STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0306

State of Minnesota,
Respondent,

vs.

Blayon Lawrence Yuoh,
Appellant.

Filed February 19, 2019
Affirmed in part, reversed in part, and remanded
Jesson, Judge

Hennepin County District Court
File No. 27-CR-17-4475

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jodi Lynn Proulx, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

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

JESSON, Judge

Appellant Blayon Lawrence Yuoh challenges his convictions of first, third, and fifth-degree criminal sexual conduct stemming from his alleged sexual assault of a

homeless, 17-year-old girl. Because sufficient evidence supports Yuoh's conviction of first-degree criminal sexual conduct and because any prosecutorial misconduct does not warrant a new trial, we affirm Yuoh's conviction of first-degree criminal sexual conduct. But we reverse Yuoh's convictions for third and fifth-degree criminal sexual conduct because they are lesser-included offenses and remand for correction of the warrant of commitment.

FACTS

On August 16, 2016, 17-year-old A.K. went to West Broadway in Minneapolis "to get high and drunk." Although she was homeless at the time and had no money, she was able to get drugs and alcohol from friends in the area. A.K. drank alcohol, smoked marijuana, and used PCP.[1]

On that day, A.K. met 26-year-old appellant Blayon Lawrence Yuoh at a park in the area. A.K. testified that Yuoh was also doing drugs. At some point, it began to rain, and A.K. testified that Yuoh asked her if she wanted to go with him to his sister's house. A.K. agreed, and the two took a bus to Robbinsdale, ending up at an apartment where Yuoh's friend lived. Two older men were at the apartment, and A.K. continued to drink alcohol and smoke marijuana. Eventually, Yuoh left the apartment, but A.K. spent the night there.

When she woke up the next day, A.K. continued drinking alcohol. At some point Yuoh returned, and A.K. left the apartment with him. A.K. thought they were going to the store, but Yuoh led her to a different part of the apartment building, where the two began

[1] PCP is a common name for the illegal drug phencyclidine, which can cause hallucinations.

kissing. Eventually, Yuoh took A.K. to a stairwell and asked her to perform oral sex on him. A.K. told him no. Yuoh asked her if she wanted to have sex, but she told him that she did not want to and that she was on her period and she thought that was "disgusting." Yuoh then turned A.K. to face the wall, pulled her pants down, and anally penetrated her.

A.K. left the building and took a bus to see her former probation officer. Because he was not there, she went to a nearby store where she began to eat snack food without paying for it. The store owner called the police. When they arrived, A.K. told officers that she had just been sexually assaulted by a man with a tattoo that said "Blaze" on his right arm. Officers took A.K. to the hospital where a nurse performed a sexual-assault exam. The nurse also swabbed A.K.'s neck after she told the nurse that Yuoh kissed her there.

A few days later, based on A.K.'s statement to police, officers put together a photo identification lineup that included a picture of Yuoh. A.K. identified Yuoh as the man who assaulted her. The state filed a complaint charging Yuoh with third-degree criminal sexual conduct, and amended the complaint before trial to include a charge of first-degree criminal sexual conduct.

At trial, A.K. testified about the assault, including that she refused to perform oral sex on Yuoh or have sexual intercourse with him. A.K. then described how Yuoh turned her around to face the wall, pulled down her pants, and anally penetrated her for 10 to 15 seconds. According to A.K., the assault hurt her, and she told Yuoh that she did not want to do that. A.K. also testified about her drug and alcohol use that day and acknowledged that PCP sometimes affects her memory and causes her to "space out." But A.K. explained that she clearly remembers Yuoh sexually assaulting her because it impacted her entire life.

The state also presented testimony from the lead investigator, who testified that Yuoh contacted police after the alleged assault. Yuoh asked if A.K.'s allegations against him involved sex before the investigator told him that A.K. alleged that he sexually assaulted her. During a subsequent voluntary interview at the police station, Yuoh initially denied knowing A.K. but eventually told the investigator that he had hung out with her for a couple of hours.[2]

The police officers who picked up A.K. at the convenience store and met her at the hospital also testified, describing what A.K. disclosed about the assault, which was consistent with her testimony. And the officers testified about their investigation, including that no physical evidence was found in the apartment stairwell, that surveillance video footage at the apartment did not show Yuoh and A.K. outside together, and that police did not attempt to find or photograph the apartment where A.K. spent the night. Nor did they attempt to find or interview any witnesses.

