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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1480**

State of Minnesota,
Respondent,

vs.

Antonio Desean Howard,
Appellant.

**Filed August 5, 2019
Affirmed in part, reversed in part, and remanded
Bratvold, Judge**

Olmsted County District Court
File No. 55-CR-17-540

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

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Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this direct appeal from the judgment of conviction of first- and third-degree criminal sexual conduct, appellant argues that (1) the prosecutor committed misconduct

during closing arguments by disparaging the defense and implying that appellant bore the burden of proof; (2) the district court erred by permitting the state to impeach him with three prior convictions; (3) the district court erred by admitting evidence of a prior incident between him and the victim as relationship evidence; and (4) the warrant of commitment must be amended to reflect that no conviction was entered on the lesser-included offense of third-degree criminal sexual conduct.

First, we conclude that the prosecutor committed misconduct in his closing argument, but the misconduct did not affect appellant's substantial rights. Next, we conclude that the district court did not abuse its discretion by permitting the state to impeach appellant or by admitting relationship evidence. Finally, we conclude that the district court erred by formally entering judgment of conviction of third-degree criminal sexual conduct because it is a lesser-included offense of first-degree criminal sexual conduct. Thus, we affirm in part, reverse in part, and remand to the district court with instructions to vacate the formal adjudicated conviction of third-degree criminal sexual conduct, but to leave the finding of guilt in place.

FACTS

The evidence at trial established that, in 2016, H.R. owned and lived in a two-bedroom mobile home in Rochester, Minnesota. H.R. stayed in the master bedroom and had several roommates: A.G. and his girlfriend shared the second bedroom; and M.H. and her boyfriend slept on the couch in the living room. In April or May 2016, A.G. invited his friend and coworker, appellant Antonio Desean Howard, to stay in the home. H.R. did not know Howard before he moved in, but allowed him to stay because he was "having a

tough time.” Additionally, until August 22, 2016, H.R.’s ex-boyfriend lived in the home and slept in the master bedroom.

On August 28, 2016, H.R. visited a friend and returned home at around 11:30 p.m. M.H. and her boyfriend were sleeping on the couch, and A.G. “and his girlfriend were in the spare bedroom sleeping.” H.R. entered her room, and saw Howard sitting in a rocking chair. H.R. got into bed, and began watching a television show on her laptop; Howard sat in the rocking chair while “smoking a blunt of K2.”¹ At one point, Howard slept for “ten, fifteen minutes,” woke up, climbed into bed next to H.R., and “started reaching toward [her.]” H.R. told Howard that she did not want to be touched or have sex, and that she wanted him to leave her alone. Howard fell asleep, and dropped his “lit blunt” on H.R., who left the bed and sat in the chair. After Howard woke up and got out of bed, H.R. returned to bed while Howard sat in the chair.

Later, Howard came back to the bed, laid on top of H.R., and pushed her “head into the pillow with his hand somewhat around [her] throat.” H.R. said “no and . . . was crying,” but Howard pulled down her shorts and her underwear, and “put his penis in [her] butt.” This caused H.R. “a lot of pain” because she had surgery in July to remove a cyst “at the bottom of [her] tailbone.” Howard then put his penis in H.R.’s vagina, while H.R. cried with her face in the pillow. Howard ejaculated, and then went to the bathroom before leaving for work. H.R. waited for Howard to leave and then fell asleep.

¹ “K2” is a controlled substance, described at trial as “synthetic marijuana.”

Later in the afternoon of August 29, H.R. told A.G.'s girlfriend and M.H. about the assault. At around 3:00 p.m., A.G. and Howard came home, and Howard denied that the assault had taken place. H.R. left to stay with friends. M.H. reported the assault to police.

On August 30, Officer Osborne called and left a voicemail for H.R., who returned his call. They discussed her "going to the hospital to do a rape kit." Also on August 30, H.R. went to the hospital, and was examined by a sexual assault nurse examiner. During the examination, the nurse noticed bleeding at H.R.'s "cervix opening," and reported that H.R. was tender and complained of pain "both on the labia majora and . . . the anal area." On August 31, H.R. met with Investigator Johnson and reported that she had been sexually assaulted by Howard on August 29.

