STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1964

State of Minnesota,
Respondent,

vs.

Jacob Thomas Price,
Appellant.

Filed September 9, 2019
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Blue Earth County District Court
File No. 07-CR-16-3406

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Pat McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Mark D. Nyvold, Fridley, Minnesota (for appellant)

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

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

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

LARKIN, Judge

Appellant challenges his convictions of third- and fourth-degree criminal sexual conduct, contending that the prosecution engaged in misconduct, that the evidence was insufficient to sustain the convictions, that the district court abused its discretion in excluding evidence of consensual sexual contact between appellant and the victim, and that the district court erred by entering judgments of conviction for both third- and fourth-degree criminal sexual conduct. We affirm appellant's conviction of third-degree criminal sexual conduct. But we reverse in part and remand for the district court to vacate the judgment of conviction for fourth-degree criminal sexual conduct.

FACTS

Respondent State of Minnesota charged appellant Jacob Thomas Price with third- and fourth-degree degree criminal sexual conduct based on allegations that he sexually assaulted B.D. in 2016. Prior to trial, Price moved, under Minn. Stat. § 609.347, subd. 4 (2018), for the admission of evidence that he and B.D. previously had consensual sexual intercourse on one occasion in 2014. The district court denied that motion. The case was tried to a jury over two days.

At trial, B.D. testified that on the night of June 24, 2016, she drove with A.J. and D.E. to Mankato to "have a few drinks." B.D. testified that they arrived in Mankato around 11:30 p.m. and drove to S.K.'s house. S.K., J.D., and Price were at S.K.'s house when B.D., A.J., and D.E. arrived. B.D. testified that she attended high school with Price and occasionally had contact with him afterward. B.D., A.J., D.E., S.K., J.D. and Price walked

together to a bar in downtown Mankato. B.D. testified that she had two drinks at the bar, but she admitted that it was possible that she had more. After playing one or two games of pool, the group headed to several other bars. B.D. testified that "an older man" at one of the bars "was hitting on [her]," "offering to buy [her] drinks," and "wouldn't leave [her] alone." B.D. asked Price to pretend that he was her boyfriend to deter the man. B.D. testified that she did not remember walking home or how much alcohol she drank and that the last thing she remembered was "a bouncer taking [her] drink and saying something along the lines of 'that's enough.'"

B.D. testified that the next thing she remembered was waking up in a bed in the morning with a lot of pain in her head, stomach, and "pubic area." B.D. testified that she was disoriented and felt very intoxicated. B.D. felt the weight and movement of another body on top of her and asked, "[W]hat are you doing?" The person on top of her did not respond. B.D. testified that Price was on top of her and that his "pubic area" was in contact with her intimate parts when she initially woke up. B.D. testified that Price's penis was not inside her vagina, but "[i]t was right there, not in [her], but millimeters" away. B.D. testified that she tried pushing Price away with her arms but that her "entire body felt like Jell-O so it didn't accomplish much." Price placed his hands on B.D.'s torso and stomach and moved his head down to her pubic area. B.D. said, "[N]o," and pushed herself away. B.D. got off the bed and picked up her clothes and other belongings from the floor. Price asked B.D. where she was going, and she replied, "[C]igarette," and left the room.

B.D. testified that she left the house, walked to a building, and called A.J. A.J. met B.D. there and contacted his brother-in-law, who took them to a hospital. At the hospital,

B.D. reported that she had been sexually assaulted and a nurse conducted a sexual-assault exam. B.D. provided a statement to a police officer at the hospital and told him she wanted to press charges.

B.D. testified that Price sent her messages on June 25 and June 26. On June 25, Price sent B.D. a message stating, "[B.D.] girl I'm so sorry if you're mad at me. But I did NOT rape you. I asked your permission before I ate you out. A cop came here and started asking questions. Did you find a ride home safe?" Price sent B.D. another message on June 26 stating, "[B.D.] I feel like s--t that this is happening. I don't understand. Please talk to me soon." B.D. had her mother send Price a message on June 27 stating, "Do not contact me again. If you do I will contact the police." B.D. testified that her mother sent that message on her behalf because they thought it was necessary.

