STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1271

State of Minnesota,
Respondent,
vs.
Danny Lee Harper,
Appellant.

Filed July 20, 2020
Affirmed in part, reversed in part, and remanded
Cochran, Judge

Hennepin County District Court
File No. 27-CR-18-16352

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

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Senior Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Cochran, 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

COCHRAN, Judge

Appellant was convicted of two counts of aiding and abetting first-degree criminal sexual conduct following a stipulated-evidence trial. In this direct appeal from final judgment, appellant argues that his convictions must be reversed because the evidence is insufficient to corroborate accomplice testimony introduced at trial. Alternatively, appellant argues that the district court erred by convicting him of two counts of aiding and abetting first-degree criminal sexual conduct based on acts committed during a single behavioral incident. And he argues that the district court erred by imposing lifetime conditional release on the second count when the district court simultaneously entered convictions for both counts. Appellant also raises a number of issues in his supplemental pro se brief.

We conclude that the accomplice testimony is sufficiently corroborated, but that the district court erred by convicting appellant of two counts of aiding and abetting first-degree criminal sexual conduct rather than one count. Because we reverse one of appellant's convictions, we do not reach the issue of the lifetime conditional release imposed based on the second conviction. We also conclude that appellant's arguments in his pro se supplemental brief are not sufficiently supported and are waived. Accordingly, we affirm in part, reverse in part, and remand.

FACTS

In the spring of 2012, the victim left a teen treatment facility, became intoxicated, and woke up in an apartment. While at the apartment, the victim was sexually assaulted

by several men and not allowed to leave. Eventually one of the men let the victim out of the apartment. From there, she went directly to the hospital.

A Sexual Assault Resource Service (SARS) nurse examined the victim and prepared a report (SARS report). The SARS report includes the victim's description of the events at the apartment and the results of the SARS nurse's examination. According to the SARS report, the victim left the treatment facility with a girl she knew as Ashley. The two girls drank alcohol. The next thing that the victim remembered was waking up at an apartment in Minneapolis with four men that she did not know. Ashley disappeared and the victim was alone with the men.

The victim reported that the group of men sexually assaulted her and kept her in the apartment against her will for several days. The victim stated that "they were all sexual with me," "they made me have sex," and "they pulled the skin in my vagina." She also reported that "they said they were going to kill me." She believed that the group consisted of a father and three sons, who lived at the apartment, and that one of the men was named Danny. She stated that "the dad pushed really hard on my chest" and that one of the sons put his hand around her neck. She also reported that the men made her have sexual intercourse with a Somali man. And she reported that the group locked her in the bathroom for a period of time. Eventually, one of the younger men let her leave the apartment when the "dad" was asleep. She reported that while she was in the apartment, she was given drinks that may have had drugs in them and that the men forced her to smoke marijuana. The victim sustained significant bruising and internal abrasions. The SARS nurse took

samples from the victim's body, and sent those samples and some of the victim's clothing to be tested for DNA from the victim's assailants.

Later that summer, Dexter Harper (Dexter)[1] was charged for an unrelated crime and his DNA profile matched the predominate male DNA profile of the DNA mixtures found on vaginal and perineal swabs taken from the victim. In November 2012, the victim identified Dexter in a photo lineup as the "dad" assailant. The victim also confirmed that Dexter had sex with her several times and that the other men had sex with her one time each. The victim stated that she was held in the apartment for three to four days by the men. She reported Dexter hid her clothes and had the others watch her so that she could not leave.

In July 2013, another DNA profile matched the victim's samples. Timothy Harper's DNA profile matched the predominant DNA profile of a DNA mixture found on the victim's rectal swab. Timothy Harper is Dexter's son.

An investigator met with Timothy in April 2014. At first, Timothy did not recall knowing the victim. But, when the investigator showed Timothy a picture of the victim, Timothy said that he knew her through his half-brother, K.B. Timothy denied that he engaged in sexual activity with the victim until the investigator told him that his DNA matched the DNA found on the victim. In May 2017, the state charged Timothy with sexually assaulting the victim. Soon after being charged, Timothy agreed to participate in

[1] We refer to Dexter Harper by his first name because he has the same last name as appellant. Similarly, we refer to Timothy Harper, mentioned later in the opinion, as Timothy.

a proffer interview. The state told Timothy that if his interview contained "something favorable," the state would discuss a "release from custody or significant reduction in [his] sentence."