The state charged Howard with two counts stemming from the August 29 incident: first-degree criminal sexual conduct (personal injury and force or coercion) under Minn. Stat. § 609.342, subd. 1(e)(i) (2016), and third-degree criminal sexual conduct (force or coercion) under Minn. Stat. § 609.344, subd. 1(c) (2016).

Before trial, the state moved for permission to impeach Howard with four prior convictions. Howard opposed the state's motion and moved to preclude testimony from H.R. about a prior instance in which she claimed that Howard had tried to pull down her shorts while she slept. After a hearing, the district court allowed the state to impeach Howard with three prior convictions. The district court also ruled that the prior incident between Howard and H.R. was admissible to "illuminate . . . the relationship of the parties."

During the jury trial, H.R., M.H., Osborne, the nurse, and Johnson testified to the facts above. Howard waived his right to remain silent and testified that he and H.R. were friends. He testified that, on August 29, he smoked a blunt in the rocking chair and H.R. talked to him about her ex-boyfriend. Later, Howard testified that H.R. invited him to lie down with her and watch a movie, and they had consensual sex. Howard acknowledged his three prior convictions on both direct- and cross-examination.

The jury found Howard guilty of count one, first-degree criminal sexual conduct and count two, third-degree criminal sexual conduct. At sentencing, the district court denied Howard's motion for a downward durational departure. The district court adjudicated the conviction of count one and imposed a sentence of 306 months. The district court also stated that count two was the "same type of behavior" as count one. Two days later, however, the district court issued a warrant of commitment that included judgments of convictions of both first- and third-degree criminal sexual conduct. This appeal follows.

D E C I S I O N

I. Howard is not entitled to a new trial based on prosecutorial misconduct that occurred during the state's closing argument.

Howard argues that the prosecutor committed misconduct during his closing argument, and that the misconduct "amounted to plain error by repeatedly disparaging the defense and implying that [Howard] bore a burden of proving his innocence." Howard asserts that the state cannot show that the statements in the prosecutor's closing argument did not affect the jury's verdict, and contends, therefore, that this court must reverse his

convictions and remand for a new trial. The state argues that there was no misconduct or, if there was misconduct, it did not affect Howard's substantial rights.

At trial, Howard did not object to the state's closing argument. When the defendant fails to object during trial, this court reviews allegations of prosecutorial misconduct under a modified plain-error standard, in which the appellant must establish (1) error and (2) that the error was plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). 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, then the burden shifts to the state to demonstrate that the misconduct did not affect the appellant's substantial rights. *Id.* If the three elements of the modified plain-error test are satisfied, this court must then determine whether to address the error to ensure the fairness and integrity of judicial proceedings.² *Id.*

Howard submits that prosecutorial misconduct occurred when the prosecutor "repeatedly referred to [the defense attorney's] closing arguments as 'straw man' arguments and suggested that these arguments could not 'create reasonable doubt.'" Specifically, Howard identifies the following from the prosecutor's rebuttal as misconduct:

² Howard contends that "the fairness and integrity" prong does not apply to our review of prosecutorial-misconduct claims. We disagree. Binding precedent states that where this court finds prosecutorial misconduct, "[i]f the state fails to demonstrate that substantial rights were not affected, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (quotation omitted). *Davis* did not reach the fairness-and-integrity element in its analysis of the prosecutor's misconduct because the state proved that the defendant's substantial rights were not affected. *Id.*

- Howard’s attorney’s closing argument “wasn’t based on the evidence, and it wasn’t based on reason, and it wasn’t based on good judgment, and it wasn’t based on common sense.”
- “And the main way in which it was argued was a form of argument called a straw man argument. And this is the kind of argument that one person involved in the dispute puts up, but only to knock it down. Puts up a claim that, oh, the State’s claiming this, or you must believe this for the Defendant to be guilty and then you can knock it down so easily. But those straw man arguments aren’t really a straightforward way of dealing with the issues in this case, and they didn’t demonstrate to you a reasonable doubt.”
- In response to Howard’s attorney’s argument that H.R. lacked visible injuries: “That’s the kind of straw man argument that simply does not create reasonable doubt.”
- The prosecutor referred to Howard’s attorney’s argument that H.R. did not make noise during the assault as “another straw man argument.” The prosecutor also stated that this was “an example of a straw man argument, an argument that doesn’t make sense, isn’t based upon good judgment, life experience, and common sense, and certainly creates no reasonable doubt in this case.”