The sexual assault nurse who examined A.K. testified about what A.K. disclosed to her, which was consistent with A.K.'s testimony. The nurse stated that although A.K. was quiet and kind of "shut down," she was alert and able to answer her questions. During the exam, the nurse noted a half-centimeter tear in A.K.'s perineum (the area between the anus and vagina) and two 3.5 centimeter tears on A.K.'s anal verge (the tissue where external tissue transitions to internal tissue). The nurse also testified that she noticed two areas of blood inside A.K.'s rectum. The nurse testified that A.K.'s injuries were consistent with a

[2] At the end of this interview, police executed a search warrant and collected a DNA sample from Yuoh.

penis being forced into the anus. Although the nurse acknowledged that these injuries could be caused by constipation or a hard bowel movement, she testified that A.K. did not report either of these conditions.

Two Bureau of Criminal Apprehension (BCA) scientists testified about the testing results from A.K.'s sexual-assault exam. The BCA found semen on the swab from A.K.'s perianal region, but there was not a sufficient amount of male DNA to generate a profile. The swab from A.K.'s neck contained DNA from a mixture of three or more people. The BCA scientist testified that although 99.9997 percent of the general population could be excluded as a contributor, Yuoh could not be excluded.

Yuoh testified on his own behalf. He stated that he was having a barbecue with some friends when A.K. came and sat down next to him "out of the blue." According to Yuoh, he was not smoking or drinking and was just talking to A.K. When it started to rain, Yuoh offered to take A.K. to a friend's apartment, and at some point the two were consensually kissing. Yuoh left A.K. at his friend's apartment and returned the next day. Yuoh testified that he never had any form of sexual intercourse with A.K., and that he did not do anything sexual other than kissing her. When asked how A.K. may have gotten the injuries the sexual assault nurse testified about, Yuoh testified that A.K. was in the bathroom for 20 to 25 minutes on the day of the alleged assault, was constipated, and that she told him "whew, that was a rough one" when she exited the bathroom.[3] Yuoh testified

[3] When questioned by defense counsel about whether she was in the bathroom "for an extended period of time" on the day of the alleged assault, A.K. testified that she "was on [her] period."

that he originally denied knowing A.K. because he was "playing [the police] for info" and admitted that he lied to police, but stated that A.K. lied to the jury during her testimony.

During closing arguments, the state commented on Yuoh's alleged "big poop defense," and the defense objected, arguing that this constituted improper burden shifting. The district court sustained the objection, but denied Yuoh's subsequent motion for a mistrial after clarification from the state regarding the burden of proof and specific instructions to the jury. Before the case was submitted to the jury, Yuoh requested an instruction on fifth-degree criminal sexual conduct, which the district court granted.

The jury found Yuoh guilty of first, third, and fifth-degree criminal sexual conduct, and the district court adjudicated Yuoh guilty on all three counts. On the count of first-degree criminal sexual conduct, the district court sentenced Yuoh to 144 months in prison. Yuoh appeals.

D E C I S I O N

Yuoh challenges his convictions on three grounds. First, Yuoh contends that his conviction is not supported by sufficient evidence. Second, Yuoh argues that prosecutorial misconduct during closing argument warrants a new trial. Finally, Yuoh asserts that it was error for the district court to adjudicate him guilty of third and fifth-degree criminal sexual conduct because those offenses are lesser-included offenses of the first-degree criminal-sexual-conduct offense. We review each argument in turn.

I. Sufficient evidence supported Yuoh's first-degree criminal-sexual-conduct conviction.

In sufficiency-of-the-evidence challenges, if an element of the offense is supported by direct evidence, appellate courts examine the record to determine if the evidence is sufficient to permit jurors to reach their verdict when "viewed in the light most favorable to the conviction." *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (citing *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989)). In doing so, a reviewing court assumes that the jury believed the state's witnesses and did not believe contrary evidence. *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004) (citations omitted). If the jury, acting with regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense, this court will not disturb the verdict. *Id.* at 25-26.

