STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1626

State of Minnesota,
Respondent,

vs.

Melvin DeVaughn Epps,
Appellant.

Filed August 24, 2020
Affirmed in part and remanded
Hooten, Judge

Hennepin County District Court
File No. 27-CR-19-567

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Hooten, Judge.

S Y L L A B U S

Minn. Stat. § 609.342, subd. 1(e)(i) (2018), provides that an individual can commit the offense of first-degree criminal sexual conduct either by force or by coercion, and these alternative means of completing one element of the offense are consistent with the fundamental fairness required by due process. Thus, a jury need not unanimously agree on

which of these means were used to commit an element of the offense in order to find the defendant guilty of first-degree criminal sexual conduct.

O P I N I O N

HOOTEN, Judge

In this direct appeal from the judgment of conviction for first-degree criminal sexual conduct, appellant argues that the prosecutor committed misconduct by misstating the law in his closing argument when he told the jury that it did not have to unanimously agree that the defendant used either force or coercion to commit the offense. In his supplemental pro se brief, appellant also argues that the evidence is insufficient to support the jury's verdict, the district court abused its discretion when it imposed an unjust sentence and failed to depart from the presumptive sentence, and the prosecutor committed misconduct when he alerted the district court to a pending proceeding in Anoka County. We affirm appellant's conviction. However, we remand to the district court to assess whether appellant is entitled to be resentenced based on a 2019 amendment to the Minnesota Sentencing Guidelines, which we declared to be retroactive in *State v. Robinette*, 944 N.W.2d 242 (Minn. App. 2020), *review granted in part* (Minn. June 30, 2020).

FACTS

On February 4, 2018, Bloomington and Richfield police officers responded to a motel in Bloomington following a report of a sexual assault. The victim, who was from out of state, alleged that she met appellant Melvin DeVaughn Epps at a party in downtown Minneapolis. At around 4:00 a.m., Epps offered to drive the victim back to her motel. Initially, Epps drove the victim to two wrong motels.

At the second wrong motel (the "second motel"), Epps parked his car in the motel parking lot. He turned to the victim and asked her for a kiss. The victim complied, believing it would be a quick kiss goodbye, "just [to] be courteous and decent." However, Epps climbed over the center console of the car, got on top of the victim, and tried to fervently kiss her. The victim testified that she rested her palms against Epps's shoulders and tried to push against him to indicate that she did not want to continue. She said "no" to Epps's advances, but Epps undid his pants and "jammed [his penis] extremely hard" in her direction. The victim testified that she repeatedly said "no" and that she did not "want to do this," but Epps applied more force, grabbed her wrists, and pressed the victim down into the car seat. Epps hyperextended the victim's shoulders, used his thighs to push her legs apart, and penetrated her vagina with his penis for approximately five minutes. The victim tried to resist but Epps applied so much force that the victim testified that she believed that if she fought back she would have "dislocate[ed] something." She testified that even after she stopped resisting, Epps continued to apply a great deal of force to her cervix and she reported feeling pain for over a week after the assault.

As Epps started to move off the victim, she unbuckled her seatbelt, opened the car door, and dove into the parking lot. The victim ran from the car, "zigzagging like a jackrabbit," because she "didn't want to get hit by [Epps's] car." After safely reaching the second motel, the victim reported to the staff that she had been sexually assaulted and asked them to call her a cab to the correct motel (the "third motel").

When she arrived at the third motel, the victim told her friend with whom she was staying what had happened. The victim's friend reported the assault to the police.

Bloomington and Richfield police officers responded and took the victim's statement concerning the night's events. The victim described her assailant and Epps's car. She also informed police that, in a rush to get out of Epps's car, she left her phone behind.

The officers also spoke with the victim's friend. The friend stated that he had been in communication with the victim after she left the party in downtown Minneapolis. The victim sent her friend several text messages at approximately 5:00 a.m. indicating that she was near the area of the third motel. The officers examined the victim's phone records and determined that its last location ping was in Blaine. After arriving at the phone's location in Blaine, the officers were unable to find the matching suspect or vehicle.

The officers took the victim to the hospital where she reported significant vaginal discomfort. DNA samples were taken from the victim and an exam revealed bruising and other injuries consistent with a sexual assault. The exam also revealed that one of the victim's earrings had been ripped out of her ear.

