STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0307

State of Minnesota,
Respondent,

vs.

Nathan Anthony Janish,
Appellant.

Filed August 26, 2019
Affirmed
Smith, Tracy M., Judge

Anoka County District Court
File No. 02-CR-17-753

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Mark G. Giancola, Rory P. Durkin, Giancola-Durkin, P.A., Anoka, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Schellhas, Judge; and Jesson, Judge.

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

SMITH, TRACY M., Judge

After his seven-year-old niece reported that he had sexually assaulted her on two occasions, appellant Nathan Anthony Janish was charged with six counts of criminal sexual

conduct: two counts each for both occasions and two counts for "multiple acts over an extended period of time." A jury found him guilty on all six counts, and the district court entered a conviction on one of the counts charging multiple acts. Janish filed a postconviction petition claiming ineffective assistance of counsel, which the district court denied without an evidentiary hearing. Janish appeals from both the conviction and postconviction ruling, arguing that (1) the postconviction court should have granted an evidentiary hearing, (2) the district court improperly admitted *Spreigl* evidence, (3) the jury's verdict may not have been unanimous, (4) the district court erred by not severing two of the counts before trial, and (5) the evidence was insufficient to support the verdict. We affirm.

FACTS

The convictions in this case arose out of several sexual assaults committed by Janish against A.W., his niece. Two sexual assaults occurred on one night in the summer of 2016, when A.W. was sleeping over at Janish's house, located in Anoka County. On that night, Janish twice approached A.W., while she was asleep or in bed, and made sexual contact with and penetrated her. A third sexual assault occurred one night in October 2016 when A.W., her sister, and her cousins were staying over at their grandparents' house in Cass County, which the family referred to as the "wood house." This sexual assault, too, involved sexual contact and penetration.

In November, A.W. reported the sexual assault at the wood house to her parents, who then contacted Midwest Children's Resource Center (MCRC). A nurse from MCRC interviewed A.W., who described both the sexual assault at the wood house and a sexual

assault at Janish's house to the nurse. The nurse then reported the sexual assaults to a police department in Cass County, the Anoka County Sheriff's Department, and Anoka County Child Protection. The Anoka County Sheriff's Department investigated. On February 1, 2017, the state charged Janish with first- and second-degree criminal sexual conduct (counts one and two) based on a sexual assault occurring at Janish's house in Anoka County, in violation of Minn. Stat. § 609.342, subd. 1(a) (2016), and Minn. Stat. § 609.343, subd. 1(a) (2016).

In early July, the state amended the complaint, adding four new counts. Counts three and four were based on the sexual assault in Cass County and charged first- and second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a), and Minn. Stat. § 609.343, subd. 1(a). Counts five and six likewise charged first- and second-degree criminal sexual conduct, but they alleged multiple acts committed over an extended period of time against a victim with whom the actor had a significant relationship, in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2016), and Minn. Stat. § 609.343, subd. 1(h)(iii) (2016). Because the initial complaint had described the Cass County sexual assault, even though it had charged only a sexual assault occurring in Anoka County, the statement of probable cause was not amended except to add a statement that "criminal sexual conduct may be prosecuted in any jurisdiction in which the violation originates or terminates."

A jury trial was held in Anoka County from July 10 to July 17, 2017. Before jury selection began, Janish's attorney moved to dismiss the new counts. He argued that the district court in Anoka County lacked jurisdiction over counts three and four because they alleged acts occurring in Cass County. He also argued that there was no probable cause for

counts five and six because acts in Anoka County followed six months later by acts in Cass County were not, according to him, "multiple acts over a protracted period of time." The district court denied the motion to dismiss counts three and four based on Minn. Stat. § 627.15 (2016), which allows a prosecution for child abuse to be venued in "the county where the alleged abuse occurred or the county where the child is found." And the district court denied the motion to dismiss counts five and six, ruling that whether the allegations constituted "multiple acts committed over an extended period of time" was a question of fact for a jury.