Howard argues that these statements were error because they disparaged the defense and misstated the burden of proof.

First, we agree that the prosecutor’s references to “straw man” arguments were plain error.³ The supreme court has held that “it is improper during closing arguments for the State to invite jurors to speculate as to the motivation for a defendant to try the case a specific way.” *State v. Pearson*, 775 N.W.2d 155, 164 (Minn. 2009). The state is permitted to “argue that there is no merit to a particular defense in view of the evidence or no merit

³ A straw-man argument is a “tenuous and exaggerated counterargument that an advocate makes for the sole purpose of disproving it.” *Black’s Law Dictionary* 1647 (10th ed. 2014). We note that Howard’s attorney’s arguments regarding lack of noise, lack of injury, and consent were not actually straw-man arguments, as that term is commonly defined.

to a particular argument.” *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). But the prosecutor’s broad statements here appear to belittle Howard’s defense. *See id.* For example, the prosecutor’s reference to a straw-man argument implies that Howard’s testimony that H.R. consented was only being offered because “nothing else [would] work.” *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994) (holding that prosecutors may not belittle a defense in the abstract or suggest a defendant raised a particular defense because it was the only defense that “might work”).

Second, we agree that the prosecutor’s “does not create reasonable doubt” arguments were also plain error. The supreme court has held that “misstatements of the burden of proof are highly improper and constitute prosecutorial misconduct.” *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985). Here, the prosecutor implied that Howard had the burden of proof. *See State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009) (“Prosecutors improperly shift the burden of proof when they imply that a defendant has the burden of proving his innocence.”).

Because Howard established plain error, the burden shifts to the state to establish that the error did not affect Howard’s substantial rights. *See Ramey*, 721 N.W.2d at 302. An error affects a defendant’s substantial rights if it was prejudicial and affected the outcome of the case. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). “An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the jury’s verdict.” *Id.* (quotations omitted). In evaluating the effect on substantial rights, this court considers various factors, such as “the pervasiveness of improper suggestions” and “the strength of evidence against the defendant.” *Id.* When reviewing a prosecutor’s closing

arguments, this court “review[s] the closing argument as a whole.” *State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010); *see State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) (noting that courts look at the state’s argument “as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence”).

The state contends that any error did not affect Howard’s substantial rights because the disputed comments were brief and not pervasive, and there was ample testimony supporting Howard’s conviction. *See Parker*, 901 N.W.2d at 926-27 (considering the pervasiveness of improper suggestions and the strength of evidence against the defendant to determine whether the error affected substantial rights). Howard asserts that, because these statements took place during the state’s rebuttal, the statements were more damaging as they “were the final statements the jury heard before retiring to deliberate.”

Based on our careful review of the record, we conclude that the prosecutorial misconduct during rebuttal argument did not affect Howard’s substantial rights. The vast majority of the prosecutor’s closing argument focused on the applicable law and the state’s evidence. *See State v. Johnson*, 616 N.W.2d 720, 729-30 (Minn. 2000) (noting that a prosecutor’s comments must be considered in the context of the entire closing argument). In fact, the disputed statements were, according to the state’s brief to this court, less than “twenty percent of [the state’s] closing remarks.” *See State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (concluding there was no prejudice when improper comments found in only four out of 45 transcript pages).

Despite the limited nature of the prosecutor’s improper remarks, Howard had no opportunity to respond because the remarks occurred during rebuttal. *See Davis*, 735

N.W.2d at 682; *see also State v. Buggs*, 581 N.W.2d 329, 341 (Minn. 1998) (noting that “the defense had an opportunity to rehabilitate the appellant on re-direct and to respond to the remarks in closing argument, clearly lessening the possibility that the remarks contributed to the verdict”). This is very concerning. Our concern is lessened, however, when we consider the prosecutor’s rebuttal as a whole. *See Johnson*, 616 N.W.2d at 729. The prosecutor began the rebuttal by reiterating that the state has the burden of proving Howard guilty “beyond a reasonable doubt,” and that this was a “high standard of proof.” The prosecutor went on to define “proof beyond a reasonable doubt” and stated twice that Howard was “presumed innocent.”