In order to convict Yuoh of first-degree criminal sexual conduct, the state was required to prove that (1) Yuoh intentionally penetrated A.K., (2) A.K. did not consent to the penetration, (3) Yuoh caused personal injury to A.K., and (4) Yuoh used force or coercion to accomplish the penetration. Minn. Stat. § 609.342, subd. 1(e)(i) (2016). Yuoh argues that the state failed to prove the first element: that he engaged in criminal sexual conduct with A.K. Alternatively, he contends that the state failed to prove that he used force or coercion. We address each argument in turn.

a. Evidence of criminal sexual conduct with A.K.

In order to address Yuoh's argument that the state failed to prove that he engaged in criminal sexual conduct with A.K., we first review the evidence that the state presented

at trial. On this element, the state presented significant direct evidence in the form of A.K.'s testimony that Yuoh put his penis in her "butt" after she told him that she did not want to do that. This evidence was corroborated by testimony from the sexual assault nurse, who testified that the injuries A.K. suffered were consistent with a penis being forced into the anus. Further, two police officers and the sexual assault nurse testified about how A.K. described the assault to them, which was generally consistent with A.K.'s testimony. This evidence, considered in the light most favorable to the conviction, was sufficient for the jury to conclude that Yuoh engaged in criminal sexual conduct with A.K. *Horst*, 880 N.W.2d at 40.

Despite this evidence, Yuoh contends that the state failed to prove that he engaged in criminal sexual conduct with A.K. because (1) A.K. was not a credible witness and (2) the corroborating evidence was lacking and circumstantial.

Yuoh's argument that A.K. was not credible rests on his assertion that A.K.'s drug use prior to the assault made her recollection unreliable. Although Yuoh is correct that A.K. did testify that when she was under the influence of PCP, she would sometimes "space out" and have difficulty with time frames, A.K. also testified that she remembered the assault because it significantly affected her life. Further, the sexual assault nurse testified that A.K. was alert and oriented and able to answer her questions. Ultimately, the jury was presented with all of this testimony, and it is the jury's role to determine the credibility of witnesses. *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004). The jury found A.K. credible, which is within its purview.

Nor are we persuaded by Yuoh's contention that the absence of corroboration in this case warrants a determination that insufficient evidence supported his conviction. In general, "a conviction can rest on the uncorroborated testimony of a single credible witness." *State v. Hill*, 172 N.W.2d 406, 407 (Minn. 1969). And in criminal-sexual-conduct cases, a victim's testimony does not require corroboration. Minn. Stat. § 609.347, subd. 1 (2016). Because it appears that the jury found A.K. to be a credible witness, further evidence corroborating her testimony was not required. But even though corroborating evidence was not required, the state presented evidence of A.K.'s injuries and of A.K.'s prior consistent statements about the sexual assault, each of which corroborated A.K.'s testimony at trial. The fact that no physical evidence conclusively established that Yuoh sexually assaulted A.K. and that no video footage showed them together outside the apartment building does not change the fact that the evidence that the state presented was sufficient for the jury to conclude that Yuoh engaged in criminal sexual conduct with A.K.

b. Evidence of sexual penetration through force or coercion.

To address Yuoh's alternative argument that the state failed to prove that he sexually penetrated A.K. by using force or coercion, we review the evidence that the state presented on this element at trial. A.K. testified that after she told Yuoh that she did not want to engage in sexual activity with him, he turned her around to face the wall, pulled her pants down, and put his penis in her "butt." She further testified that it hurt when Yuoh put his penis inside her "butt," and the sexual assault nurse stated that A.K.'s injuries were consistent with a penis being forced into an anus. This evidence was sufficient to establish that Yuoh inflicted bodily harm on A.K. which caused her to submit to sexual activity,

meeting the statutory definition of force. *See* Minn. Stat. § 609.341, subd. 3 (2016) (defining "force"); *State v. Brouillette*, 286 N.W.2d 702, 706 (Minn. 1979) (finding force where defendant forcefully grabbed victim by the shoulders, turned her around, and grabbed her in the buttocks and vaginal area and the victim testified that she was afraid the defendant might hurt her).