At trial, A.W. described three sexual assaults by Janish: two on the same summer night at Janish's house in Anoka County and one in October at the wood house in Cass County. A.W. testified that, during each sexual assault, Janish "stuck his private part in [her] mouth," "rubbed something up against her bottom," and "put . . . [her] hand around his private part." Other witnesses testified about A.W.'s prior reports of the sexual assaults, the circumstances on the nights when the sexual assaults occurred, and Janish's statements about his conduct on the nights when the sexual assaults occurred. The state then rested.

Janish's attorney moved for a judgment of acquittal, arguing that no reasonable jury could find Janish guilty because A.W. never specifically said the word "penis" when reporting the abuse or when testifying and because A.W.'s parents testified to having doubts about whether the sexual assaults had happened. The district court denied the motion.

Several witnesses testified in Janish's defense, stating that Janish had not been alone with A.W. and that they had not seen any abuse. Janish also testified; he denied having any

sexual contact with A.W. and said that other people were in the room on each of the nights he was alleged to have sexually assaulted A.W.

Before the last day of trial, Janish moved to dismiss counts three through six, arguing that the crimes had not occurred in Anoka County and that A.W. could not be found in Anoka County for purposes of Minn. Stat. § 627.15. The district court heard the motion orally and took it under advisement. After the defense rested, the district court denied Janish's motion to dismiss. It ruled that venue was appropriate for counts five and six because Anoka County was where the offenses began. And the district court ruled that venue was appropriate for counts three and four because A.W. could be found in Anoka County since investigation of the Cass County allegations of child abuse occurred in Anoka County.[1]

The jury returned guilty verdicts on all six counts. After the verdicts, Janish moved for a judgment of acquittal or a new trial, arguing that the evidence was insufficient to support a conviction on any count and arguing, in the alternative, that the district court lacked jurisdiction over counts three through six. As a subargument of his jurisdictional argument, Janish also contended that he was entitled to a new trial because the state, by introducing evidence on the counts over which the district court lacked jurisdiction, had introduced prior-bad-acts evidence without providing *Spreigl* notice.[2] The district court

[1] The district court cited *State v. Krejci*, 458 N.W.2d 407, 410 (Minn. 1990) (concluding that venue was appropriate in the county where a child-abuse victim was hospitalized and the abuse was investigated).

[2] "[E]vidence of other crimes, wrongs or acts . . . commonly known as *Spreigl* evidence, is inadmissible to prove a defendant's character but may be admitted to show motive, intent,

denied a judgment of acquittal or a new trial, ruling that the evidence was sufficient to support the jury's verdict. The district court reversed its determination that A.W. could be "found" in Anoka County for purposes of Minn. Stat. § 627.15 and therefore dismissed counts three and four. But the district court refused to dismiss counts five and six because, it ruled, Minn. Stat. § 609.53 (2016) permits criminal-sexual-conduct cases to be prosecuted "in any jurisdiction in which the violation originates or terminates" and counts five and six depended on multiple acts, the first of which took place in Anoka County. Finally, the district court denied Janish's motion for a new trial based on the dismissal of counts three and four, reasoning that the evidence of the Cass County acts was not improper *Spreigl* evidence because those acts were part of what the state had to prove to establish counts five and six.

The district court entered a conviction on count five—one of the two remaining first-degree offenses—and did not enter convictions on the other first-degree offense or the

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absence of mistake, identity, or plan." *State v. Campbell*, 861 N.W.2d 95, 102 (Minn. 2015) (citing *State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965)); *see also* Minn. R. Evid. 404(b) (defining other-acts evidence). There are five requirements for the admission of *Spreigl* evidence:

> (1) notice is given that the state intends to use the evidence; (2) the state clearly indicates what the evidence is being offered to prove; (3) the evidence is clear and convincing that the defendant participated in the other offense; (4) the *Spreigl* evidence is relevant and material to the state's case; and (5) the probative value of the *Spreigl* evidence is not outweighed by its potential for unfair prejudice.