A.J. testified that he and D.E. walked back to S.K.'s house separately from the others and that when they arrived at the house, someone told him that B.D. was asking for him. A.J. went to an upstairs bathroom, saw B.D. over the toilet, and thought she was intoxicated. A.J. testified that he and Price tried to help B.D. because she "wasn't really in control of herself" at the time and "wasn't able to walk by herself." A.J. and Price decided to put B.D. to bed because she was "highly intoxicated" and they did not want to leave her unattended. A.J. and Price brought B.D. back downstairs and placed her in a bedroom. A.J. testified that he told Price that B.D. was intoxicated and to "make sure that nothing happens tonight." A.J. testified that Price said, "I'm not going to f--k her. She's too f--ed up." A.J. testified that when he woke the next morning, Price was walking through the living room. Price seemed panicked, and he was asking where B.D. was. Shortly

afterward, B.D. called A.J. B.D. was crying and would not tell A.J. why. A.J. testified that after he located B.D., he asked if something happened between her and Price. A.J. testified that B.D. told him that she had said, "[N]o."

D.E. testified that he returned to S.K.'s house with A.J. at around 2:15 a.m. and fell asleep on a couch at approximately 2:45 a.m. D.E. testified that when he woke on the morning of June 25, Price was asking where B.D. was. D.E. testified that Price told him that he had helped B.D. up to the bathroom and then they went back to a bedroom and "had relations." D.E. testified that Price said he "had ate [B.D.] out." D.E. further testified that he believed that Price told him that he had sexual intercourse with B.D.

J.D. testified that B.D. seemed to get more intoxicated as the night went on and that she was "intoxicated but coherent" when she walked back to S.K.'s house at approximately 2:00 a.m. J.D. further testified that B.D. and Price had engaged in "flirtatious behavior" at the bars that night and were "very flirtatious" while walking back to S.K.'s house. For example, Price gave B.D. a piggyback ride. When B.D. returned to S.K.'s house, she vomited and then drank more alcohol. J.D. testified that she slept in an upstairs bedroom with S.K. and that Price entered the bedroom twice. Price entered the bedroom the first time to ask for a phone charger and entered it the second time to ask if J.D. knew where B.D. was. J.D. asked Price if he had sexual intercourse with B.D., and Price said that he had.

S.K. testified that B.D. was intoxicated when she returned to his house and that people helped her get to the bathroom and into bed. S.K. testified that he stayed in the upstairs bedroom with J.D. and that when they woke, Price asked them if they knew where

B.D. was. Price left the house and looked up and down the street, yelling B.D.'s name. Price yelled loudly enough that S.K. could hear him from the bedroom and was worried that his neighbors would hear. S.K. testified that Price told him that he had sexual relations with B.D.

Officer Kevin Waterstreet of the Mankato Department of Public Safety testified that at approximately 8:25 a.m. on June 25, 2016, he responded to a sexual-assault complaint. Officer Waterstreet went to Mayo Clinic Health Systems in Mankato and spoke with B.D. B.D. reported that she remembered being downtown until bar close and then did not remember any details until approximately 7:00 a.m. when she woke up in a bed and Price was on top of her. Officer Waterstreet went to S.K.'s house and found Price sleeping. Officer Waterstreet had trouble waking Price, and Price seemed confused when the officer began questioning him. After Officer Waterstreet repeated himself numerous times, Price was coherent and seemed to understand the questions. Officer Waterstreet asked Price four or five times whether he "hooked up" with B.D. the night before. Price replied that he did not and that he had "never hooked up with somebody that was otherwise inclined." Officer Waterstreet took statements from D.E., S.K., and J.D. Each of them reported that Price said that he had sexual intercourse with B.D. the night before. After taking those statements, Officer Waterstreet spoke with Price again, and Price admitted that he had consensual oral sex and sexual intercourse with B.D.

A Sexual Assault Nurse Examiner (the SANE nurse) testified that she examined B.D. on the morning of June 25, 2016. The SANE nurse testified that B.D. indicated that penetration had occurred but that she was "[u]nsure" whether penetration had occurred

with a penis. The SANE nurse testified that during the physical examination of B.D., she documented a bloody discharge in B.D.'s vagina near the cervix. B.D. denied having her period at the time and had no discharge until that morning. When asked what the cause of a bloody discharge could be, the SANE nurse explained that with "any type of penetration, . . . especially if there isn't . . . an arousal where you have a natural lubricant, it can cause friction which can then cause trauma that you might not be able to note." The SANE nurse testified that she took a blood sample from B.D. to test for the presence of drugs and alcohol.

