STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0330

State of Minnesota,
Respondent,

vs.

Brandon William Bierbrauer,
Appellant.

Filed February 3, 2020
Affirmed in part, reversed in part, and remanded
Hooten, Judge

Anoka County District Court
File No. 02-CR-16-6819

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Bryan, Judge.

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

HOOTEN, Judge

In his direct appeal from convictions and sentences for two counts of third-degree criminal sexual conduct, appellant argues that the district court committed reversible error

by excluding testimony on how synthetic cannabinoids, collectively called "K2," such as that used by the victim and appellant shortly before appellant committed the offenses, can generally affect a person's ability to accurately perceive and recall events. Appellant also argues that the district court erred when it convicted and sentenced appellant twice for the same behavioral incident of criminal misconduct. We affirm in part, reverse in part, and remand.

FACTS

On March 17, 2016, a 14-year-old victim reported to staff at her middle school that she was sexually assaulted by two 18-year-old men, appellant Brandon Bierbrauer and another male. After middle school staff contacted the police, the victim reported to the officers that on the evening of January 8, 2016, the victim met with the two men and traveled to a local abandoned gas station popular with teenagers in the area. While at the station, the trio played "truth or dare" and the victim and Bierbrauer smoked K2 supplied by Bierbrauer. While the victim was unable to move her body due to a "body high," Bierbrauer removed her pants. Despite the victim telling Bierbrauer "no," Bierbrauer penetrated the victim's vagina with his penis. The other 18-year-old male put his penis in the victim's mouth. The victim cried as she told the men "stop"—but Bierbrauer did not.

The next morning, the men brought the victim to a local McDonald's where she met with her friend and her parents picked her up. The victim reported that Bierbrauer later contacted her through Facebook to apologize for "being immature."

The state charged Bierbrauer with one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b) (2014) (sexual penetration of a minor of

at least 13 but under 16 where the actor is more than 24 months older than the minor). The state later amended the complaint to add a second charge of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(c) (2014) (sexual penetration through force or coercion).

For his defense, Bierbrauer sought to call an expert witness, a forensic toxicologist, to testify that K2 is a brand name for synthetic cannabinoids and that acute intoxication from synthetic cannabinoids can lead to "agitation or irritability, restlessness, anxiety, confusion, short-term memory and cognitive impairment, and psychosis." The state filed a motion in limine to exclude the forensic toxicologist's testimony, arguing that it was neither relevant nor helpful to the trier of fact.

The district court addressed the state's motion at trial. Bierbrauer explained that the purpose of the proposed testimony was to inform the jury about how synthetic cannabinoids can generally affect the body. The district court noted that it was confused as to why a toxicologist's statements about K2 were relevant when no specific sample of blood was taken from the victim and no specific formulation of K2 was identified. The district court granted the state's motion in limine, determining that the testimony would be neither relevant nor helpful because the forensic toxicologist would be unable to say that "the K2 that these people used affects these people in this way" and therefore any testimony about the general effects of K2 would be essentially limited to an unhelpful generalization that "K2 is a drug and, like any drug, can affect your ability to recall." Furthermore, the district court noted that, because the testimony would be neither relevant nor helpful to the jury, the only purpose would be to impermissibly attack the credibility of the victim. Later at

trial, the district court expanded its ruling to exclude any testimony whatsoever about the general effects of K2 because the testimony was not relevant.

At trial, a detective informed the jury that K2 is a term for organic plant material laced with an unknown, and usually controlled, substance. There was no testimony or evidence as to which chemical was present in the K2 smoked by the victim or how synthetic cannabinoids can generally affect an individual. Also at trial, the victim testified about the events of that evening and confirmed that she smoked an unknown form of K2. Her testimony was consistent with what she told the police and was corroborated by the testimony of the other 18-year-old male, who had already pleaded guilty to one count of third-degree criminal sexual conduct.

The jury found Bierbrauer guilty of both counts of third-degree criminal sexual conduct. The district court sentenced him to concurrent sentences of 140 months in prison on the first count of violating Minn. Stat. § 609.344, subd. 1(b) and 180 months in prison on the second count of violating Minn. Stat. § 609.344, subd. 1(c). This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion when it excluded testimony about K2.

Bierbrauer argues that the district court erred when it granted the state's motion in limine to exclude testimony about the general effects of K2 for relevance because the testimony was critical for the jury to assess the accuracy and reliability of the victim's testimony.

A district court's ruling on evidentiary matters, including on the admissibility of an expert opinion, "rest within the sound discretion" of the district court and "will not be reversed unless it is based on an erroneous view of the law or it is an abuse of discretion." *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760 (Minn. 1998); *see also State v. Willis*, 559 N.W.2d 693, 698 (Minn. 1997) ("[T]his court will not reverse a trial court's evidentiary ruling absent a clear abuse of discretion."). Even if a district court erroneously excludes testimony, thereby affecting a defendant's constitutional right to present a defense, an appellate court will not reverse a district court's decision to exclude that testimony if the error was harmless beyond a reasonable doubt. *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989).