In October 2018, the officers learned that one of the DNA samples taken from the victim matched a sample taken from Epps, which was already in the criminal database. The officers then located and interviewed Epps, who confirmed that he was at the same party as the victim, but denied meeting her, driving her home, or engaging in any sexual conduct. Another DNA sample was taken from Epps after the interview.

Following the interview and a second positive DNA match, Epps amended his initial statement. He stated that he met the victim at the party and took her to an apartment complex, where he had consensual sex with her in a bathroom. He then drove the victim to the second motel and had consensual sex with her in his car. Epps stated that after the

victim left, he discovered the victim's phone in his car but did not return it to her. The state examined cell tower records and determined that they were inconsistent with Epps's reported timeline.

The state charged Epps with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i), which prohibits criminal sexual conduct causing personal injury to a victim under circumstances in which the actor uses force or coercion.

At a jury trial, the following testimony and evidence was submitted to support the state's case: (1) the officers testified that they observed marks and bruising on the victim's back, legs, arms, and blood near her ear; (2) hospital staff testified that the victim made statements which were consistent with her testimony concerning the assault; (3) hospital staff reported injuries consistent with a forcible encounter and nonconsensual sex, including bruising and marks on the victim's wrists and arms consistent with being held down, bleeding from the victim's ear, and various bruises and abrasions; (4) the victim testified that she suffered numerous injuries, including a hematoma and bruising on her spine and her pelvic area; (5) phone records corroborated the victim's timeline, indicating that her phone was in downtown Minneapolis until approximately 5:00 a.m., at the second motel between 5:30 a.m. and 6:15 a.m., and at a location near Epps's home in Blaine at around 7:00 a.m.; (6) Epps and his car matched the description of the assailant and his car given by the victim; and (7) both of Epps's DNA samples matched the sample taken from the victim.

During his closing argument, the prosecutor identified the elements of the charged offense: (1) the intentional act of sexual penetration, (2) without the consent of the

complainant, (3) causing personal injury to the complainant, and (4) through the use of force or coercion. In regards to the fourth element, the prosecutor stated the following:

> Once again, let's talk about unanimity. So you don't all need to agree that there was either force or coercion in order for this element to be met.
>
> So six of you could say: Yep, I think there was force. Six of you could say: There was coercion but not force.
>
> That element is still met in that situation.

After closing arguments, the district court instructed the jury that their "verdict must be unanimous."

The jury returned a verdict of guilty. In response to three special verdict questions, the jury found that Epps used force, coercion, and both force and coercion in the commission of the charged offense. The district court denied Epps's request for a sentencing departure and sentenced him to prison for 156 months, the presumptive sentence for first-degree criminal sexual conduct. Epps appeals.

ISSUES

I. Did the prosecutor's closing argument violate Epps's right to a unanimous verdict?

II. Was the evidence sufficient to sustain Epps's conviction for first-degree criminal sexual conduct?

III. Did the district court abuse its discretion when it denied Epps's request for a downward sentencing departure?

IV. Did the prosecutor commit misconduct by alerting the district court to a pending case in Anoka County?

ANALYSIS

Epps challenges his conviction and sentence for first-degree criminal sexual conduct. He argues that the prosecutor committed misconduct by misstating the law in his closing argument regarding the elements of first-degree criminal sexual conduct. He also argues, in a pro se supplemental brief, that the evidence is insufficient to sustain the jury's verdict, the district court abused its discretion when it imposed an unjust sentence and failed to depart from the presumptive sentence, and the prosecutor committed misconduct when he alerted the district court to a pending proceeding in Anoka County.

I. The prosecutor's closing argument did not violate Epps's right to a unanimous verdict.

Epps first argues that the prosecutor committed misconduct during his closing argument when he argued that the jury need not unanimously agree on whether Epps used "force" or used "coercion" to commit an element of the charged offense.