In addition, the state presented a strong case against Howard, including H.R.’s testimony, M.H.’s testimony, testimony from police officers and the nurse about H.R.’s statements to them, which were consistent with H.R.’s testimony, and medical records from H.R.’s sexual-assault exam. The district court also properly instructed the jury on the presumption of innocence and the state’s burden to prove Howard guilty beyond a reasonable doubt. *See State v. McDonough*, 631 N.W.2d 373, 389 n.2 (Minn. 2001) (“[A] prosecutor’s attempts to shift the burden of proof are often nonprejudicial and harmless where . . . the district court clearly and thoroughly instructed the jury regarding the burden of proof.”). For the reasons mentioned, we conclude that the prosecutor’s misconduct during rebuttal argument did not affect Howard’s substantial rights.⁴ Accordingly, a new trial is not warranted.

⁴ Even if we were to assume, without deciding, that the prosecutor’s misconduct affected Howard’s substantial rights, the final step in the modified plain-error analysis is whether

II. The district court did not abuse its discretion by permitting the state to impeach Howard with three prior felony convictions.

Howard contends that the district court erred by allowing the state to impeach Howard with “three of his unsanitized prior convictions.” The state was permitted to impeach Howard with the following prior felony convictions: (1) a 2005 third-degree controlled-substance crime, (2) a 2005 fifth-degree controlled-substance crime, and (3) a 2012 domestic assault. Appellate courts “will not reverse a district court’s ruling on the impeachment of a witness by prior conviction absent a clear abuse of discretion.” *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011) (quotation omitted).

Prior-conviction evidence is admissible if the crime is a felony and “the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.” Minn. R. Evid. 609(a). In conducting this balancing test, the district court considers five factors:

- (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant’s subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant’s testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 537-38 (Minn. 1978). Because the district court is in “a unique position” to assess and weigh the *Jones* factors, “it must be accorded broad

the prosecutor’s misconduct affected the fairness and integrity of the judicial proceedings and, therefore, requires reversal. *Davis*, 735 N.W.2d at 682. We would then conclude that, in Howard’s case, the fairness and integrity of judicial proceedings were not jeopardized and a new trial is not required. Howard was “afforded a complete adversarial trial” and “presented his defense and theory of the case.” *State v. Kelley*, 832 N.W.2d 447, 457 (Minn. App. 2013), *aff’d on other grounds*, 855 N.W.2d 269 (Minn. 2014).

discretion.” *State v. Hochstein*, 623 N.W.2d 617, 625 (Minn. App. 2001). “[A]ny felony conviction is probative of a witness’s credibility, and the mere fact that a witness is a convicted felon holds impeachment value.” *Hill*, 801 N.W.2d at 652. “If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions.” *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006).

Here, the district court considered each of the five *Jones* factors on the record. The district court concluded that Howard’s criminal activity after the prior offenses and before the current charges weighed in favor of admission. The district court also found that the 2005 drug convictions were “not similar at all” to the crimes charged, and the 2012 domestic assault was “different enough.” The district court found that Howard’s testimony was very important to the case, and credibility was a central issue. After considering each of the *Jones* factors, the district court concluded that it would use a cautionary instruction and allow the state to impeach Howard with the three prior felony convictions.

Still, Howard makes several arguments as to why the district court abused its discretion in allowing these convictions. First, Howard argues that the convictions had little impeachment value. But the district court specifically found that these convictions would help the jury to see Howard as a “whole person,” which is the relevant inquiry in the first *Jones* factor. *See id.* (holding “that a prior conviction can have impeachment value by helping the jury see the ‘whole person’ of the defendant”).