A. The district court did not abuse its discretion when it determined that testimony about the general effects of synthetic cannabinoids was not relevant.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. "Evidence which is not relevant is not admissible." Minn. R. Evid. 402. A determination regarding the admissibility of relevant evidence is within the discretion of the district court. *State v. Schulz*, 691 N.W.2d 474, 477 (Minn. 2005).

The district court determined that, because neither charge Bierbrauer faced implicated issues of intoxication, and there was no evidence of the type of K2 smoked by the victim and Bierbrauer, testimony about the general effects of the K2 was not relevant and therefore inadmissible. We agree. As the district court noted, there was no evidence

about the specific formulation of the K2 smoked by the victim and Bierbrauer, and any testimony related to the general effects of K2 would be limited to saying "K2 is a drug and, like any drug, can affect your ability to recall."

As the victim admitted to smoking a specific, yet unknown, form of synthetic cannabinoid that night, and a detective informed the jury that K2 is a generic term for organic plant material laced with an unknown, and usually controlled, substance, additional testimony about the effects of varying forms of K2 in general did not tend to make any fact of consequence more or less probable. Therefore, we cannot conclude that the district court abused its discretion when it excluded all testimony related to the general effects of K2. *See Reagan v. Madden*, 17 Minn. 402, 403, 17 Gil. 378, 380 (1871) (stating that just because "we might have come to a conclusion different from that arrived at by the district court" does not provide sufficient reason for us to reverse the district court's discretionary decision).

Because we hold that the district court did not abuse its discretion when it excluded all testimony related to the effects of K2, we decline to address the district court's decision to exclude Bierbrauer's expert witness.

B. The exclusion of general testimony about K2 was harmless beyond a reasonable doubt.

Even if the district court erroneously excluded testimony about the general effects of K2, an appellate court will not reverse a district court's decision to exclude that testimony if the error was harmless beyond a reasonable doubt. *Kelly*, 435 N.W.2d at 813. This 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." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994).

Although there is not a single test for determining what is sufficient for this court to hold that the fully realized damaging potential of excluded evidence would have caused a reasonable jury to reach a different verdict, courts have focused on looking at the excluded evidence in light of other evidence of the defendant's guilt. *See State v. Blom*, 682 N.W.2d 578, 622–23 (Minn. 2004) (holding that improperly excluded evidence could not cause a reasonable jury to find a different verdict because of strong evidence of the defendant's guilt).

At trial, the victim testified that on the night of January 8, 2016, the group smoked K2 and then Bierbrauer took off the victim's pants even though the victim told him "stop," moved the victim into position, penetrated the victim's vagina with his penis, and continued to do so after she told him "no." The victim was 14 years old at the time and Bierbrauer was 18 years old. The other 18-year-old male testified that he did not smoke K2 that night and that he witnessed Bierbrauer having sex with the victim. On cross-examination, the victim acknowledged that she smoked K2 the next morning and could not remember any details of her conversation with her friend at the McDonald's the following morning because she was high. Finally, even though the district court excluded testimony about the general effects of K2, Bierbrauer still extensively attacked the credibility of both the victim and the other 18-year-old male during the course of his defense, including telling the jury during closing argument that the victim was an admitted liar and that the 18-year-old male

was an admitted drug addict. And yet, even in light of this information, the jury found Bierbrauer guilty on both counts.

As the victim plainly testified that the drug affected her memory, any additional information regarding the general effects of K2 on an individual's memory would not have presented any novel or helpful insights to the jury under these circumstances. Accordingly, although we do not believe that the district court abused its discretion when it excluded testimony related to the general effects of K2, even if the district court erred when it excluded this testimony, we are satisfied beyond a reasonable doubt that a reasonable jury would have reached the same conclusion even if the testimony had been admitted.

II. The district court erred when it convicted and sentenced Bierbrauer for two counts of third-degree criminal sexual conduct.

Bierbrauer argues that the district court erred when it convicted and sentenced him for two counts of third-degree criminal sexual conduct because both counts were based on the same 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). Absent a statutory exception, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2018). Whether an offense is subject to multiple convictions and sentences under the same statutory section is a question of law we review de novo. *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012).

The district court relied on a statutory exception outlined in Minn. Stat. § 609.035, subd. 6 (2018), to sentence Bierbrauer for both offenses. Minn. Stat. § 609.035, subd. 6, states "prosecution or conviction for committing a violation of sections 609.342 to 609.345 *with force or violence* is not a bar to conviction of or punishment for *any other crime* committed by the defendant as part of the same conduct." (Emphasis added.) Although Bierbrauer's offenses fall within statutory range outlined in this statutory exception, they are not subject to the exception because his offenses were: (1) not committed "with force or violence," and (2) both offenses are sex offenses and not "any other crime." We address both reasons below.