Because Epps did not object to the prosecutor's closing argument at trial, we review any alleged misconduct by the prosecutor under the modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 299–300 (Minn. 2006). "Under that test, the defendant has the burden to demonstrate that the misconduct constitutes (1) error, (2) that was plain." *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010). "[T]he burden then shifts to the State to demonstrate that the error did not affect the defendant's substantial rights." *Id.* For a state to demonstrate that the error had no impact on a defendant's substantial rights, the state must establish "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation

omitted). Even if the state meets this burden, we will still assess "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.*

We note that during closing arguments, a prosecutor may explain the state's burden to the jury. *State v. McDaniel*, 777 N.W.2d 739, 751 (Minn. 2010). But a prosecutor may not misstate the law. *Id.* at 750. In determining whether a prosecutor misstated the law and thus a reversible error has occurred, we must look "at the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

We begin by determining whether the prosecutor committed misconduct by misstating the law. Epps argues that the prosecutor's closing argument to the jury constituted misconduct because the prosecutor informed the jury that it need not unanimously agree on whether Epps used force or coercion to commit the charged offense. Specifically, Epps maintains that, to satisfy the unanimity requirement under Minn. R. Crim. P. 26.01, subd. 1(5), all 12 jurors must unanimously agree that Epps used force, that he used coercion, or that he used both force and coercion to accomplish the charged offense. The state argues that force and coercion are alternative means of accomplishing one element of the offense, and that the element was satisfied so long as the jury was unanimous in its decision that Epps used either force or coercion in committing the offense. Thus, the state argues that it does not matter if some of the jurors found that only force was used, while the other jurors found that only coercion was used.

A jury must unanimously agree that the state has proven each element of the charged offense. *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002). But "the jury need not always

decide unanimously which of several possible means [a] defendant used to commit [an] offense in order to conclude that an element has been proved beyond a reasonable doubt."[1] *Id.*

In *Ihle*, in which the Minnesota Supreme Court reviewed an obstruction-of-legal-process charge, the court explained the means-versus-elements analysis as follows:

> [I]f [a] statute establishes alternative means for satisfying an element, unanimity on the means is not required. That is, a jury cannot convict unless it unanimously finds that the government has proved each element of the offense; however the jury need not always decided unanimously which of several possible means the defendant used to commit the offense in order to conclude that an element has been proved beyond a reasonable doubt.

Id.

We applied this analysis in *State v. Lagred*, where we indicated that a court must consider the plain language of a statute to determine whether it "manifests legislative intent to establish separate and independent offenses, as opposed to one crime that can be committed in alternative ways." 923 N.W.2d 345, 351, 354 (Minn. App. 2019). We conclude the same analysis can be applied to the elements of an offense.

[1] We note that neither this court nor the Minnesota Supreme Court has previously determined whether force and coercion are alternative means of committing an element of the offense of criminal sexual conduct. But in *State v. Hart*, we analyzed Minn. Stat. § 609.342, subd. 1(c) (1990) (reasonable fear of bodily harm), and Minn. Stat. § 609.342, subd. 1(e)(i) (personal injury through force or coercion), and found that a district court's disjunctive jury instruction regarding the charge of criminal sexual conduct in the first degree did not violate the defendant's right to a unanimous verdict because both subdivisions were alternative ways to commit first-degree criminal sexual conduct and thus the jury was not required to specify under which subdivision it convicted the defendant. 477 N.W.2d 732, 737–38 (Minn. App. 1991), *review denied* (Minn. Jan. 16, 1992).

i. The plain language of Minn. Stat. § 609.342, subd. 1(e)(i), dictates that force and coercion are alternative means of completing one element of the offense of first-degree criminal sexual conduct.

Our review of the plain language of Minn. Stat. § 609.342, subd. 1(e)(i), leads us to the conclusion that force and coercion are alternative means of completing one element of the offense of criminal sexual conduct. *See State v. Hayes*, 826 N.W.2d 799, 804 (Minn. 2013) (explaining that if a statute is unambiguous, a court must apply its plain meaning without resorting to canons of statutory construction).

The statute under which Epps was convicted states that a defendant is guilty of first-degree criminal sexual conduct if he or she engages in sexual penetration with a complainant, causing personal injury to the complainant. Minn. Stat. § 609.342, subd. 1(e) (2018). The statute then lists different circumstances that must be present in order for a conviction under this provision of the statute to stand: the use of force or coercion or knowledge "that the complainant is mentally impaired, [] incapacitated, or physically helpless." Minn. Stat. § 609.342, subd. 1(e)(i–ii).