A forensic scientist at the Minnesota Bureau of Criminal Apprehension (BCA) testified that chemical testing revealed that B.D.'s alcohol concentration was 0.086 plus or minus 0.004 as of 9:18 a.m. on June 25, 2016. The forensic scientist testified that an alcohol concentration of 0.08 was considered impaired for the purposes of driving-while-impaired offenses. He estimated that B.D.'s alcohol concentration at 6:00 a.m. on June 25, 2016, was between 0.11 and 0.16, depending on her burn-off rate.

Price testified in his own defense, stating that he and B.D. had "pleasant" interactions at the bars and during the walk back to S.K.'s house and that he gave B.D. a piggyback ride on her request. Price testified that B.D. became sick and he helped her in the bathroom. After he and B.D. entered the downstairs bedroom and lay down on the bed, A.J. entered and told him to not "let anything funny happen." Price said he would not. Price testified that B.D. woke him and asked if he could walk her to the bathroom again. According to Price, after B.D. returned from the bathroom, she began rubbing his abdomen and genitalia, and he asked her if he could perform oral sex. Price testified that B.D.

undressed, he performed oral sex on her, and they had sexual intercourse. B.D. told Price that she wanted to get cigarettes and left the bedroom. Price testified that he then fell asleep.

Price testified that when he woke up again, B.D. was not in the room, and he went looking for her. The other people at the house asked what had happened between him and B.D., and he told them that he and B.D. had sex. Price testified that he fell asleep again, the police woke him, and he did not remember what he told the police. Price testified that when S.K. approached him later and explained the situation, he was shocked and immediately messaged B.D. on Facebook to try to "figure out what was going on." Price testified that he went to the police and told them what had happened.

The jury found Price guilty as charged. The district court entered judgments of conviction on both counts of criminal sexual conduct and sentenced Price to serve a 48-month prison term for the third-degree criminal-sexual-conduct conviction. Price appeals.

D E C I S I O N

Price presents four grounds for relief. We address them in the order in which they are set forth in his primary brief.

I.

Price contends that the prosecution engaged in misconduct, arguing that the "prosecution's repeated references in jury selection to the complainant in a criminal sexual conduct case as a victim, and its eliciting from a State witness that the complainant here is a victim, and using 'sexual assault' as if its occurrence should be assumed, were plain errors" that require a new trial.

Price did not object to the alleged misconduct. Unobjected-to prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 297-300 (Minn. 2006); *see State v. Parker*, 901 N.W.2d 917, 925-26 (Minn. 2017) (reiterating the standard). A plain-error claim based on prosecutorial misconduct has three requirements: (1) the prosecutor's unobjected-to act must constitute error, (2) the error must be plain, and (3) the error must affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302. "An error is plain if it was clear or obvious," and an error is clear or obvious if the error "contravenes case law, a rule, or a standard of conduct." *Id.* (quotation omitted). It is misconduct to violate clear or established standards of conduct expressed in orders by a district court. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). The defendant has the burden of showing error that is plain. *Ramey*, 721 N.W.2d at 302. If plain error is established, the burden shifts to the state to show that the error did not affect the defendant's substantial rights. *Id.* If a reviewing court concludes that any prong of the plain-error analysis is not satisfied, the court need not consider the other prongs. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

Price argues that the prosecution engaged in misconduct by repeatedly using the word "'victim' to describe as victims complainants in general who allege sexual assault, and to so describe B.D. in particular." Price also argues that the prosecution engaged in misconduct by using "the phrase 'sexual assault' as if it were something to be assumed as having occurred." We address each argument in turn.

Use of "Victim"

Prior to trial, the district court issued an order stating, "If there is an alleged victim, the attorney for the State shall instruct its witnesses to make all reasonable efforts to use neutral language and not refer to *the alleged victim* as 'victim.'" (Emphasis added.)

Price argues that the state violated the district court's pretrial order at least three times as follows. First, B.D. testified that she was given a "victim's bag" before being released from the hospital, and the prosecutor asked her, "What's a victim's bag?" B.D. explained that it was a plastic bag that contained "underwear, socks, a toothbrush, personal care products, sweat pants and a shirt" and that she received it before being released from the hospital. Second, Officer Waterstreet testified that he "made sure that the nurse wanted to go check and make sure the victim wanted to speak to an officer ahead of time." And third, the prosecution asked the officer whether "based on your experience have you seen victims reluctant to report this type of crime," to which Officer Waterstreet replied, "Yes, sir."