But Yuoh argues that A.K.'s testimony that "[a]nd he didn't like force really hard to grab me, but he turned me around to the wall" establishes that Yuoh did not use force to assault A.K. Further, Yuoh contends that A.K. did not testify that she was scared and that the state did not establish that Yuoh was significantly larger than A.K. Although Yuoh is correct that A.K. testified that Yuoh did not "force really hard to grab [her]," the sexual assault nurse testified that A.K. suffered injuries consistent with a penis being forced into her anus. And A.K.'s testimony that Yuoh turned her around to face a wall, pulled down her pants, and caused her physical pain while anally penetrating her, is sufficient to meet the statutory definition of force. *See* Minn. Stat. § 609.341, subd. 3; *State v. Meech*, 400 N.W.2d 166, 167-68 (Minn. App. 1987) (upholding a conviction for third-degree criminal sexual conduct where defendant told the victim to "shut up," pushed up her nightgown, and held her hands down during the assault). Accordingly, we conclude that the state presented sufficient evidence that Yuoh sexually penetrated A.K. by using force or coercion.

II. Although the prosecutor committed misconduct amounting to plain error during his closing argument, the error did not affect Yuoh's substantial rights.

Yuoh argues that during closing argument, the prosecutor committed several instances of misconduct which denied Yuoh his right to a fair trial. Because Youh's argument contains both instances of unobjected-to and objected-to misconduct, we review each category of allegations separately.

a. Unobjected-to allegations of prosecutorial misconduct

A prosecutor commits misconduct if he violates established standards of conduct, including caselaw, rules, or orders by a district court. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Yuoh alleges three instances of unobjected-to prosecutorial misconduct that were plain error: the prosecutor's speculation about the events of the sexual assault, the prosecutor's attack on the veracity of Yuoh's testimony, and the prosecutor's decision to attack the defendant's character and inject his personal opinion into the trial.

When the defendant fails to object during trial, we review allegations of prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard of review, the appellant must establish 1) error and 2) that the error was plain. *Id.* Plain error is one that was clear or obvious, which may be the case if the error "contravenes case law, a rule, or a standard of conduct." *Id*. If the appellant establishes plain error, the burden then shifts to the state to demonstrate that the misconduct did not affect the appellant's substantial rights. *Id.* If all three elements of the test are met, "[this court] may correct the error only if it seriously affect[s] the

fairness, integrity, or public reputation of judicial proceedings." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) (quotations omitted).

First, Yuoh argues the prosecutor committed misconduct by speculating about Yuoh's motives for committing a sexual assault. The prosecutor argued:

> The defendant selected the victim because he knew that she didn't have any resources, he knew that she was homeless, he knew that she was using drugs, he knew that she had no money, no cell phone, seemed like she didn't have any family that cared about her. He figured that he would get away with it because, after all, who is going to believe her? He probably figured she wouldn't even come in to testify yesterday. The defendant selected the victim in this case because of her particular vulnerabilities. *Hopefully he doesn't get away with it.*

Yuoh argues that there was no evidence in the record to support the prosecutor's speculation about his knowledge of A.K.'s situation, and that this argument and the prosecutor's statement that "hopefully he doesn't get away with it" only served to inflame the passions of the jury.

Caselaw is clear that prosecutors may not speculate about events that occurred during the crime without a factual basis in the record. *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000). Further, a prosecutor's closing argument must not be intended to "inflame the passions and prejudices of the jury against the defendant." *State v. Clark*, 296 N.W.2d 359, 371 (Minn. 1980). But prosecutors may draw reasonable inferences from the evidence presented at trial. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995).

The prosecutor's statement that "[h]opefully he doesn't get away with it" constitutes clear misconduct amounting to plain error. This statement may have served to inflame the

jury's passions and prejudice against Yuoh. But testimony established that Yuoh knew A.K. did not have a place to go and that A.K. was under the influence of several substances, making her vulnerable, and it was reasonable for the prosecutor to infer from this testimony that Yuoh targeted A.K. because of those vulnerabilities. Accordingly, the remainder of the prosecutor's statements are reasonable inferences from the evidence presented at trial.