Next, Howard argues that the 2005 fifth-degree drug conviction was “possibly decayed” and, therefore, inadmissible.⁵ “Evidence of a conviction . . . is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.” Minn. R. Evid. 609(b). At the motion hearing, the prosecutor stated that Howard served an executed prison sentence for the 2005 fifth-degree conviction which “lasted past August 29, 2006.” In addition, Howard’s trial attorney stated that both of the 2005 convictions fell within the ten-year period, but noted that they were “just on the cusp.” Finally, the presentence investigation stated that, on October 24, 2005, Howard was committed for 21 months for the fifth-degree controlled-substance crime. This record supports the prosecutor’s assertion that Howard would have been released after August 29, 2006. Thus, the district court’s finding that this conviction was within the ten-year period before August 29, 2016, was not an abuse of its discretion.

Third, Howard argues that the 2012 domestic-assault conviction was too similar to the crimes charged in the current case. *Jones* stated that “the greater the similarity” between the prior crime and the charged crime, “the greater the reason for not permitting use of the prior crime to impeach.” 271 N.W.2d at 538. Howard cites no authority for his assertion that domestic assault and criminal sexual conduct are too similar to allow admission of the 2012 conviction. He contends that both crimes involve “a nonconsensual act of violence

⁵ In his brief to this court, Howard agrees that the 2005 third-degree controlled-substance conviction fell within the ten-year period because he was “likely released from confinement sometime in 2008” for that conviction.

committed against people from the defendant's personal life." But relevant caselaw has held that a district court does not abuse its discretion by permitting impeachment with crimes more similar than domestic assault and criminal sexual conduct. *See, e.g., State v. Frank*, 364 N.W.2d 398, 399 (Minn. 1985) (holding that the admission of two rape convictions in a first-degree criminal-sexual-assault trial was not an abuse of the district court's discretion); *State v. Flemino*, 721 N.W.2d 326, 229 (Minn. App. 2006) (approving impeachment evidence of a burglary conviction at a robbery trial).

Finally, Howard argues that the district court abused its discretion by "failing to require the impeachment . . . with unspecified felony convictions." The supreme court has held that the decision to sanitize prior convictions is left to the district court. *Hill*, 801 N.W.2d at 652-53. The district court in this case properly balanced the probative value and the prejudicial effects of the impeachment evidence. We conclude that the district court did not abuse its broad discretion by declining to sanitize Howard's convictions. In sum, the district court did not abuse its discretion by allowing the state to impeach Howard with three prior felony convictions.

III. The district court did not abuse its discretion by allowing testimony regarding a prior incident between Howard and H.R. as relationship evidence.

H.R. testified that, in June 2016, after a birthday party, she fell asleep on the couch in the living room. H.R. stated that she woke up to Howard "pulling . . . at [her] shorts." After this occurred, H.R. testified that she felt very uncomfortable with "having [Howard] at the house" and asked for A.G.'s help in evicting Howard. In a pretrial order, the district court allowed H.R.'s testimony as relationship evidence. Howard argues that this evidence

was not admissible because “1) the prior incident did not constitute a crime, [and] 2) it did not illuminate the relationship between [Howard] and [H.R.]” We review the district court’s admission of relationship evidence for an abuse of discretion. *State v. Hormann*, 805 N.W.2d 883, 888 (Minn. App. 2011), *review denied* (Minn. Jan. 17, 2012). To be entitled to relief, an appellant must show that the district court abused its discretion and that he was prejudiced as a result. *Id.*

General “relationship evidence is character evidence that may be offered to show the strained relationship between the accused and the victim . . . [and] such evidence has further probative value when it serves to place the incident for which appellant was charged into proper context.”⁶ *State v. Loving*, 775 N.W.2d 872, 880 (Minn. 2009) (quotations omitted). Relationship evidence may illuminate the relationship between the defendant and the alleged victim, and place a crime in the context of that relationship. *See id.*; *see also Hormann*, 805 N.W.2d at 890 (stating that relationship evidence includes evidence of a “strained relationship” that puts the incident between the accused and the victim in context). Before admitting the relevant evidence, district courts must consider whether the relationship evidence should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

⁶ Howard relies solely on the claim that the prior-incident evidence was inadmissible under Minn. Stat. § 634.20 (2016), which provides that a district court may admit evidence of “domestic conduct by the accused against the victim of domestic conduct, or against other family or household members . . . unless the probative value is substantially outweighed by the danger of unfair prejudice.” *See* Minn. Stat. § 634.20. But section 634.20 describes only one “subtype of general relationship evidence.” *State v. Bell*, 719 N.W.2d 635, 638-39 n.4 (Minn. 2006). Here, the district court did not rely on section 634.20 in admitting the prior-incident evidence.

jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Minn. R. Evid. 403.