In the proffer interview, Timothy indicated that when he arrived at the apartment, Dexter (his father), K.B. (his half-brother), appellant (Danny Harper), and the victim were there. Timothy said his father lived at the apartment, and that K.B. and appellant were staying at the apartment with his father. Appellant is Dexter's younger brother and Timothy's uncle. Timothy did not live at the apartment at the time. Timothy noted that the apartment is a studio apartment, with no separate rooms other than a bathroom.

Shortly after he arrived, Timothy saw both appellant and K.B. in the bathroom with the victim, who was naked. He saw K.B. have sex with the victim on the bathroom floor. After K.B. finished, he saw appellant have sex with the victim on the bathroom floor. Then, Timothy saw appellant take the victim to the couch in the living-room area where appellant again had sex with the victim. When appellant was finished, K.B. tried to have anal intercourse with the victim. After that, Timothy had vaginal intercourse with the victim on the floor of the apartment at the urging of K.B.

Timothy stated that he spent the night at the apartment. The next morning, two Somali men who knew K.B. came to the apartment and took the victim somewhere else. They later brought the victim back to the apartment. Shortly thereafter, K.B. and appellant left the apartment. Before they left, K.B. told Timothy not to let the victim leave. Timothy reported that the victim was naked while in the apartment because her clothes were hidden under Dexter's bed. Timothy gave the victim her clothes and let her leave.

Timothy also told the police that he did not see Dexter have sex with the victim but that K.B. told him that Dexter had done so before Timothy arrived. Timothy stated that appellant, K.B., and Dexter were all angry with him for letting the victim leave the apartment. Timothy stated that he let the victim leave because "nobody deserves that."

After Timothy's statement, an investigator called appellant and requested a voluntary DNA sample. On the call, appellant acknowledged being in the apartment with Dexter and K.B. while the victim was there, and that Timothy later came over to the apartment. Appellant denied having sex with the victim. And he could not recall if K.B. had sex with the victim. Appellant also told the investigator that he left at one point to smoke marijuana with a friend who lived upstairs in the same apartment building. When he returned, he saw the victim lying in the bed with Dexter. The victim said that Dexter told her not to move out of the bed. Later, after Timothy arrived, he heard K.B. urge Timothy to have sex with the victim because it was Timothy's birthday. Appellant admitted that he gave Timothy a condom, but stated that he did not see Timothy having sex with the victim because he "went to the store across the street." He also remembered the victim walking around the apartment naked and claimed that, at one point, she grabbed his penis through his pants. According to appellant, the victim was in the apartment with the men for two days. He claimed that he did not see anyone have sex with the victim during that two-day period. Ultimately, appellant agreed to provide a DNA sample.

DNA Evidence

The samples taken from the victim's body and clothing included: (1) vaginal, (2) perineal, (3) rectal, (4) jeans-sperm, and (5) jeans non-sperm. Forensic testing revealed

that semen and seminal fluid were present on the vaginal, perineal, and rectal swabs, as well as on the victim's jeans. DNA mixtures were found on each of these items. Dexter's DNA profile matched predominate male DNA profiles of the mixtures found on the vaginal and perineal swabs. For the rectal swab, analysts identified a DNA mixture of two or more individuals. Timothy's DNA profile matched a predominate male DNA profile found on the rectal swab. And appellant could not be excluded from being a possible contributor to a minor-type DNA profile found on the rectal swab. But, it was estimated that 99.9992% of the general population could be excluded from being a contributor to that DNA mixture. Appellant also could not be excluded from being a possible contributor to the DNA mixture found on the jeans-sperm sample. Similarly, it was estimated that 99.91% of the general population could be excluded from being a contributor to the jeans-sperm sample.

On June 28, 2018**,** the state charged appellant with two counts of aiding and abetting first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1 (2010).