Yuoh's second allegation of prosecutorial misconduct involves comments from the prosecutor about the veracity of his testimony. The prosecutor argued:

> Do you believe [A.K.] or do you believe the defendant, *a two-time felon who was obviously lying yesterday?*
>
> The defendant's testimony yesterday seemed to almost trivialize the sexual assault. He testified that the injuries on [A.K.] must have come from a big bowel movement because he himself had a big bowel movement three days ago.
>
> . . . .
>
> His explanation of [A.K.'s] multiple injuries to her perineum and her anal verge was that she was in the bathroom for a long time on August 17, 2016. Again, his testimony of having a big poop and then his own testimony that he himself had a big poop three days ago, it trivializes what happened to [A.K], it trivializes the sexual assault that occurred in this case.

Yuoh contends that these statements were inappropriate comments on the veracity of his testimony and constituted the prosecutor improperly giving his own opinion about Yuoh's credibility.

During closing arguments, prosecutors are permitted "to analyze the evidence and argue that particular witnesses were or were not credible. *State v. Wright*, 719 N.W.2d 910, 918-19 (Minn. 2006). But it is improper for a prosecutor to give his own opinion

about the credibility of a witness during closing argument. *State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn. 2006). Here, the prosecutor went beyond arguing that Yuoh was not credible and gave his own opinion about Yuoh's credibility by stating that he "was obviously lying yesterday."

Still, the state argues that the prosecutor's comment was proper, noting that Yuoh opened up the issue of his credibility by voluntarily testifying on his own behalf. *See State v. Sharich*, 209 N.W.2d 907, 911 (Minn. 1973) (noting that by voluntarily testifying on his own behalf, a defendant opens up the issue of only his credibility). Although Yuoh's decision to testify did open the door to the issue of his credibility, the prosecutor's comment that Yuoh was "obviously lying" goes beyond arguing that Yuoh was not a credible witness. Instead, the prosecutor offered his own opinion about Yuoh's credibility: that he was obviously lying. Because the prosecutor violated a standard established by caselaw, by giving his own opinion about Yuoh's credibility, his statement is misconduct amounting to plain error. *See Ramey*, 721 N.W.2d at 302.

Finally, Yuoh maintains that the prosecutor attacked his character and injected his personal opinion into his closing argument by arguing:

> What the defendant did to [A.K.] is criminal, it is wrong, and it has been wrong and criminal since the very first time humans even wrote a legal code more than 4000 years ago, nearly 4000 years ago, when the crime of rape was specifically spelled out and punishable. *I mean, for a grown man to sexually assault a homeless teenage girl has got to be one of the lowest things you can do.*

Yuoh contends that this statement attacked his character and amounted to the prosecutor injecting his personal opinion into the closing argument.

Prosecutors may not inject their personal opinions into a case. *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005). Preventing prosecutors from expressing their own opinions serves "to prevent exploitation of the influence of the prosecutor's office." *Id.* (quotation omitted). Here, the prosecutor's statement that "I mean, for a grown man to sexually assault a homeless teenage girl has got to be one of the lowest things you can do" is injecting the prosecutor's own personal opinion into the case. As such, the prosecutor's comment violated caselaw, which constitutes prosecutorial misconduct amounting to plain error. *See id.*, (cautioning the state to avoid *any* language constituting the prosecutor's personal opinion).

In sum, the prosecutor's comments about hoping Yuoh did not get away with sexually assaulting A.K. and his comments that Yuoh was "obviously lying" and that "I mean, for a grown man to sexually assault a homeless teenage girl has got to be one of the lowest things you can do" constituted prosecutorial misconduct amounting to plain error.

Because Yuoh established plain error, the burden shifts to the state to establish that the error did not affect Yuoh's substantial rights. *See Ramey*, 721 N.W.2d at 302. A plain error affects a defendant's substantial rights when "it was prejudicial and affected the outcome of the case." *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017) (quotation omitted). An error is prejudicial when "there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *Id.* (quotation omitted). When evaluating the effect of prosecutorial misconduct on substantial rights, we consider various factors, including "the pervasiveness of improper suggestions and the strength of the evidence against the defendant." *Id.* (quotations omitted).