A plain reading of the statute dictates that the elements of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(i), are: (1) the intentional act of sexual penetration, (2) without the consent of the complainant, (3) causing personal injury to the complainant, and (4) through the use of force or coercion. The word "or" in the fourth element is defined as "[u]sed to indicate an alternative," *The American Heritage Dictionary of the English Language* 1238 (5th ed. 2011), and means that the element may be established through *either* the use of force *or* the use of coercion. Thus, the state need not prove that both coercion and force were used for our court to sustain a conviction for

first-degree criminal sexual conduct and a jury need not unanimously agree which of the two possible means a defendant used to commit the offense. This reading is consistent with CRIMJIG 12.03, which sets forth the elements for the offense of first-degree criminal sexual conduct and does not list force or coercion as separate elements. *See* 10 *Minnesota Practice*, CRIMJIG 12.03 (2019) (listing the elements of first-degree criminal sexual conduct).

This plain reading of the statute is also consistent with cases addressing similarly written statutes. In *Ihle*, the Minnesota Supreme Court considered an argument that the district court erred when it did not instruct the jury that it had to unanimously agree regarding the specific conduct that constituted obstruction of the legal process. 640 N.W.2d at 917. The statute at issue provided that a defendant may not "obstruct[], hinder[], or prevent[] the lawful execution of any legal process" or "obstruct[], resist[], or interfere[] with a peace office while the officer is engaged in the performance of official duties." Minn. Stat. § 609.50, subd. 1(1)–(2) (2000).

Relying on the plain language of the statute, the Minnesota Supreme Court determined that the conduct prohibited by both provisions of the statute was not inherently different so as to result in a fundamental unfairness by not requiring unanimity from the jury. *Ihle*, 640 N.W.2d at 919 ("The close similarity of the conduct described by the statute . . . leads us to conclude there is no risk of unfairness in not requiring unanimity."). The Minnesota Supreme Court therefore determined that the district court did not err when it failed to instruct the jury that the statute delineated separate elements. *Id.*

The Minnesota Supreme Court and our court have reached similar conclusions after examining the plain text of other statutes. *See State v. Pendleton*, 725 N.W.2d 717, 729–31 (Minn. 2007) (explaining that a jury need not unanimously agree on the underlying purpose of a defendant's action to be convicted under Minn. Stat. § 609.185(a)(3) (2004)); *State v. Dalbec*, 789 N.W.2d 508, 510–11 (Minn. App. 2010) (holding that a district court did not err when it failed to instruct the jury that it must unanimously agree regarding which of the defendant's acts constituted the charged offense under Minn. Stat. § 609.2242, subd. 2 (2008)), *review denied* (Minn. Dec. 22, 2010); *Hart*, 477 N.W.2d at 737 (stating that a district court's distinctive jury instruction regarding Minn. Stat. § 609.342, subd. 1 (1990) did not violate a defendant's right to a unanimous verdict).

In *Lagred*, we examined the plain language of the relevant charging statues in *Pendleton*, *Ihle*, *Dalbec*, and *Hart* and determined that they were similarly structured to the aggravated-robbery statute at issue in *Lagred*. 923 N.W.2d at 353. We explained that each of the statutes "first state that certain conduct constitutes a crime." *Id.*; *see also Pendleton*, 725 N.W.2d at 729–30 (explaining that Minn. Stat. § 609.25, subd. 1 (2004), states "[w]hoever, for any of the following purposes, confines or removes from one place to another, any person without the person's consent . . . is guilty of kidnapping and may be sentenced as provided in subdivision 2"); *Ihle*, 640 N.W.2d at 915 (explaining that Minn. Stat. § 609.50, subd. 1, states "[w]hoever intentionally does any of the following may be sentenced as provided in subdivision 2").

We then observed that the "statutes next list[ed] the alternative acts, purposes, or circumstances that result in the commission of the crime." *Lagred*, 923 N.W.2d at 353;

see also Pendleton, 725 N.W.2d at 730 (stating that § 609.25, subd. 1, lists three alternative purposes to commit kidnapping); *Ihle*, 640 N.W.2d at 915 (clarifying that Minn. Stat. § 609.50, subd. 1, lists alternatives acts that constitute obstruction).