Trial and Sentencing

Appellant waived his right to a jury trial and proceeded with a stipulated-evidence trial. The stipulated evidence included: the police reports; the SARS report and accompanying photographs; DNA test results; and transcripts and recordings of interviews with the victim, Timothy, and appellant. The district court reviewed all of the evidence and written arguments. The district court later issued written findings of fact, conclusions of law, and an order finding appellant guilty of both counts of aiding and abetting first-degree criminal sexual conduct. The district court sentenced appellant to concurrent

executed terms of 70 months' imprisonment for both counts and imposed a lifetime conditional release for count two.

This appeal follows.

D E C I S I O N

Appellant argues that both of his convictions should be vacated because Timothy's accomplice statement is uncorroborated. Alternatively, appellant argues that the district court erred when it convicted him of two counts of aiding and abetting first-degree criminal sexual conduct, rather than one count, because both counts were based on the same conduct. He also argues that the district court erred when it sentenced him to lifetime conditional release on count two. Finally, appellant raises a number of issues in his pro se brief. We address each issue in turn.

I. The accomplice statement is sufficiently corroborated.

Appellant argues that both of his aiding and abetting first-degree criminal sexual conduct convictions should be vacated because there is insufficient evidence to corroborate Timothy's accomplice statement.

In Minnesota, "a criminal conviction cannot be based on the uncorroborated testimony of an accomplice." *State v. Clark*, 755 N.W.2d 241, 251 (Minn. 2008); *see also* Minn. Stat. § 634.04 (2010) ("A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.").

To determine whether an accomplice's testimony is sufficiently corroborated, we consider, among other factors,

> participation in the preparation for the criminal act; opportunity and motive; proximity of the defendant to the place where the crime was committed under unusual circumstances; and association with persons involved in the crime in such a way as to suggest joint participation.

State v. Smith, 932 N.W.2d 257, 264 (Minn. 2019) (quotation omitted). We "review the evidence just as we would on a sufficiency challenge—in the light most favorable to the prosecution, and with all conflicts in the evidence resolved in favor of the verdict." *State v. Nelson*, 632 N.W.2d 193, 202 (Minn. 2001); *see also Smith*, 932 N.W.2d at 264; *State v. Chavarria-Cruz*, 839 N.W.2d 515, 519 (Minn. 2013). If the defendant's "connection to the crime may be fairly inferred from those circumstances, the corroboration is sufficient." *State v. Pederson*, 614 N.W.2d 724, 732 (Minn. 2000) (quoting *State v. Adams*, 295 N.W.2d 527, 533 (Minn. 1980)).

Here, the state charged appellant with two counts of aiding and abetting first-degree criminal sexual conduct. *See* Minn. Stat. §§ 609.342, subd. 1 (defining first-degree criminal sexual conduct), .05, subd. 1 (2010) ("A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime."). One count alleged that appellant aided and abetted the penetration of the victim through the use of force or coercion, causing injury to the victim. *See* Minn. Stat. § 609.342, subd. 1(e)(i). The other count alleged that appellant aided and abetted the penetration of the victim in a manner that caused the victim fear of great bodily harm. *See* Minn. Stat. § 609.342, subd. 1(c).

Accordingly, the accomplice statement and corroborating evidence must connect appellant to these crimes. *Pederson*, 614 N.W.2d at 732. But accomplice testimony need not be corroborated for each individual element of the crime. *State v. Her*, 668 N.W.2d 924, 927 (Minn. App. 2003), *review denied* (Minn. Dec. 16, 2003). The corroborating evidence is sufficient if it restores confidence in the truth of the accomplice's testimony and points to the defendant's guilt in some substantial degree. *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010) (noting that "the corroborating evidence need only link the defendant to the crime in some substantial degree that tends to affirm the truth of the accomplice's testimony and to point to the guilt of the defendant" (quotation omitted)).

Appellant argues that there is insufficient corroborating evidence because the "corroboration of Timothy's statement was minimal." The state argues that the corroborating evidence is sufficient. We agree with the state.