Campbell, 861 N.W.2d at 102 (quoting *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

two lesser-included offenses. At sentencing, the district court granted a downward dispositional departure, sentencing Janish to the presumptive duration of 144 months but granting a stay of execution with 20 years' probation.

Janish appealed and was granted a stay to allow him to file a postconviction petition with the district court. Janish's postconviction petition claimed ineffective assistance of counsel—identifying seven ways in which his trial counsel was allegedly ineffective—and sought an evidentiary hearing. Following argument on the postconviction petition, the district court denied the petition without an evidentiary hearing.

Janish brings this combined direct and postconviction appeal.

D E C I S I O N

I. The district court did not err by denying a postconviction evidentiary hearing.

Appellate courts review the denial of a request for an evidentiary hearing on a postconviction petition for an abuse of discretion. *Taylor v. State*, 874 N.W.2d 429, 430 (Minn. 2016). Legal issues are reviewed de novo, but factual matters are reviewed only to determine "whether there is sufficient evidence in the record to support the postconviction court's findings." *Brown v. State*, 863 N.W.2d 781, 786 (Minn. 2015). Reversal is not warranted "unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Id.* (quoting *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010)).

The postconviction court must grant an evidentiary hearing on a postconviction petition "[u]nless the petition and the files and records of the proceeding conclusively show

that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2018); *Brocks v. State*, 753 N.W.2d 672, 674 (Minn. 2008) (construing the hearing required by section 590.04 to be an evidentiary hearing).

Before the postconviction court, Janish identified seven bases for his claim that he received ineffective assistance of counsel. Here, Janish relies on none of them[3] and instead asserts a new basis on which the district court should have granted an evidentiary hearing: that trial counsel was ineffective because he failed to move to sever the Cass County counts from the other counts before trial.

The general rule against appellate consideration of claims raised for the first time on appeal applies to postconviction petitions. *Andersen v. State*, 913 N.W.2d 417, 428 n.11 (Minn. 2018) (declining to consider claims not raised before the postconviction court). Because Janish did not argue to the postconviction court that his trial counsel should have moved to sever the Cass County counts before trial, he has forfeited that argument for purposes of this appeal.

Even if we were to consider his claim on its merits, it would fail. Criminal defendants have a right to the effective assistance of counsel. U.S. Const. amend. VI; *McMann v. Richardson*, 397 U.S. 759, 772, 90 S. Ct. 1441, 1449 n.14 (1970). To show that

[3] At oral argument, Janish's counsel argued that, because the postconviction petition was included in the addendum to the brief, all seven arguments in the petition were incorporated by reference into the brief itself. But "an issue that is not raised in the 'argument portion' of a brief is deemed waived on appeal." *State v. Jackson*, 655 N.W.2d 828, 837 (Minn. App. 2003) (quoting *In re Application of Olson*, 648 N.W.2d 226, 228 (Minn. 2002)). Thus, we decline to address the arguments that Janish raised to the postconviction court but did not brief to this court.

the Sixth Amendment right has been denied because counsel was ineffective, an appellant must show two things: first, "that counsel's performance was deficient," and, second, "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). A court "need not analyze both elements of the *Strickland* test if one or the other is determinative." *Sanchez v. State*, 890 N.W.2d 716, 720 (Minn. 2017). To show prejudice, a defendant must show "a reasonable probability . . . that the outcome would have been different, but for counsel's errors." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017) (quotation omitted). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome of the case." *Id.* (quotation omitted).

The second *Strickland* element is determinative here. The factual basis of counts five and six included the facts supporting counts three and four. To show that Janish committed multiple acts "over an extended period of time," the state needed to introduce evidence of the Cass County sexual assault. *See* Minn. Stat. §§ 609.342, subd. 1(h)(iii), .343, subd. 1(h)(iii). Thus, the same evidence would have been introduced at trial regardless of whether counts three and four were severed. Trial counsel's failure to seek pretrial severance of those charges could not have prejudiced Janish.