Based on the similarity between the aggravated-robbery statute at issue in *Lagred* and the relevant charging statutes in *Pendleton*, *Ihle*, *Dalbec*, and *Hart*, as well as the plain language of the statute, we determined that the aggravated-robbery statute listed alternative means, not elements, to commit the charged offense. *Lagred*, 923 N.W.2d at 354. "Thus, a jury need not unanimously agree regarding which of those means was used to commit a first-degree aggravated robbery." *Id.*

Applying the same analysis to the present case, we conclude that the statute lists force or coercion as alternative means for accomplishing the same element as described by Minn. Stat. § 609.342, subd. 1(e)(i). Like the statutes at issue in *Pendleton*, *Ihle*, *Lagred*, *Dalbec*, and *Hart*, the first-degree criminal sexual conduct statute begins by stating what conduct is prohibited. *See* Minn. Stat. § 609.342, subd. 1 (2018) (stating a defendant is guilty of criminal sexual conduct if he engages in sexual penetration with a complainant and he causes personal injury to the complainant). The statute then lists alternative acts that result in the commission of the crime. *See* Minn. Stat. § 609.342, subd. 1(e)(i) (stating that an actor can use "force or coercion to accomplish the act"). This format is identical to those in the relevant charging statutes in *Pendleton*, *Ihle*, *Lagred*, *Dalbec*, and *Hart*, in which the Minnesota Supreme Court and our court determined that jury unanimity was not required. We therefore conclude that Minn. Stat. § 609.342, subd. 1(e)(i), lists alternative means of accomplishing an element of the offense of criminal sexual conduct.

Further, we note that the United States Supreme Court has addressed whether it is constitutionally permissible to permit jurors to reach a guilty verdict without unanimously specifying "which overt act, among several named, was the means by which a crime was committed." *Schad v. Arizona*, 501 U.S. 624, 631, 111 S. Ct. 2491, 2496 (1991). In answering this question in the affirmative, the Supreme Court noted that it has never required jurors "to agree upon a single means of commission" when returning a guilty verdict because "different jurors may be persuaded by different pieces of evidence" yet may still agree on a defendant's guilt. *Id.* at 631–32, 111 S. Ct. at 2497. We see no reason why the Supreme Court's reasoning in *Schad* cannot be applied to the present case.

Epps concedes that the jury agreed on all elements of the charged offense apart from the means he used to commit the offense, force or coercion. But, under *Schad*, a jury need not agree on the "preliminary factual issues," including the means used to commit the offense, when returning a general verdict. *Id.* at 632, 111 S. Ct. at 2497.

Epps acknowledges the similarity between the first-degree criminal sexual conduct statute and the relevant charging statutes in *Pendleton*, *Ihle*, *Lagred*, *Dalbec*, and *Hart*, but argues that we should read "force or coercion" as separate and distinct elements of the offense, thereby requiring a jury to unanimously agree on whether the defendant committed the offense using force *or* whether the defendant committed the offense using coercion. But adopting this interpretation is contrary to United States Supreme Court and Minnesota court precedent. *See id.*; *see also Ihle*, 640 N.W.2d at 915 (stating that "'[w]hoever intentionally does any of the following may be sentenced as provided in subdivision 2:[](1) obstructs, hinders, or prevents the lawful execution of any legal process . . . or apprehension

of another on a charge or conviction of a criminal offense'" (quoting Minn. Stat. § 609.50, subd. 1(1))).

The Minnesota Supreme Court explicitly determined in *Ihle* that a district court need not instruct a jury to unanimously agree on what specific conduct "obstruct[ed], hinder[ed] or prevent[ed] the lawful execution of any legal process . . . or apprehension of another on a charge or conviction of a criminal offense." *Ihle*, 640 N.W.2d at 915 (quoting Minn. Stat. § 609.50, subd. 1(1)). Similarly, a district court is not required to instruct a jury that they need to unanimously agree on whether the defendant used force or whether the defendant used coercion to commit the offense of criminal sexual conduct. This is because force or coercion are alternative means of committing one element of the charged offense, and are not separate elements.