We conclude that the accomplice statement is sufficiently corroborated for three reasons. First, appellant's own statements corroborate Timothy's accomplice statement. *See Her*, 668 N.W.2d at 927 (noting that admissions in a defendant's testimony may corroborate an accomplice's testimony). Appellant admitted to police that he was at Dexter's studio apartment with Dexter, K.B., and Timothy while the victim was present. Appellant also stated that he saw the victim in bed with Dexter and that the victim said that Dexter told her not to leave the bed. And appellant admitted that he gave Timothy a condom. Each of these statements support that appellant was at the place the crime was committed and that he had an opportunity to participate. *Smith*, 932 N.W.2d at 264.

Second, the victim's statements to the SARS nurse and to the police corroborate Timothy's accomplice statement. The victim stated that four men—whom she believed were all related—"were all sexual with me" and "they pulled the skin in my vagina." And the victim stated that "they said they were going to kill me." She also reported that they hid her clothes and held her in the apartment against her will until one of the men eventually let her go. These statements by the victim are consistent with Timothy's statement that all four men had sex with the victim, that the victim's clothes were hidden from her, and that the victim was not allowed to leave until Timothy let her go. And the SARS report confirmed that the victim had injuries including significant bruising on her body and internal abrasions in her vaginal area. The victim also said she thought one of the men was named "Danny," which corroborates Timothy's statement that appellant was present and an active participant in the criminal activity.

Third, the DNA evidence corroborates Timothy's statement. Several samples were taken from the victim as part of the investigation and tested for DNA. Analysis of the DNA mixture found on the vaginal and perineal swabs confirmed that Dexter participated in the sexual assaults. And analysis of the DNA mixture found on the rectal swab confirmed that Timothy participated in the sexual assaults. Finally, analysis of the DNA mixtures found on the rectal and jeans-sperm swabs indicated that appellant's DNA profile could not be excluded as a contributor to those mixtures.

Viewing the evidence in the light most favorable to the prosecution, as we are required to do, we conclude that the evidence is sufficient to corroborate Timothy's accomplice testimony because it indicates that appellant was present and was associated

with the persons involved in the crimes in such a way as to suggest his participation. Accordingly, because the accomplice testimony is sufficiently corroborated to convict appellant, we affirm the district court's findings of guilt.

II. The district court improperly convicted appellant of two counts of aiding and abetting first-degree criminal sexual conduct based on the same course of conduct.

Appellant next argues that the district court erred by convicting him of, and imposing sentences for, two counts of aiding and abetting first-degree criminal sexual conduct. Appellant maintains that the complaint, the state's case to the district court, and the district court's verdict show that both convictions arose out of the same course of conduct. As a result, he contends that the district court violated Minn. Stat. § 609.04 (2010)[2] by convicting him of both counts. We agree.

Minnesota Statutes section 609.04 has been interpreted to bar "multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). But, "the protections of section 609.04 will not apply if the offenses constitute separate criminal acts." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). "The inquiry into whether two offenses are separate criminal acts is analogous to an inquiry into whether multiple offenses

[2] We note that appellant cites Minn. Stat. § 609.035 (2010) in his brief. However, we understand appellant's argument to be grounded in section 609.04 based on his reliance on *State v. Eppler*, 362 N.W.2d 315 (Minn. 1985), and his request to vacate one of the convictions. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (noting that appellate courts have a responsibility "to decide cases in accordance with law, and that responsibility is not to be diluted" by a failure to cite relevant authority (quotation omitted)).

constituted a single behavioral incident under Minn. Stat. § 609.035." *Id.* Determining whether two intentional crimes are part of a single behavioral incident requires consideration of the time and place of the crimes and whether the criminal conduct was motivated by a single criminal objective. *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011). The state has the burden of proving that crimes were not part of a single behavioral incident. *State v. Zuehlke*, 320 N.W.2d 79, 82 (Minn. 1982). "Whether a defendant's offenses occurred as part of a single course of conduct is a mixed question of law and fact." *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). We review the district court's finding of fact under a clearly erroneous standard, and its application of the law to those facts de novo. *Id.*

Here, appellant was convicted of two counts of aiding and abetting first-degree criminal sexual conduct—one count under Minn. Stat. § 609.342, subd. 1(c) (penetration with fear of great bodily harm) and one count under Minn. Stat. § 609.342, subd. 1(e)(i) (penetration with force or coercion and personal injury to the victim). Both crimes arise under the same criminal statute. And the district court's findings regarding the sexual penetration involved in both crimes is virtually identical.