We are not persuaded that the state violated the district court's pretrial order. In her testimony, B.D. did not refer to herself as a victim; she merely described a bag containing items that she received from the hospital after her sexual-assault exam. Likewise, the prosecution's question to Officer Waterstreet regarding the reluctance of victims to report sexual assaults referred to victims in general, and not to B.D. in particular. Lastly, although Officer Waterstreet referred to B.D. as "the victim," Price does not argue that the prosecutor intentionally elicited the reference; instead, the statement appears to have been an inadvertent passing reference. *See State v. Haglund*, 267 N.W.2d 503, 505-06 (Minn.

1978) (stating that the admission of inadmissible and prejudicial evidence is not reversible error if the prosecutor did not intentionally elicit the testimony, the statement was merely a passing reference, and the evidence of guilt was strong).

Price also argues that the district court's order "implicitly covered other parts of the trial process that involved the jury, like jury selection," and that "during jury selection the jurors continuously heard the prosecution equating complainant and witness." We disagree. The district court's order is clear and unambiguous: it attempted to prevent the state's witnesses from referring to any "alleged victim" in this case as a "victim." When language is unambiguous, we generally apply it as written. *See, e.g.*, *State v. Petersen*, 910 N.W.2d 1, 6 (Minn. 2018) (stating that if the language of a rule of criminal procedure is plain and unambiguous, appellate courts follow the language of the rule). The complained-of statements in jury selection do not violate the unambiguous language of the district court's pretrial order.[1]

Moreover, the complained-of jury-selection statements refer to victims in general, and not to B.D. in particular. For example, one of the prosecutors asked, "What kind of reaction would you expect from a victim?", "Do you expect victims to look a certain way?", and "[I]s there anybody that still . . . believes that . . . there should be some type of aggression on a victim's part or some type of fighting back?" Because none of the

[1] In addition, we question how an alleged violation of an *implied* condition could constitute error that is plain. *See Fields*, 730 N.W.2d at 782 (stating that it is misconduct to violate "clear or established standards of conduct," including "orders by a district court").

complained-of jury-selection statements referred to B.D. as the victim, they did not violate the district court's pretrial order.

Lastly, Price relies on *State v. Hall*, 764 N.W.2d 837, 845 (Minn. 2009), in support of his arguments. The supreme court in *Hall* stated that "[t]here may be a situation in which the reference to 'victim' is so overused that it results in unfair prejudice to a defendant and therefore constitutes an abuse of the broad discretion vested in the district court to rule on evidentiary issues," but the supreme court decided that *Hall* was not such a case. 764 N.W.2d at 845. Thus, Price essentially asks us to find plain error based on a case saying that there could, hypothetically, be a possibility of error in a future case. That is not plain error. *See Ramey*, 721 N.W.2d at 302 ("An error is plain if it was clear or obvious." (quotation omitted)).

In sum, Price has failed to show that the use of the word "victim" in jury selection or at trial constitutes error that clearly or obviously violates the district court's pretrial order or caselaw. Because Price has failed to establish error that is plain, he is not entitled to relief under the plain-error standard.

Use of "Sexual Assault"

Price argues that although the district court's order "did not specifically prohibit the prosecution from using the phrase 'sexual assault' as if it were something to be assumed as having occurred," the prosecution nonetheless engaged in misconduct by doing so "because that usage is akin to calling the complainant a victim, because both usages assume what the State has the burden to prove." Price argues that "*Hall* puts prosecutors on notice not to use terms in ways that are likely to unfairly prejudice defendants" and that

"[b]ecause, as case law recognizes, using 'victim' can be prejudicial, it follows that saying 'sexual assault' in a way that assumes it occurred is likewise prejudicial, and therefore clear or obvious misconduct."

However, as discussed above, *Hall* does not establish that the use of the term "victim" in this case was error. And because *Hall* does not address whether references to "sexual assault" could be misconduct, *see* 764 N.W.2d at 844-45, it does not establish that such statements in this case are error, much less plain error. Again, Price has not met his burden to show error that is plain. He therefore is not entitled to relief under the plain-error standard of review.