Bierbrauer was convicted of violating Minn. Stat. § 609.344, subd. 1(b), and Minn. Stat. § 609.344, subd. 1(c), and sentenced to 140 months and 180 months respectively. Although a conviction under Minn. Stat. § 609.344, subd. 1(c), encompasses a third-degree sexual assault committed not only by coercion, but also by force, the district court noted, and the jury was instructed, that Bierbrauer's conviction was based on the "coercion" element of the statute and not the "force" element.

Coercion is statutorily defined as "the use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the complainant" or "the use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant's will." Minn. Stat. § 609.341, subd. 14 (2014). On the other hand, "force" is defined as "the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the

actor against the complainant or another" that the complainant "reasonably believe[s] that the actor has the present ability to execute the threat." Minn. Stat. § 609.341, subd. 3 (2014). Furthermore, the supreme court has noted that a sexual assault based on "coercion" is not the same as "force or violence." *State v. Leake*, 699 N.W.2d 312, 321 (Minn. 2005) (holding that third-degree sexual assault based on "coercion" was not the same as "force or violence" and thus did not qualify as a "heinous crime" under Minn. Stat. § 609.106, subd. 1(3) (2004)). The statutory exemption relied upon by the district court only applies to sex crimes committed through "force or violence" and not "coercion." *See* Minn. Stat. § 609.035, subd. 6 (providing that a sex crime committed with force or violence is not a bar to conviction or sentencing). As Bierbrauer was convicted and sentenced for violating the "coercion" component of Minn. Stat. § 609.344, subd. 1(c), his conviction and sentence is not eligible for the statutory exception relied upon by the district court.

This statutory exception is further limited to circumstances in which a defendant is convicted of and sentenced for criminal sexual conduct through force or violence *and* an additional crime that is not a criminal sexual conduct crime. *See State v. Patzold*, 917 N.W.2d 798, 811 (Minn. 2018) (holding that Minn. Stat. § 609.035, subd. 6, allows a court to convict and sentence a defendant for a sexual assault and domestic assault); *State v. Mitchell*, 881 N.W.2d 558, 564 (Minn. App. 2016) (holding that "any other crime" in a burglary exception case meant "a crime different from burglary"), *review denied* (Minn. Aug. 23, 2016). As the statutory exception applies only to categories of crimes committed other than criminal sexual conduct offenses, and Bierbrauer was convicted of and

sentenced for two criminal sexual conduct offenses, his convictions and sentences are not eligible for the statutory exception relied upon by the district court.

Therefore, the district court erred when it convicted and sentenced Bierbrauer to both counts under the statutory exception listed in Minn. Stat. § 609.035, subd. 6. As Minn. Sent. Guidelines 4.B (2014) list Minn. Stat. § 609.344, subd. 1(c) as a higher severity level than Minn. Stat. § 609.344, subd. 1(b), and a defendant should "be punished for the most serious of the offenses arising out of a single behavioral incident," *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted), we remand Bierbrauer's charge under Minn. Stat. § 609.344, subd. 1(b), with instructions for the district court to vacate the judgment for conviction and the sentence while leaving the underlying finding of guilt intact. *See State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999) (stating that a court does not lose jurisdiction over lesser-included offenses to which the defendant is found guilty); *see also State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (holding that the proper procedure when a defendant is convicted of more than one count for the same act is for the district court to adjudicate and impose a sentence on one count only).

Finally, as the district court used Bierbrauer's conviction under Minn. Stat. § 609.344, subd. 1(b), to add 1.5 points to Bierbrauer's criminal-history score when calculating his sentence for Minn. Stat. § 609.344, subd. 1(c), and these additional 1.5 points subjected Bierbrauer to a three-month sentencing enhancement, the vacation of his first conviction will decrease his criminal-history score in a way that alters his sentencing range from 156 to 180 months to 153 to 180 months. *See* Minn. Sent. Guidelines 4.B. Even though his current 180-month sentence for violating Minn. Stat. § 609.344, subd.

1(c), still falls within the new presumptive range based on a lower criminal-history score, as the sentence itself was based on an incorrect criminal-history score, it constitutes an illegal sentence. *See State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017) (holding that a sentence is an unauthorized sentence if based on an incorrect criminal-history score even if the correct score does not change the presumptive sentence range).

Accordingly, we remand this issue to the district court with instructions to vacate Bierbrauer's sentence and conviction for his violation of Minn. Stat. § 609.344, subd. 1(b), and resentence him for his violation of Minn. Stat. § 609.344, subd. 1(c), based on his new criminal-history score.

Affirmed in part, reversed in part, and remanded.