STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1671

State of Minnesota,
Respondent,

vs.

Michael James Boss,
Appellant.

Filed July 20, 2020
Reversed and remanded
Smith, John, Judge[*]
Concurring in part, dissenting in part, Johnson, Judge

Brown County District Court
File No. 08-CR-18-121

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

Charles W. Hanson, Brown County Attorney, Daniel D. Kalk, Assistant County Attorney, New Ulm, Minnesota (for respondent)

Jacob M. Birkholz, Michelle K. Olsen, Birkholz & Associates, LLC, Mankato, 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

SMITH, JOHN, Judge

We reverse appellant Michael James Boss's conviction of contributing to the need for protection or services in violation of Minnesota Statutes section 260C.425, subdivision 1(a) (2016), because the evidence is only sufficient to support a conviction of an attempt to violate this section and remand for entry of conviction of the lesser-included offense.

FACTS

The victim, A.G., is a child who was born in 2007. A.G. had been a friend of Boss's daughter, L.B., since A.G. was eight years old. A.G. lived with her aunt, who is her legal guardian. Since about 2016, A.G. regularly stayed with Boss, his wife and their five children after school and for sleepovers with L.B. On December 4, 2017, L.B. gave A.G. a Christmas stocking. The stocking was sewn shut. Inside the stocking there was candy and a note. The note was folded several times. On the outside it stated "For [A.G.] only! (Make sure you are alone before opening)." As the note unfolded there were several other warnings stating "If you are not [A.G.], turn back now!" and "Anyone but [A.G.] crossing this point is in Big Trouble!" The inside of the note contained the following message:

> [A.G.]—I [heart] u! (and miss you)
> When the Lord tells you,
> take a walk down central street by yourself
> (probably sometime around midnight or after midnight)
> (don't cross railroad tracks)
> I just want to talk. Look 4 me by the train tracks

> Obey the Lord above all other things!
> (throw this out after you are done reading it)
> Do not be afraid, God is with you
> Mike.

There was a hand-drawn map in the bottom right-hand corner of the note. It said "Community Center" with a drawing of railroad tracks, Central Street and Jackson Street, with an arrow pointing towards the railroad tracks and a star. The star on the map is nearby an abandoned property.

When A.G. came home from school that day, she handed her aunt the note, who read it and then called the police. A.G. was ten years old when she received the note from Boss, who was 48 years old. A.G. testified that she felt scared and unsafe when she read the note and she knew she would not go to meet Boss. A.G. testified she was afraid that if she went to meet Boss, he would "do something" to her. A.G. had never run away from her aunt's home, school, or Boss's home.

Officer Mathwig spoke with A.G. and her aunt. Officer Mathwig testified that it appeared to him that Boss was trying to get A.G. to leave her house in the middle of night to meet with him. Officer Mathwig testified that he conducted surveillance of the Boss residence that night to see if Boss would act on the letter. There was a snowstorm that night and he did not see Boss leave the house. The next day, A.G.'s aunt obtained a temporary Harassment Restraining Order (HRO) protecting A.G. from Boss on the basis that A.G. was underage and Boss was pursuing her. Boss mailed a letter to the district court, in which he wrote, "Adoption + Marriage = [A.G.] can safely join my family. Or,

marriage only if legally it's impossible to have an adoption and marriage in place at the same time." The letter was admitted as a trial exhibit.

Several of Boss's emails, also admitted as trial exhibits, showed that Boss had expressed romantic ideations about A.G. to A.G. and to the family facilitator at A.G.'s school. Boss began emailing the family facilitator on December 11, 2017. The family facilitator forwarded the emails to Officer Mathwig. In his first email, Boss stated that he and his wife had openly discussed with A.G.'s aunt the possibility of the Boss family adopting A.G. About a month earlier, A.G.'s aunt "slammed the door on the adoption thing." Boss wrote:

> [A]s a last ditch effort to try and clear things up, *I wrote [A.G.] a note to try and meet with her* one last time before we sold our house and left Springfield never to see her again. As you know, [A.G.] belongs to God first, the state of MN 2nd, and [A.G.'s aunt] last. . . . In all the time I knew [A.G.], I never made any sexual advances on her. . . . I said some loving things to her over the past year (that God told me to say), but everything said was to affirm her as an adorable, valuable, and loved individual. I also talked about the future plans that I believe God has for her life, but I told her it was always her decision.