II.

Price contends that the evidence was insufficient to sustain his convictions, arguing that "the prosecution failed to prove B.D. was physically helpless when [he] allegedly committed penetration and contact in the form of alleged oral sex, because B.D. testified she was awake and said 'no.'" Price concludes, "That, and other factors, permitted one or more jurors to find penetration and contact proven based on an insufficiently-proven form of penetration and contact, resulting in guilty verdicts that may be premised on a factual theory the State did not prove, and requiring them to be vacated for insufficient evidence."

Price was convicted of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d) (2014), which provides that "[a] person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree" if "the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless." Price was also convicted of fourth-degree criminal

sexual conduct under Minn. Stat. § 609.345, subd. 1(d) (2014), which provides that "[a] person who engages in sexual contact with another person is guilty of criminal sexual conduct in the fourth degree" if "the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless." "'Physically helpless' means that a person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor." Minn. Stat. § 609.341, subd. 9 (2014).

Ordinarily, when considering a claim of insufficient evidence, this court closely analyzes the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). A defendant bears a "heavy burden" when seeking to reverse a jury verdict based on insufficient evidence. *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001).

Price's sufficiency challenge is unique. Price notes that "[t]he State presented evidence that [he] told others at the house he had had sexual intercourse with B.D." and that "he testified he had consensual sexual intercourse with B.D." Price concedes that "[t]his could have provided the jurors an act other than oral sex on which to premise a conviction on Counts I (penetration) and II (contact), if they believed B.D. was asleep or

otherwise unable to consent to sexual intercourse when it occurred." In doing so, Price does not dispute that there was sufficient evidence to support his convictions on the theory that he engaged in penile penetration with B.D. when she was physically helpless.

However, Price notes that "no way exists to determine that the jurors unanimously agreed it was penile penetration they relied on to find proven the . . . penetration and . . . contact elements." Price argues that because B.D. "testified she was aware [he] was going to perform oral sex, and [she] said 'No,'" B.D. was not "physically helpless when the alleged oral sex occurred," and that the evidence regarding "the alleged oral sex" was therefore insufficient to support his convictions. Price acknowledges that "[s]ome or even all jurors could have, as the prosecutor argued in closing, convicted [him] of the third-degree penetration charge based on penile penetration," but he hypothesizes that "one or more also could have convicted [him] . . . based on the oral sex to which B.D. testified, and which the court instructed on as [a] basis for convicting . . . when it defined cunnilingus as constituting penetration." *See* Minn. Stat. § 609.341, subd. 12(1) (2014) (defining "[s]exual penetration" to include "any of the following acts committed without the complainant's consent, except in those cases where consent is not a defense[:] . . . cunnilingus"). For the reasons that follow, Price's sufficiency argument does not persuade us to reverse.

The district court instructed the jury that "[c]unnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person." But the district court also instructed the jury that it could not find Price guilty unless he "knew or had reason to know that [B.D.] was

physically helpless" and that "[a] person is physically helpless if she is: asleep or not conscious; unable to withhold consent or withdraw consent because of a physical condition; or unable to communicate non-consent." Price maintains that B.D. was not physically helpless, as defined by statute, when the oral sex occurred. *See* Minn. Stat. § 609.341, subd. 9. Given the district court's instructions and B.D.'s testimony that she said, "No," when Price initiated cunnilingus, we agree with Price that the evidence does not support a finding that B.D. was physically helpless during any cunnilingus.

However, we presume that jurors follow the district court's instructions. *State v. Martin*, 614 N.W.2d 214, 227 (Minn. 2000). We therefore presume that the jurors followed *all* of the district court's instructions, including the instructions explaining that they could not find Price guilty unless he knew or had reason to know that B.D. was physically helpless when the alleged sexual penetration and contact occurred. Under those instructions—as Price argues—there was little basis to find that B.D. was physically helpless during cunnilingus. Thus, Price's sufficiency argument asks us to assume that one or more jurors ignored the district court's instructions and found him guilty based on cunnilingus even though the state's evidence showed that B.D. was not physically helpless at that time. Price asks us to do so even though the prosecution did not expressly argue that the jury could or should find Price guilty based on cunnilingus.[2] We will not do so. Instead, we presume that each juror followed the district court's instructions and, in

[2] Indeed, Price notes that "the prosecution did not argue oral sex as a basis for penetration and contact" and complains that the prosecution failed to go a step further and "tell the jurors not to find penetration and contact based on the alleged oral sex."

accordance with those instructions, based his or her finding of guilt on penile penetration and not on cunnilingus.