Based on the plain language of the criminal sexual conduct statute and its similarity to the statutes analyzed in *Pendleton*, *Ihle*, *Lagred*, *Dalbec*, and *Hart* and the Supreme Court's precedence in *Schad*, we conclude that the terms "force" and "coercion" establish alternative means of committing one element of the first-degree criminal sexual conduct offense.

ii. Determining that Minn. Stat. § 609.342, subd. 1(e)(i), sets forth alternative means of an element of the offense is consistent with due process and fundamental fairness.

Consistent with our court's analysis in *Lagred*, we must also determine whether classifying force or coercion as alternative means of completing one element of the offense of first-degree criminal sexual conduct is consistent with due process and fundamental fairness. 923 N.W.2d at 354. "In assessing whether alternative statutory means violate

due process, the Minnesota Supreme Court has considered whether the means are distinct, dissimilar, or inherently separate." *Id.*

This approach of looking to the meaning of the terms to assess fundamental fairness has been continually applied by Minnesota courts. In *Pendleton*, the Minnesota Supreme Court determined that "the three kidnapping purposes available to the jury,"—"committing bodily harm, committing murder, or facilitating fight after third-degree assault"—"are not so inherently distinct . . . [or divergent] as to violate due process." 725 N.W.2d at 732. The Minnesota Supreme Court reached a similar conclusion in *Ihle*, in which it considered whether the obstruction of justice statute contained alternative means, rather than separate elements. 640 N.W.2d at 919. The court concluded that it contained alternative means because the conduct outlined in the statute was not so inherently different and thus grouping them together as alternative means would not result in fundamental unfairness. *Id.* Finally, in *State v. Crowsbreast*, the Minnesota Supreme Court determined that "jurors are not required to unanimously agree on which acts comprised [a] past pattern of domestic abuse," and that such a conclusion did not violate due process because "[t]he grouping of past acts of domestic abuse . . . is in no way an irrational or unfair definition of domestic abuse homicide, nor are those acts so inherently separate as to present a due process issue" and thus a fundamental fairness issue. 629 N.W.2d 433, 439 (Minn. 2001).[2]

[2] We also note that the *Lagred* court considered whether a statute proscribes only "one punishment for first-degree aggravated robbery regardless of which means [was] used to commit the crime" when determining whether grouping alternative means violated due process. 923 N.W.2d at 354. This court noted that the proscription of a similar punishment "lends credence to assigning similar blameworthiness or culpability" for the relevant charging statute. *Id.* In this case, a defendant convicted of first-degree criminal sexual

We conclude that based on the definitions of force and coercion and the Minnesota Supreme Court's analysis in the preceding cases, the alternatives listed in Minn. Stat. § 609.342, subd. 1(e)(i), are no more distinct or separate than the conduct described in the relevant charging statutes in *Pendleton*, *Ihle*, and *Crowsbreast*. *See The American Heritage Dictionary* 357 (5th ed. 2011) (defining "coerce" as the ability to "pressure, intimidate, or force [a party] into doing something"); *see also id.* at 685 (defining "force" as "[t]he use of physical power or violence to compel or restrain"). We are therefore persuaded that defining force or coercion as alternative means of completing an element of the offense, and not as separate elements, is fundamentally fair and does not violate due process.

Accordingly, we hold that Minn. Stat. § 609.342, subd. 1(e)(i), contains alternative means of committing the force or coercion element of the offense of first-degree criminal sexual conduct and those alternatives are consistent with the fundamental fairness required by due process. A jury need not unanimously agree which of those means was used to commit the offense. Thus, the prosecutor did not misstate the law in his closing argument so as to commit prosecutorial misconduct.[3]

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conduct may be sentenced to no more than 30 years in prison, regardless of which means is used to commit the element of force or coercion. Minn. Stat. § 609.342, subd. 2(a) (2018). This adds further credence to our conclusion that the first-degree criminal sexual conduct statute lists alternative means to complete an element of the crime, and not separate elements.