The state contends that any error did not affect Yuoh's substantial rights because the comments were brief and not pervasive and because the judge properly instructed the jury. *See State v. James*, 520 N.W.2d 399, 405 (Minn. 1994) (noting that in the context of the entire proceeding, a prosecutor's improper comment was harmless). Based on our review of the entire record, we agree.

When considering the closing arguments as a whole, the prosecutor's comments amounting to error were fundamentally troubling yet relatively brief, amounting to three sentences in the context of a nearly 25 page closing argument. The vast majority of the prosecutor's closing argument appropriately focused on outlining the law and the state's case and summarizing the evidence presented. *See State v. Johnson*, 616 N.W.2d 720, 729 (Minn. 2000) (noting that a prosecutor's comments must be considered in the context of the entire closing argument). More critically, the state presented a strong case against Yuoh, including: A.K.'s testimony, evidence of her injuries, forensic testimony that Yuoh could not be excluded as a contributor to the saliva found on A.K.'s neck, evidence that A.K. identified Yuoh in a photo line-up as the man who assaulted her, and testimony from two police officers and the sexual assault nurse about how A.K. described the assault to them, which was consistent with A.K.'s testimony. *See id.* at 730 (noting that when reviewing not just the prosecutor's closing argument but the record as a whole, the defendant was not prejudiced by the prosecutor's comments). Given that the prosecutor's comments were brief and the strength of the evidence against Yuoh, the state has sufficiently demonstrated that any error did not affect Yuoh's substantial rights. Accordingly, a new trial on the basis of prosecutorial misconduct is not warranted.

b. Objected-to allegations of prosecutorial misconduct

Yuoh also alleges that he was deprived of a fair trial due to prosecutorial misconduct that he objected to at trial. We review objected-to allegations of prosecutorial misconduct for harmless error. *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). But the standard for determining whether an error was harmless varies based upon the severity of the misconduct, requiring certainty beyond a reasonable doubt that misconduct was harmless in cases involving unusually serious prosecutorial misconduct and, in less serious cases, reviewing whether the misconduct likely "played a substantial part in influencing the jury to convict."[4] *State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974).

Yuoh argues that the prosecutor committed misconduct during closing argument by belittling the defense and improperly shifting the burden of proof. The prosecutor argued:

> The defendant in his testimony suggested that maybe one of his buddies, Tim or Todd, the O.G., could have possibly sexually assaulted [A.K.]. That's the first we heard of that. And if the defendant truly believes that was a possibility it would have made sense for him to mention it to Investigator Gates when Investigator Gates interviewed the defendant about this? Because remember, the defendant testified that he was playing Investigator Gates because he knew that there was a setup coming. So wouldn't the defendant explain to Investigator Gates these alternative perpetrators, Tim and Todd, the O.G., when he was interviewed by the investigator?
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> . . . .
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> The defendant has the right to a trial and he has the right to an attorney. And before the defendant testified yesterday it was evident what type of strategy [defense counsel] was using

[4] The Minnesota Supreme Court has questioned whether this two-tiered approach is still good law, while declining to decide the question. *See State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010); *see also State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012).

> in a case where there was strong evidence against his client. [Defense counsel's] strategy was to discredit [A.K.] and to suggest that the investigation was insufficient.
>
> It was a two-pronged approach. [Defense counsel] questioned Robbinsdale Police Officer Casey Landherr asking why he didn't knock on eighty to ninety doors at the Robinwood apartment building until he found Tim. [Defense counsel] tried to suggest that the BCA didn't do a full job because they didn't do blood typing on the sperm cell which [the BCA scientist] testified is a type of forensic science that hasn't been used in at least twenty years and she only learned about as a historical thing. So the strategy was discredit [A.K.] and try to demonstrate that the investigation and the forensic science was somehow insufficient.
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> *And then the defendant testified, really threw a monkey wrench into things. It will be interesting to see how [defense counsel] incorporates the big poop defense in his closing argument, or the grand conspiracy among who knows how many people. How will [defense counsel] handle the fact that the defendant admitted that he did kiss [A.K.]?*

At this point, defense counsel objected, and the district court sustained the objection. The prosecutor then reminded the jury that Yuoh had no burden in the case, meaning that he did not have to testify, present any evidence, or give a closing argument, and that the state needed to prove everything beyond a reasonable doubt. But Yuoh contends that comments in the prosecutor's rebuttal also amounted to belittling his defense:

> So this is the state's opportunity to respond to arguments made by the defense in their closing argument. This is not a second closing argument from me.
>
> And, as predicted, the defense did make a closing argument even though they are not required to. And, as predicted, the defense did attack the credibility of [A.K.]. . . .
>
> . . . .