Because the petition and the record conclusively show that Janish could not establish the prejudice element of *Strickland*, the district court did not abuse its discretion by denying his postconviction petition without an evidentiary hearing.

II. The district court did not err by improperly admitting *Spreigl* evidence.

Janish argues that the district court erred by admitting evidence of another crime, wrong, or act, in violation of Minn. R. Evid. 404(b). Janish's objection is to A.W.'s testimony that Janish sexually assaulted her a second time—not just once—on the night of the charged sexual assault in Anoka County. Janish also objects to T.W.'s testimony that A.W. previously said that she did not recall whether the additional sexual assault in Anoka County took place at the home Janish lived in at the time of the charged Anoka County sexual assault or in the home Janish lived in before that.

When "a defendant fails to object to the admission of evidence, our review is under the plain-error standard." *State v. Drew*, 889 N.W.2d 323, 330 (Minn. App. 2017). Because Janish's trial counsel did not object to A.W.'s testimony, and actually elicited T.W.'s testimony during cross-examination, the plain-error standard of review applies. *See State v. Gisege*, 561 N.W.2d 152, 158 n.5 (Minn. 1997) (stating that plain error applies equally to invited error and unobjected-to-error). To establish plain error, an appellant must show "(1) error, (2) that was plain, and (3) that affected the defendant's substantial rights." *State v. Brown*, 792 N.W.2d 815, 820 (Minn. 2011). If all three factors are shown, the appellate court determines "whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 821 (quotation omitted).

Janish fails to establish the first prong. The district court did not err by admitting evidence that Janish had committed a second sexual assault against A.W. at his house in Anoka County on the same night as the offense charged in counts one and two. Evidence of the additional sexual assault in Anoka County tended to prove that Janish's "sexual

abuse involved multiple acts committed over an extended period of time," an element of the crimes charged by counts five and six. *See* Minn. Stat. §§ 609.342, subd. 1(h)(iii), .343, subd. 1(h)(iii). Because evidence of the additional sexual assault was evidence of the charged multiple-acts crime, it was not "[e]vidence of another crime, wrong, or act" and Minn. R. Evid. 404(b) does not apply.

III. The district court did not err by accepting a verdict that was not unanimous.

Janish next argues that the district court erroneously accepted a verdict that was not unanimous because evidence of three different acts was introduced but the jury was not specifically instructed that they had to agree on which of the acts he had committed in order to find that he had engaged in "multiple acts" of sexual abuse as charged in counts five and six.

Janish's argument is incorrect. The jury found Janish guilty of all counts. That means that the jurors unanimously agreed that Janish had engaged in both sexual penetration and sexual contact at his home in Anoka County—counts one and two—and that he had engaged in both sexual penetration and sexual contact several months later in Cass County—counts three and four. Thus, the jury unanimously agreed that Janish had committed multiple acts over an extended period of time. While Janish suggests that the subsequent dismissal of the Cass County counts makes the jury's verdict nonunanimous, it is unclear how that can be so. The fact that the court dismissed counts three and four because it concluded that venue was improper does not change the jury's unanimous finding: Janish committed the acts underlying those counts.

Even if the dismissal of counts three and four somehow erases the jury's unanimous determination on those counts, Janish's argument still fails. Janish did not request a specific unanimity instruction at trial. Thus, this court reviews for plain error. *See State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015) (applying plain-error review in the context of a challenge to the lack of a specific unanimity instruction). Janish cannot establish that the district court erred—much less plainly—by not sua sponte giving a specific unanimity instruction.