Price additionally argues that the state erred in failing to request "an instruction that the jurors had to be unanimous as to the form of penetration and contact they found proven" and that the district court plainly erred by not giving such an instruction. Price did not object to the district court's failure to give a unanimity instruction. "[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* "An error is plain if it was clear or obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotation omitted).

Price asserts that "a court not requiring unanimity when the State's evidence permits the jury to convict on an unproven factual theory is plain error." He relies on *State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015), in support of that argument. But the supreme court in *Wenthe* did not conclude that the omission of a specific-unanimity instruction was plain error. 865 N.W.2d at 299. Instead, the supreme court stated that it "need not decide . . . whether the district court erred by omitting a specific-unanimity instruction, because the alleged error did not affect [the defendant's] substantial rights." *Id.* Because Price does not cite precedential authority supporting his assertion that the district court—or the state—erred by not giving a unanimity instruction, the alleged error is not plain and not a

basis for relief. *See Ramey*, 721 N.W.2d at 302 (stating that plain error is usually shown if the error contravenes caselaw, a rule, or a standard of conduct).

Given the evidence at trial, the district court's instructions, and the lack of an express argument by the prosecutor that the jury should find Price guilty based on cunnilingus, it is highly improbable that any juror based a finding of guilt on cunnilingus as opposed to penile penetration. Because Price does not dispute that there was sufficient evidence to support his convictions on the theory that he engaged in penile penetration with B.D. when she was physically helpless, Price has not met his heavy burden to show that the evidence was insufficient to sustain his convictions.

III.

Price contends that "[t]he District Court abused its discretion and denied [him] his Fifth and Sixth Amendment due process and fair trial rights to present a defense when it denied his request to present evidence of previous consensual sexual conduct he and B.D. had" because it was "relevant to showing that B.D. consented to the sexual relations in this case."

Minnesota's rape-shield statute and Minn. R. Evid. 412 provide that, in a prosecution for acts of criminal sexual conduct, "evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury," unless an enumerated exception applies. Minn. Stat. § 609.347, subd. 3 (2018); Minn. R. Evid. 412(1); *see* Minn. Stat. § 609.347, subd. 4 (providing procedure for defendant to offer sexual-history evidence). When the consent of the victim is a defense, "evidence of the victim's previous sexual conduct with the accused" may be

admissible. Minn. Stat. § 609.347, subd. 3(a)(ii). Sexual-history evidence is also admissible when "constitutionally required by the defendant's right to due process, his right to confront his accusers, or his right to offer evidence in his own defense." *Wenthe*, 865 N.W.2d at 306 (quoting *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986)).

However, sexual-history evidence may only be admitted if "the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature." Minn. Stat. § 609.347, subd. 3; Minn. R. Evid. 412(1); *see Benedict*, 397 N.W.2d at 341 (stating that the district court "ought to balance the probative value of [sexual-history] evidence against its potential for causing unfair prejudice"). The party seeking to admit evidence of a victim's sexual history has the burden to establish that it is admissible. *See State v. Crims*, 540 N.W.2d 860, 868 (Minn. App. 1995) ("Unless and until a defendant shows the victim's sexual history to be relevant to the facts at bar, this particular form of character evidence simply is not admissible under the normal rules of evidence."), *review denied* (Minn. App. Jan. 23, 1996).

This court reviews the district court's evidentiary rulings for a "clear abuse of discretion." *State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015). "Under an abuse-of-discretion standard, [an appellate court] may reverse the district court when the district court's ruling is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (quotation omitted). This court applies the abuse-of-discretion standard even if a defendant claims that exclusion of evidence deprived him of his constitutional right to present a complete defense. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006). If a defendant shows that the district court erroneously excluded defense evidence in

violation of the defendant's right to present evidence, this court must determine "whether, assuming that the damaging potential of the excluded evidence were fully realized, . . . the error was harmless beyond a reasonable doubt." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994) (quotation omitted).