[3] We note that even if we were to agree with Epps that the first-degree criminal sexual conduct statute requires a jury to unanimously agree whether a defendant committed the offense with force or whether the defendant committed the offense with coercion, we conclude that he would still not be entitled to a new trial. The record before us makes clear that the special verdict form questions submitted to the jury asked it to determine whether Epps committed the offense using force, using coercion, or using both force and coercion. In response, the jury indicated that they found that Epps used both force *and* coercion to

II. The evidence is sufficient to sustain Epps's conviction for first-degree criminal sexual conduct.

Epps next argues that the evidence is insufficient to sustain the jury's verdict, maintaining that the evidence only supports a conviction of second-degree criminal sexual conduct or third-degree criminal sexual conduct.

When evaluating a claim concerning the sufficiency of the evidence, "we carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the [factfinder] to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted).

We review the evidence "in the light most favorable to the conviction . . . [and] assume the jury believed the [s]tate's witnesses and disbelieved any evidence to the contrary." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation and citation omitted). "This is especially true [when] resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the jury." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). 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 that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

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commit the charged offense. Therefore, any alleged error by the prosecutor would have been harmless. *See* Minn. R. Crim. P. 31.01 (requiring an error that does not affect a defendant's substantial rights to be disregarded).

The state may use a combination of direct and circumstantial evidence to obtain a conviction. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). Direct evidence is evidence that, if believed, directly proves the existence of a fact without requiring any inferences by the factfinder. *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). Circumstantial evidence, on the other hand, is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist" and "always requires an inferential step to prove a fact that is not required with direct evidence." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017).

Testimony provided by a witness, concerning what the witness saw or heard, is considered direct evidence because it is "based on personal knowledge or observation and that if true, proves a fact without inference or presumption." *Id.* When determining whether direct evidence supports a conviction, the factfinder must consider "whether the witness's memory is accurate, whether the witness accurately perceived the subject of the testimony, and . . . whether the witness is telling the truth." *State v. Brazil*, 906 N.W.2d 274, 278–79 (Minn. App. 2017), *review denied* (Minn. Mar. 20, 2018). Inconsistencies in testimony go to witness credibility, which is an issue reserved for the jury. *State v. Pendleton*, 706 N.W.2d 500, 511–12 (Minn. 2005).

To prove a violation of first-degree criminal sexual conduct, the state must show that the defendant caused "personal injury to the complainant, and . . . use[d] force or coercion to accomplish the act." Minn. Stat. § 609.342, subd. 1(e)(i).

Epps argues that the evidence is insufficient to sustain his conviction because "there [was] conflicting evidence that was presented [at trial] and expressed which contradicts the

force [and] coercion" element. Epps points to conflicting testimony provided by the victim and the lack of corroboration to indicate that there was force or coercion present. Further, he claims that he and the victim engaged in consensual intercourse.

It is well settled that, even when testimony is uncorroborated, credibility determinations are left exclusively to the jury. *Pieschke*, 295 N.W.2d at 584; *see also State v. Reichenberger*, 182 N.W.2d 692 (Minn. 1970) (holding that "the task of weighing credibility was for the jury," and not the Minnesota Supreme Court when the jury was apprised of previous inconsistent statements from the victim concerning an assault). Further, although corroboration of a sexual-abuse victim's testimony is not required under Minn. Stat. § 609.347, subd. 1 (2018), the record before our court contains ample evidence to corroborate the victim's direct testimony that Epps used force or coercion to commit the charged offense.

The sexual-assault nurse and the responding police officers testified that the victim sustained physical injuries following the attack that were consistent with being restrained. Hospital staff testified that the force required to cause the injuries to the victim's arms and wrists were consistent with Epps's body weight. The sexual-assault nurse further testified that the victim's physical injuries were consistent with a forcible encounter and nonconsensual sex. This testimony also disputed Epps's claim that the intercourse was consensual. Based upon on this record, we conclude that there is sufficient evidence with regard to the force or coercion element to sustain the jury's verdict.

III. The district court did not abuse its discretion when it denied Epps's request for a sentencing departure.

Epps next asserts that the district court abused its discretion when it denied his request to depart from the presumptive sentencing guidelines.