Janish relies on *Richardson v. United States* in asserting plain error. 526 U.S. 813, 824, 119 S. Ct. 1707, 1713 (1999). In *Richardson*, the Supreme Court held that a statute which required proof of a "continuing series of violations," required "unanimity in respect to each individual violation" rather than unanimity with respect to the fact that there was a series of violations. *Id.* at 815-16, 119 S. Ct. at 1709. There can be no dispute that a jury is required to unanimously find each element of an offense. *State v. Dalbec*, 789 N.W.2d 508, 511 (Minn. App. 2010) ("A jury cannot convict a defendant unless it unanimously finds that the government has proved each element of the charged offense."). But *Richardson* and Minnesota law distinguish between situations where a series of acts is a single element and situations where each act in a series is an element. *Richardson*, 526 U.S. at 817-18, 119 S. Ct. at 1710 ("[W]e must decide whether the statute's phrase 'series of violations' refers to one element, namely a 'series,' in respect to which the 'violations' constitute the underlying brute facts or means, or whether those words create several elements, namely the several 'violations,' in respect to *each* of which the jury must agree unanimously and

separately."); *Dalbec*, 789 N.W.2d at 511 ("[A] jury must reach a unanimous verdict on all elements of the crime but need not agree on the underlying facts.").

Thus, the critical question is whether the phrase "the sexual abuse involved multiple acts," Minn. Stat. § 609.342, subd. 1(h)(iii), defines a single element of first-degree criminal sexual conduct on which the jury must unanimously agree or whether each of the multiple acts is an independent element on which the jury must unanimously agree. While several unpublished cases indicate that "multiple acts" is a single element,[4] published caselaw has not answered this question.

But there is precedential caselaw on similar issues. As a general rule, the state need not prove the specific dates of sexual abuse. *State v. Rucker*, 752 N.W.2d 538, 547-48 (Minn. App. 2008) ("Generally, specific dates need not be proved in cases charging criminal sexual conduct over an extended period of time."), *review denied* (Minn. Sept. 23, 2008); *see also State v. Becker*, 351 N.W.2d 923, 927 (Minn. 1984) (stating that the statute did not "make a particular time period a material element of the offense"); *State v. Poole*, 489 N.W.2d 537, 544 (Minn. App. 1992) ("[S]pecific dates need not be charged or proven in a sexual abuse case."). This general rule has led to conclusions that undermine Janish's argument. For example, in *Rucker*, this court held that a district court "did not err in not

[4] *See State v. Schauer*, A13-0500, 2014 WL 6608790, at *4 (Minn. App. Nov. 14, 2014) ("The district court was not required to instruct the jury to make findings on which specific acts [the defendant] committed under this count, only that [the defendant] committed 'multiple acts' . . . ."); *State v. Derosier*, A03-1718, 2005 WL 1331078, at *2-3 (Minn. App. June 7, 2005) (holding that the district court was not required to instruct the jury that they must agree on which of 11 acts of criminal sexual conduct the defendant had committed against the victim), *aff'd on other grounds*, 719 N.W.2d 900 (Minn. 2006).

instructing the jury that it must unanimously agree on which specific incidents formed the basis of appellant's convictions" for criminal sexual conduct against a child that was alleged to have occurred over a multi-year period of time. 751 N.W.2d at 548. While *Rucker* differs from this case in certain respects, it certainly does not make plain that a specific unanimity instruction is required when, as here, a defendant is charged with committing multiple acts of sexual assault over an extended period of time.

IV. The district court did not commit reversible error by not severing the Cass County counts before trial.

Janish next argues that he is entitled to reversal because the district court failed to sever counts three and four before trial. Janish's counsel asked the district court to dismiss counts three and four before trial but did not specifically move for severance. If we construe Janish's request to dismiss as a motion to sever, we apply a de novo standard of review to the district court's decision not to sever. *See State v. Fitch*, 884 N.W.2d 367, 378 (Minn. 2016) ("[Appellate courts] review a district court's decision regarding whether to sever charges or offenses de novo.").