In district court, Price moved to admit evidence that he and B.D. had consensual sexual intercourse on one occasion in the summer of 2014. Price's motion alleged that he and B.D. "were at a bonfire together drinking alcohol. They eventually went to bed together in a fifth wheel camper. While they were in bed, [B.D.] started kissing [him]. Then they each took their own clothes off and engaged in consensual intercourse." The state acknowledged that this incident had occurred.

The parties discussed Price's motion at a pretrial hearing. The state argued that "even though [the sexual-history evidence] may be allowed under the rules[,] this information would still be more prejudicial than it would be probative for the jury" because it was a single instance of consensual sexual intercourse that occurred two years before the incident in this case and had "nothing to do with whether [B.D.] consented that evening." The district court questioned whether the incident had probative value given that it occurred two years before the charged incident, and defense counsel responded that "the similarities between the incident back in '14 and the incident in 2016 are that alcohol was used. And our contention is that [Price] removed [B.D.'s] clothing in both incidents."

The district court denied Price's request to admit evidence of his past consensual sexual intercourse with B.D., reasoning as follows:

> Well, be that as it may, there might be similarities but how is—And I'm taking his affidavit at face value here. I do not understand how a consensual sexual encounter perhaps two years earlier has any probative value for something that happened two years later. And that's the way I see it is that this happened. I'll take it [at] face value; I'll take it as truth that the alleged victim and the defendant did engage in a consensual sexual encounter, under the circumstances similar. Alcohol was involved and whatever other factual similarities there were. However, it was two years earlier. It would be like, perhaps I loaned my car to somebody two years ago. Well, that didn't carry through two years. So the Court will deny the request. I do find that it would [have] virtually no probative value. Certainly would be—could be prejudicial and the standard has not been met. So the request is denied.

Price argues that because "the circumstances of the consensual sexual intercourse he and B.D. had in 2014 were similar to those in 2016" and because the district court accepted them as established, it "had no valid reason for finding that [his] proffered reasons for admitting the prior sexual conduct did not qualify it for admission." Price further argues that "the State never provid[ed] any explanation as to how or why the previous sexual conduct was inflammatory and prejudicial or would confuse the jurors."

On the one hand, it was not unreasonable for the district court to reason that despite the similarities between the incidents, the passage of time reduced the probative value of the 2014 incident. A comment to rule 412 notes that the rule previously had a one-year limitation for admissibility and states, "Obviously, the longer time lapse between the past conduct and the date of the alleged consent, the less probative the evidence becomes." Minn. R. Evid. 412 1989 comm. cmt. And the supreme court has stated, in the context of relationship evidence, that although "evidence of prior relations between a defendant and

victim may be admissible, probative value diminishes with remoteness from the act." *State v. Swain*, 269 N.W.2d 707, 714 (Minn. 1978) (citation omitted).

On the other hand, Price persuasively argues that absent the information regarding the 2014 incident, "[t]he jurors did not learn the full nature of the relationship and the context in which the sexual conduct in this case occurred." Price asserts that "the prosecution tried to, and succeeded, in portraying [him] and B.D. as just acquaintances" and argues that "B.D.'s testimony about the nature of her relationship with [him] strongly, but erroneously, suggested to the jurors that the sexual conduct in this case was far less likely to have been consensual than all the relevant facts would indicate."

Although evidence regarding the 2014 incident could have changed the trial narrative regarding the relationship between Price and B.D., Price did not make that argument to the district court, and it is difficult to fault the district court for failing to imagine and consider unidentified reasons why the evidence may have been probative. It is also difficult to fault the district court for not reconsidering the issue, sua sponte, when the relevance of the evidence became more apparent during trial.

However, we need not decide whether the district court abused its discretion because, for the reasons that follow, any error in denying Price's request to admit evidence of the 2014 incident was harmless beyond a reasonable doubt.

As to that issue,

> the reviewing court must be satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (*i.e.*, a reasonable jury) would have reached the same verdict. Only then can it be said that the erroneous exclusion of the evidence

> was harmless. If, on the other hand, there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, then the erroneous exclusion of the evidence is prejudicial.

Post, 512 N.W.2d at 102 (footnote omitted). "The error should be considered in the context of all of the facts appearing in the record." *State v. Lee*, 929 N.W.2d 432, 440 (Minn. 2019) (quotation omitted). An error may be harmless beyond a reasonable doubt if the evidence of guilt was "very strong." *See id.* at 440-41.

