. § 609.035, subd. 1, permits additional punishment for only one count of domestic assault for the described conduct. Accordingly, the district court could not sentence appellant to consecutive one-year prison terms for both counts of domestic assault based on the very same described conduct of appellant.[7]

[7] We suppose that the state might also have charged appellant with disorderly conduct for this conduct as well. Minn. Stat. § 609.72, subd. 1 (2016) (describing disorderly conduct as, among other things, engaging in "offensive, obscene, abusive, boisterous, or noisy conduct" in a "public or private place"). Perhaps this same conduct amounted to other crimes. But the *conduct* can only be punished once, in addition to the criminal-sexual-conduct conviction.

We also recognize that our prior holding in *State v. Dalbec*, 789 N.W.2d 508, 512-13 (Minn. 2010), that assault-fear and assault-harm are "alternative means by which an assault may be committed" has been called into question by the supreme court's holding in *State v. Fleck*, 810 N.W.2d 303, 312 (Minn. 2012), that assault-harm is a general-intent crime and assault-fear is a specific-intent crime. *See State v. Machacek*, No. A13-0508, 2015 WL 4523505, at *6-7 (Minn. App. June 29, 2015), *review denied* (Minn. Sept. 15, 2015); *State v. Moallin*, No. A14-0329, 2014 WL 7237037, at *4-5 (Minn. App. Dec. 22, 2014), *review granted* (Minn. Feb. 25, 2015) *and order granting review vacated* (Minn. Aug. 11, 2015); *State v. Evans*, No. A13-2256, 2014 WL 7011130, at *2-3 (Minn. App. Dec. 15, 2014), *review granted* (Minn. Feb. 25, 2015) *and order granting review vacated* (Minn. Aug. 11, 2015). But because appellant has not challenged the propriety of two domestic-assault convictions on these facts, the question of whether assault-fear and assault-harm are separate crimes or are instead alternative means of committing the same crime, is not before us. Based on the plain language of Minn. Stat. § 609.035, subd. 1, the jury's determination that appellant's conduct as described in the complaint constituted both assault-harm and assault-fear allows only one consecutive sentence for that conduct.[8]

We therefore reverse appellant's sentences on the domestic-assault charges and remand for the district court to vacate the sentence for one of those convictions.

[8] In any event, *Machacek*, *Moallin*, and *Evans* are distinguishable. In those cases, the defendants were charged with individual counts of assault that did not specify fear or harm; the question was whether the district courts' jury instructions were proper and whether the juries were unanimous on what conduct had been proved. *Machacek*, 2015 WL 4523505 at *6-7; *Moallin*, 2014 WL 7237037 at *4-5; *Evans*, 2014 WL 7011130 at *2-3. Here, the state charged both assault-fear and assault-harm based on the identical described conduct; the jury found that the state proved both charges.

IV. Appellant's pro se argument is based on matters outside the record.

Appellant argues in a pro se supplemental brief that his convictions should be reversed because he was forced to wear an ankle bracelet at trial. After a thorough review of the record, we see no mention of an ankle bracelet in any of the documents or in the transcripts of the district court proceedings. "It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered." *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977). We do not reach the merits of appellant's argument.

D E C I S I O N

The district court acted within its discretion by allowing the state to submit limited relationship evidence of appellant's prior assaults against an ex-girlfriend, and the prosecutor did not commit misconduct amounting to plain error. The district court also did not err in convicting and sentencing appellant for one domestic assault because, under the plain language of Minn. Stat. § 609.035, subd. 6, a person convicted of a criminal-sexual-conduct offense with force or violence may be convicted and sentenced for any other crime committed by that person as part of the same conduct. But because the two domestic-assault crimes involve the same underlying conduct of appellant, he may be sentenced for only one crime of domestic assault.

Affirmed in part, reversed in part, and remanded.