"On motion . . . , the court must sever offenses or charges if: (a) the offenses or charges are not related." Minn. R. Crim. P. 17.03, subd. 3(1). "Offenses are 'related,' and severance is not required . . . if the offenses arose out of a single behavioral incident." *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006). In considering severance, "courts should evaluate the temporal and geographic proximity of the offenses and assess whether the conduct was motivated by an effort to obtain a single criminal objective." *Id.* at 607-08. The fact a defendant committed "multiple crimes over time for the *same* criminal objective

does not mean that he committed those crimes to attain a *single* criminal objective." *State v. Bakken*, 883 N.W.2d 264, 271 (Minn. 2016). Further, if a defendant commits multiple crimes that are unrelated to each other, but each of which is independently related to an additional crime, joinder of the unrelated crimes will nonetheless be improper. *State v. Ross*, 732 N.W.2d 274, 280 (Minn. 2007).

Consistent with these principles, counts one and two (the Anoka County offense) were not properly joined with counts three and four (the Cass County offense). The conduct underlying the two pairs of counts was separated temporally by several months and geographically by several counties. That separation means that, even if Janish was motivated by the same sexual intent when committing the Anoka County offense and the Cass County offense, his motivation does not constitute a single criminal objective. Because the Anoka County offense was among the "multiple acts" charged by counts five and six, counts one and two could be joined with counts five and six. And because the Cass County offense was among the "multiple acts" charged by counts five and six, counts three and four could also be joined with counts five and six. But because the Anoka County offense and the Cass County offense did not arise out of the same behavioral incident, those counts could not be joined with each other.

"But the ultimate question in a severance claim is one of prejudice." *Fitch*, 884 N.W.2d at 379 (quotation omitted). As discussed above, evidence of the Cass County act was admissible because it was one of the "multiple acts" charged by counts five and six. Thus, admission of evidence relevant to the improperly joined counts could not be prejudicial to Janish. Had counts three and four been severed before trial, the exact same

evidence would have been admissible in order to prove counts five and six. Thus, Janish could not have been prejudiced by the joinder in this case. *Cf. id.* ("[J]oinder is not prejudicial if evidence of each offense would have been admissible *Spreigl* evidence in the trial of the other." (quotation omitted)).

Janish makes two arguments against this conclusion. First, he argues that the Cass County conduct would not have been admissible because "multiple acts" under Minn. Stat. §§ 609.342, subd. 1(h)(iii), .343, subd. 1(h)(iii), does not refer to "distinct acts separated by space and time" but rather to "different types of sexual conduct committed within the same temporal/spatial topography." But we construe statutes as a whole, to give effect to all provisions. *State v. Henderson*, 907 N.W.2d 623, 625 (Minn. 2018). The phrase immediately following "multiple acts" in the statute is "committed over an extended period of time." Minn. Stat. §§ 609.342, subd. 1(h)(iii), .343, subd. 1(h)(iii). The requirement of "an extended period of time" is inconsistent with Janish's asserted "same temporal/spatial topography" interpretation, which we therefore reject.

Second, he argues that the statute itself violates due process by allowing the state to charge as a single crime multiple acts that, if charged separately, would not be subject to joinder. He argues that this allows the state to introduce what is, in effect, propensity evidence because multiple bad acts have been combined into a single crime.

But there are several problems with Janish's argument. First, Janish identifies no caselaw suggesting that a defendant has a due-process right to an offense consisting only of a single act. Second, comparable statutes, in which several distinct bad acts are elements of the crime, have been upheld against similar challenges. *See, e.g.*, *State v. Cross*, 577

N.W.2d 721, 724-25 (Minn. 1998) (rejecting, in an appeal from a conviction of domestic-abuse murder, the defendant's argument that "past pattern of domestic abuse" was prior-bad-acts evidence subject to *Spreigl*, reasoning the past abuse was an element of the offense and was subject to proof beyond a reasonable doubt). Third, even the erroneous admission of evidence of prior bad acts does not violate the Due Process Clause because it is not "fundamentally unfair." *Dowling v. United States*, 493 U.S. 342, 352-54, 110 S. Ct. 668, 674-75 (1990). We see no due-process problem with a statute that permits conviction only if a jury is persuaded beyond a reasonable doubt that the defendant has committed multiple acts of sexual abuse.