Notwithstanding the district court's findings, the state argues for the first time on appeal that appellant committed two separate criminal acts. The state relies on our analysis in *State v. Barthman*, 917 N.W.2d 119, 129 (Minn. App. 2018), *aff'd*, 938 N.W.2d 257 (Minn. 2020). In *Barthman*, the state charged the defendant with six counts of sexually abusing his daughter for incidents that occurred over a period of three years. *Id.* at 124. Barthman asserted that the state failed to show that two of the counts were not committed

as part of a single behavioral incident. *Id.* at 128-29. We disagreed and concluded that the victim described two distinct offenses that occurred at different times. *Id.* at 129. The supreme court granted review, and affirmed, determining that the complaint and the complainant described separate incidents occurring at separate times. *Barthman*, 938 N.W.2d at 267. The state argues that this case is similar because Timothy described two incidents in his statement—a couch incident and a bathroom incident. We are not persuaded.

Here, unlike in *Barthman*, the complaint did not allege or distinguish separate acts for each of the two criminal-sexual-conduct charges. The district court's findings of fact and conclusions of law also do not identify separate acts as the basis of the two guilty verdicts. Instead, the district court relied on the *same* factual basis to find appellant guilty of both counts of criminal sexual conduct. Consistent with the state's position below, the district court's findings of fact and conclusions of law describe a continuous course of conduct. As appellant points out, the district court's order reflects two alternative means of aiding and abetting the same first-degree criminal sexual conduct crime. Therefore, because the district court did not find separate acts of criminal sexual conduct to support separate convictions, appellant was improperly convicted twice under different sections of the same statute for acts committed during a single behavioral incident and only one conviction can stand. Accordingly, we reverse and remand to vacate one of appellant's

convictions.[3] *See Jackson*, 363 N.W.2d at 760 (reversing to vacate a conviction where defendant was convicted of multiple offenses under the same statute for acts committed during a single behavioral incident).

III. Pro se brief.

Appellant also submitted a pro se supplemental brief in which he argues (1) that evidence was mishandled, insufficient, and not credible; (2) that the victim was not credible; and (3) that he received ineffective assistance of counsel. Appellant does not cite to authority and provides no further argument to support these assertions.

An assignment of error in a brief not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015). Because no prejudicial error is obvious on mere inspection, we conclude that appellant has waived these arguments.

With regard to appellant's argument that he received ineffective assistance of counsel, we also note that the record has not been sufficiently developed for review by this court. "Generally, an [ineffective-assistance-of-counsel] claim should be raised in a postconviction petition for relief, rather than on direct appeal." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). "A postconviction hearing provides the court with additional facts to explain the attorney's decisions, so as to properly consider whether a defense counsel's performance was deficient." *Id.* (quotation omitted). Without those

[3] Because we reverse one of appellant's convictions, it is clear that appellant should only be sentenced to 10 years of conditional release and we do not reach the issue of the lifetime conditional release. Minn. Stat. § 609.3455, subd. 6 (2010).

additional facts, "any conclusions reached by [an appellate] court as to whether [an] attorney's assistance was deficient would be pure speculation . . . ." *Id.* But an appellate court may consider an ineffective-assistance-of-counsel claim on direct appeal if it can be decided on the trial record. *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004).

Here, appellant argues that his attorney was ineffective because he conspired with the state, used illegal drugs, and failed to return payments made to him after being fired. Given the record developed at trial, we cannot review any of appellant's claims. There is no evidence in the record that appellant's attorney conspired with the state, used illegal drugs, or failed to return money. As a result, if we were to review appellant's claims it would be "pure speculation." *Gustafson*, 610 N.W.2d at 321. Because further development of the record is required, we cannot decide appellant's ineffective assistance claim, but appellant may pursue that argument in postconviction proceedings. *See Leake v. State*, 737 N.W.2d 531, 535-36 (Minn. 2007).

Affirmed in part, reversed in part, and remanded.