A district court may pronounce a sentence that departs from the presumptive range established by the sentencing guidelines when substantial and compelling circumstances exist that justify the departure. Minn. Sent. Guidelines 2.D.1 (2018); s*ee also State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (noting that a district court abuses its discretion when it departs from the sentencing guidelines unless it determines that "identifiable, substantial, and compelling circumstances" exist to justify a departure). We "will not generally review a district court's exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range." *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). Only a rare case will cause an appellate court to reverse a district court's refusal to depart from the presumptive sentencing guidelines. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Epps seems to argue that the district court abused its discretion when it denied his request for a sentencing departure. During the sentencing hearing, Epps indicated to the district court that he was amenable to treatment and asked the district court to impose the statutory minimum for the charged offense. However, Epps did not submit a departure motion. The district court denied his oral request and imposed a sentence of 156 months. This sentence was within the sentencing guidelines range for the convicted offense. Minn. Sent. Guidelines 4.B (2018) (noting that the sentencing range for first-degree criminal

sexual conduct with a criminal history score of one is 144 to 187 months). Because his sentence was within the presumptive range, Epps has failed to show that the district court abused its discretion. *Delk*, 781 N.W.2d at 428.

Although we conclude that the district court did not abuse its discretion in regards to Epps's sentence, we nonetheless remand to the district court to consider whether Epps may be entitled to resentencing based on an amendment to the sentencing guidelines. We note that Epps generally argues that the sentence imposed by the district court was unjust. The district court's sentencing memorandum indicates that Epps was assigned one criminal history point for custody status. The district court assigned Epps one criminal history point because he committed the charged offense while on probation for a gross misdemeanor conviction. *See* Minn. Sent. Guidelines 2.B.2.a.(1) (2018) (explaining that the sentencing guidelines permit a district court to assign custody status points to offenders who commit an offense while on probation for another offense).

However, the Minnesota Sentencing Guidelines were amended in 2019 and the language concerning custody status points was modified to indicate that half a point, and not one point, should be assigned to an offender who commits an offense while on probation. Minn. Sent. Guidelines 2.B.2.a (Supp. 2019). We have determined that this change to the sentencing guidelines is retroactive. *Robinette*, 944 N.W.2d at 252. Because of this recent decision, we note that there may be an issue with the validity of Epps's sentence. But because the district court did not consider this argument and Epps has not specifically raised it before our court, in the interest of judicial economy, we remand to the

district court to consider the validity of Epps's sentence pursuant to the amended sentencing guidelines and *Robinette*.

IV. Any misconduct by the prosecutor in alerting the district court to a pending case in Anoka County was harmless.

Epps finally argues that the prosecutor committed misconduct entitling him to a new trial. Epps alleges that the prosecutor violated his presumption of innocence during sentencing by referring to a pending criminal charge in Anoka County to the district court.

For objected-to prosecutorial misconduct, this court uses a harmless error test. *Ramey*, 721 N.W.2d at 299 n.4. The harmless error test requires that a defendant show that the prosecutor committed misconduct, and that the misconduct was prejudicial. *Id.* Because Epps objected to the district court's consideration of the pending Anoka County proceeding during his sentencing hearing, we apply a harmless-error analysis to the prosecutor's statements.

Our review of the record indicates that the prosecutor alerted the district court to a potential charge of criminal sexual conduct against Epps in Anoka County during the sentencing phase of Epps's trial. But the district court determined that it would not consider the pending case in its sentencing determination because "it [was] a pending offense and [Epps] [was] presumed innocent." Any alleged misconduct by the prosecutor was therefore harmless because the district court did not rely on the information provided by the prosecutor when it sentenced Epps. Accordingly, we conclude that Epps is not entitled to a remand on this ground.

D E C I S I O N

Because we conclude that force and coercion are alternative means of committing an element of the offense of first-degree criminal sexual conduct, and because those alternatives are consistent with the fundamental fairness required by due process, we conclude that the prosecutor did not commit misconduct when he argued that the jury need not unanimously agree on the specific means by which Epps committed the element of force or coercion.

We also conclude that the evidence is sufficient to sustain the jury's verdict, that the district court did not abuse its discretion when it denied Epps's request for a downward sentencing departure, and that any alleged misconduct by the prosecutor in alerting the district court to a pending proceeding in Anoka County was harmless. However, we remand to the district court to consider whether Epps is entitled to be resentenced in accordance with the revised sentencing guidelines.

Affirmed in part and remanded.