Thus, because the Cass County conduct was part of the actus reus charged by counts five and six, Janish suffered no prejudice due to the joinder of counts three and four for this trial.

V. The evidence was sufficient to support the verdict.

Janish's final argument is that, because A.W. never said the word "penis" while testifying, there was insufficient evidence for the jury to have found that he committed sexual penetration. He argues that A.W. only used the phrase "front potty" to describe the organ she was talking about and claims that the jury could only have "speculated" as to what that meant.

When reviewing a challenge to the sufficiency of the evidence, "[t]he verdict will not be overturned if, giving due regard to the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt, the [factfinder] could reasonably have found the defendant guilty of the charged offense." *State v. Palmer*, 803

N.W.2d 727, 733 (Minn. 2011) (second alteration in original) (quoting *State v. Leake*, 699 N.W.2d 312, 319 (Minn. 2005)). In performing this analysis, we will "view the evidence in a light most favorable to the verdict and assume the jury believed the state's witnesses and disbelieved contrary evidence." *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010) (quotation omitted).

To obtain a conviction for first-degree criminal sexual conduct, the state needed to prove that Janish engaged in "sexual penetration" with A.W, meaning, in this case, that there was any contact between Janish's penis and her mouth. Minn. Stat. § 609.342, subd. 1; *see also* Minn. Stat. § 609.341, subd. 12 (2016) (defining "sexual penetration" to include "fellatio"); *State v. Ptacek*, 766 N.W.2d 355, 359 (Minn. App. 2009) (holding that "fellatio," as used in section 609.341, means "any contact between the penis of one person and the mouth, tongue, or lips of another person"), *review denied* (Minn. Aug. 26, 2009).

Janish's argument is that A.W.'s testimony was not sufficiently specific to allow the jury to find that there had been any contact between his penis and A.W.'s mouth. But A.W. testified that Janish "stuck his private part in [her] mouth," "rubbed something up against [her] bottom," and "put [her] hand around his private part." She described Janish's "private part" as being "bigger than his thumb." The jury also heard about A.W.'s prior reports of the abuse. A.W. told her mother that she knew that the object inserted into her mouth was Janish's "potty area" because "it tasted like pee" and "it was hard to breathe" during the sexual assault. And A.W. described the object to the MCRC nurse as being "a cylinder" and "smooth." Viewing this evidence in the light most favorable to the verdict, the jury

could reasonably have concluded that the object inserted into A.W.'s mouth was Janish's penis.

Further, Janish cites no authority requiring particular language or specificity in describing sexual assault. He does not point to any case suggesting that the word "penis" or the use of an anatomical doll or illustration is required. And the use of developmentally appropriate language to describe sexual assault is a common theme of cases involving criminal sexual conduct against children; those cases do not express concern over the lack of medically specific terminology, and some explicitly affirm children's testimony using nonmedical terminology against a sufficiency-of-the-evidence challenge. *See, e.g.*, *State v. Myers*, 359 N.W.2d 604, 607 (Minn. 1984) (complainant said that the defendant would "touch her on her 'chest' and between her legs"); *State v. Duncan*, 608 N.W.2d 551, 554 (Minn. App. 2000) (child/juvenile victims referred to different parts of anatomy by various euphemisms); *State v. Wilbur*, 445 N.W.2d 582, 583 (Minn. App. 1989) (victim stated that defendant had "touched her with himself" and that he hurt her with "his weiner"), *review denied* (Minn. Oct. 19, 1989).

There is no serious question that A.W.'s testimony was sufficiently specific for the jury to have found that Janish engaged in sexual penetration. The evidence was sufficient to support the conviction beyond a reasonable doubt.

Affirmed.