> You saw the blame the victim defense. Classic defense, blame the victim. She should have gone to a homeless shelter, she shouldn't have been using drugs, she shouldn't have eaten that food she couldn't afford, she had no money.

Assuming without deciding that these comments constituted error, any error was harmless, even if we apply the more stringent harmless-beyond-a-reasonable-doubt standard. As noted above, the state presented significant evidence of Yuoh's guilt to the jury. Further, at the district court's order, the prosecutor followed his comments with a reminder to the jury about the burden of proof, and the district court comprehensively instructed the jury about the burden of proof requirement. *See State v. Budreau*, 641 N.W.2d 919, 926 (Minn. 2002) (noting that the law presumes that jurors follow the district court's instructions). Accordingly, given the strength of the evidence and the corrective statements by both the prosecutor and the district court, we discern that any error was harmless and does not warrant a new trial.

Finally, we note that the cumulative effect of any prosecutorial misconduct during closing arguments does not warrant a new trial. We find the identified comments from the prosecutor disturbing. But upon review of the entire record, we are satisfied that the prosecutor's comments did not prejudice Yuoh. The state presented a strong case against Yuoh, including testimony from A.K. which was corroborated by numerous other witnesses who testified about what she disclosed to them. When the prosecutor's brief, isolated comments—considered cumulatively—are viewed in light of the entire record, we discern no prejudice warranting a new trial on the basis of prosecutorial misconduct. *See Montanaro v. State*, 802 N.W.2d 726, 734 (Minn. 2011) (concluding that after reviewing

the prosecutor's closing argument in light of the entire record, any misconduct viewed in isolation or collectively did not have a significant impact on the jury's verdict and did not affect the defendant's substantial rights).

III. The district court erred by entering convictions for third and fifth-degree criminal-sexual-conduct offenses because they are lesser-included offenses of the first-degree criminal-sexual-conduct offense.

Both Yuoh and the state agree that the district court erred by entering convictions for third and fifth-degree criminal-sexual-conduct offenses because they are lesser-included offenses of the first-degree criminal-sexual-conduct offense. We agree as well.

Under Minnesota Statutes section 609.04, subdivision 1 (2016), an actor may be convicted of "either the crime charged or an included offense, but not both." An included offense may be "a lesser degree of the same crime." Minn. Stat. § 609.04, subd. 1(1). Accordingly, a defendant cannot be convicted of two separate counts of criminal sexual conduct based on one act or course of conduct. *State v. Folley*, 438 N.W.2d 372, 373 (Minn. 1989).

Here, all of the criminal-sexual-conduct charges stemmed from a single act: Yuoh's sexual assault of A.K. in the apartment stairwell. Therefore, although the jury found Yuoh guilty of all three counts, it was improper for the district court to adjudicate Yuoh guilty of third and fifth-degree criminal sexual conduct because the third and fifth-degree criminal-sexual-conduct offenses are lesser-included offenses of the first-degree criminal-sexual-conduct offense. As such, we reverse Yuoh's convictions for third and fifth-degree

criminal sexual conduct and remand to the district court for correction of the warrant of commitment.

In sum, sufficient evidence supported Yuoh's conviction of first-degree criminal sexual conduct and any prosecutorial misconduct that occurred does not warrant a new trial. Accordingly, we affirm Yuoh's first-degree criminal-sexual-conduct conviction. But we reverse his convictions for third and fifth-degree criminal sexual conduct because they are lesser-included offenses of the first-degree criminal sexual conduct and remand for correction of the warrant of commitment.

Affirmed in part, reversed in part, remanded.