Again, Price testified that he had sexual intercourse with B.D. The evidence that B.D. was physically helpless when that sexual intercourse occurred was very strong. A.J., J.D., and S.K. testified that B.D. was intoxicated on the night of the incident, and A.J. testified that B.D. "wasn't really in control of herself." That testimony was corroborated by the BCA forensic scientist's testimony that B.D.'s alcohol concentration indicated legal impairment as of 9:18 a.m. the next morning and that it would have been even higher earlier that morning. A.J. testified that he warned Price, "[M]ake sure that nothing happens tonight," because B.D. was so intoxicated and that Price replied, "I'm not going to f--k her. She's too f--ed up." B.D. testified that when she woke up, Price was on top of her and his penis was "millimeters" away from her vagina. The SANE nurse testified that she documented a bloody discharge in B.D.'s vagina and that a bloody discharge can be caused by penetration if there is not arousal at the time of penetration. All of those circumstances strongly suggest that B.D. was asleep or unconscious when the sexual intercourse occurred and therefore not able to communicate nonconsent.

Moreover, A.J. testified that Price seemed panicked when he asked about B.D. the next morning, and S.K. testified that Price was yelling loudly and looking up and down the street for B.D. Officer Waterstreet testified that initially, Price repeatedly denied that he had sexual contact with B.D. and stated that he has "never hooked up with somebody that was otherwise inclined." But after D.E., S.K., and J.D. contradicted Price's denial, Price admitted that he had had sexual intercourse with B.D. Price's inconsistent statements regarding whether he had engaged in sexual activity with B.D., as well as his behavior after B.D. left S.K.'s house, likely undermined his credibility with the jury and its willingness to believe his version of the events. *See State v. Jones*, 753 N.W.2d 677, 693 (Minn. 2008) (noting that defendant's "credibility was seriously undermined by the inconsistent statements he made to police and his admission that he perjured himself in the first trial").

Lastly, the charges against Price—as well as the jury's verdict—were based on the theory that B.D. was incapable of consenting because she was physically helpless. Evidence that B.D. had consented to sexual activity with Price two years earlier had little relevance regarding the ultimate issue: whether B.D. was *capable* of consenting at the time of the charged offense.

In sum, even if the district court erred by excluding evidence regarding the 2014 incident, we are satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized—that on one occasion two years earlier B.D. had consensual intercourse with Price—a reasonable jury would have reached the same verdict given the very strong evidence that B.D. was physically helpless and

unable to consent at the time of the penile penetration in this case. The alleged error therefore does not provide a basis for relief.

IV.

Price contends that the district court erred by entering judgments of conviction for both third- and fourth-degree criminal sexual conduct because his "convictions represent one behavioral incident."

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2018). An "included offense" is defined to include "a lesser degree of the same crime" and "a crime necessarily proved if the crime charged were proved." *Id.*, subd. 1(1), (4). "To determine whether an offense is an included offense falling under this statute, a court examines the elements of the offense instead of the facts of the particular case." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). "An offense is necessarily included in a greater offense if it is impossible to commit the greater offense without committing the lesser offense." *Id.* (quotation omitted). This court reviews whether an offense constitutes a lesser-included offense de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

When a defendant is convicted of more than one charge for the same act, the district court should adjudicate formally on one count only. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). "The remaining conviction(s) should not be formally adjudicated at [that] time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated . . . ." *Id.*

The state agrees with Price that this court "should remand with instructions to vacate the judgment of conviction for [fourth-degree criminal sexual conduct]." Caselaw supports that outcome. *See State v. Koonsman*, 281 N.W.2d 487, 489-90 (Minn. 1979) (holding that defendant who "committed only one criminal sexual act" and was found guilty of third- and fourth-degree criminal sexual conduct could only be convicted of one count of third-degree criminal sexual conduct). We therefore reverse in part and remand for the district court to vacate the judgment of conviction for fourth-degree criminal sexual conduct. The jury's guilty verdict on that count should remain intact. *See State v. Walker*, 913 N.W.2d 463, 467-68 (Minn. App. 2018) (reversing and remanding to district court with instructions to vacate the formal adjudication of lesser-included offense, but not the finding of guilt regarding that offense).

Affirmed in part, reversed in part, and remanded.