First, Howard disputes that the prior-incident evidence was relevant or “qualif[ies] as relationship evidence.” Relationship evidence assists the factfinder by providing a context with which it can better judge the credibility of the people in the relationship. *See Loving*, 775 N.W.2d at 880. We agree with the district court that evidence of a previous incident where Howard attempted to pull down H.R.’s shorts is relevant, and revealed that Howard had “some sexual interest in the alleged victim.” The evidence, as stated by the state, also “shows a prior instance where the alleged victim said no to a sexual advance.” Thus, the evidence helped illuminate the context of the strained relationship between Howard and H.R. *See id.* In addition, the evidence corroborated H.R.’s testimony about the events of August 29, 2016, namely, that Howard initiated sexual contact with H.R.

Second, Howard argues that the relationship evidence was more prejudicial than probative. We disagree. “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.” *Bell*, 719 N.W.2d at 641 (quotation omitted). We have already discussed the probative value of the evidence. And, to balance the probative value against any unfair prejudice, the district court instructed the jury that the relationship evidence should be considered “only to test the believability and weight of the witnesses’ testimony.” *See State v. Ware*, 856 N.W.2d 719, 729 (Minn. App. 2014) (noting that in the context of section 634.20 relationship evidence, the “district court’s limiting instruction

lessens the probability of undue weight being given by the jury to the evidence.” (quotation omitted)). Thus, we conclude that the district court did not abuse its discretion in admitting the previous incident between H.R. and Howard as relationship evidence.⁷

IV. The warrant of commitment must be corrected.

At sentencing, the district court adjudicated and sentenced Howard for count one, and stated that count two was the “same type of behavior.” The district court later issued a warrant of commitment, however, that included a conviction of third-degree criminal sexual conduct.

On appeal, Howard argues that the adjudication for count two must be vacated, because the district court’s oral sentencing pronouncement must control and because third-degree criminal sexual conduct is an included offense of first-degree criminal sexual conduct. The state agrees that the “warrant of commitment should be corrected to reflect the district court’s pronouncement and the statutory prohibition on multiple convictions for a crime and its lesser included offense.” Although the state agrees that the conviction should be corrected, we conduct an independent inquiry. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

Under section 609.04, subdivision 1, a person may be convicted of a crime charged or of a lesser-included offense, but not both. Minn. Stat. § 609.04, subd. 1 (2016). A lesser-included offense is “[a] crime necessarily proved if the crime charged were proved.”

⁷ Finally, Howard asserts that the “cumulative effect” of the alleged trial errors deprived him of a fair trial. *See State v. Penkaty*, 708 N.W.2d 185, 206 (Minn. 2006). Because we find only one error, there is no “cumulative effect” as asserted by Howard.

Id., subd. 1(4). When a jury finds a defendant guilty of more than one offense based on a single course of conduct, the district court should “adjudicate formally and impose sentence on one count only.” *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999).

The record indicates, and the state does not dispute, that both charges against Howard were based on the same act, the nonconsensual sexual penetration. *See* Minn. Stat. §§ 609.342, subd. 1(e)(i), 609.344, subd. 1(c). The difference between the two offenses is that count one, first-degree criminal sexual conduct, has a personal-injury element that count two does not have. Thus, count two was “necessarily proved” by count one, and is a lesser-included offense. *See State v. Koonsman*, 281 N.W.2d 487, 489-90 (Minn. 1979) (holding it would violate section 609.04 to convict defendant of “two counts of criminal sexual conduct in the third degree and two in the fourth degree” for one act of criminal sexual conduct.)

Accordingly, we reverse and remand to the district court with instructions to vacate Howard’s conviction of count two but to leave the finding of guilt in place. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (stating that the proper procedure “when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only,” and to leave the remaining count unadjudicated); *State v. Crockson*, 854 N.W.2d 244, 248 (Minn. App. 2014), *review denied* (Minn. Dec. 16, 2014).

Affirmed in part, reversed in part, and remanded.