(Emphasis added).

In another email admitted into evidence, Boss wrote, "I believe He wants to put [A.G.] in my care for the rest of my life. For that to happen, marriage would be an option for her (probably 10-15 years from now)." Boss stated, "I'm very aware of the statutory rape laws and would never want to jeopardize [A.G.'s] future by breaking any of these laws." In yet another email admitted into evidence, Boss wrote that he believed God wanted him to share more details about his relationship with A.G. over the past year.

Boss's email recounted an incident in which he woke A.G. up during one of her sleepovers with L.B. and offered to marry her. Boss stated:

> I told [A.G.] that I believed God had a plan for us to be married many years down the road if she wanted that. . . . I told her to keep this a secret only because I was afraid if my wife found out that it would jeopardize the adoption. . . . nothing was said to her in lust or selfish motivation . . . I know that lust is motivated by wanting to control someone and I never wanted to control [A.G.] because I know that is the one thing that will shut her down quicker than anything.

In its order, the district court found that Officer Mathwig testified credibly that Boss was grooming A.G. The district court noted that Officer Mathwig has received education that specializes in sex trafficking, and has received training on the subject. The court further credited Officer Mathwig's testimony that predatory grooming behavior includes gaining the trust of the victim, targeting the victim, fulfilling the needs of the victim, and isolating the victim. Mathwig testified that "From there, a typical violator would sexualize the relationship and continue to maintain control of that victim." The district court found that Officer Mathwig's opinion, that the information in the emails depicted typical grooming behavior, was credible. Boss was targeting A.G. and Boss gained her trust by including her in activities with his family, specifically church events. Finally, Boss attempted to isolate A.G. by offering to adopt her and then offering to marry her.

The district court found that Boss encouraged A.G. to leave the home of her legal guardian without her guardian's permission. The district court reasoned that Boss was an adult with a delusional fantasy that someday he was going to marry A.G., and therefore by encouraging her to meet with him, Boss "would have placed A.G. in an environment that

would be injurious or dangerous to her." The district court concluded that although A.G. did not meet with Boss as requested, finding that Boss encouraged her to do so was sufficient to show that he contributed to her need for protection or services. The district court reasoned that requiring that the child actually runs away or places themselves in an injurious or dangerous environment would render the word "encouraged" in Minnesota Statutes section 260C.425 (2016) superfluous. The district court cited Minnesota Statutes section 645.17(2) (2016) in support of its interpretation. The district court found Boss guilty as charged and gave him a one year jail sentence.

On appeal, Boss argues that Minn. Stat. § 260C.425 requires the child to actually be in need of protection or services. Boss argues that merely "encouraging" A.G. to be a runaway, or that her behavior, condition, or environment could be injurious or dangerous, was insufficient. Second, Boss argues the district court had insufficient evidence to find that he was guilty of contributing to A.G.'s need for protection or services.

D E C I S I O N

I. Even when an offender encourages a child's need for protection or services, a criminal conviction requires that the child must actually be in need of protection or services.

On appeal, Boss argues that Minnesota Statutes section 260C.425 requires the state to prove the child's need for protection or services. Boss argues that merely "encouraging" the possibility that A.G. could be a runaway, or that her behavior, condition, or environment could be injurious or dangerous is insufficient. "A sufficiency-of-the-evidence claim that turns on the meaning of the statute under which a defendant has been convicted presents a question of statutory interpretation that we review de novo." *State v.*

Pakhnyuk, 926 N.W.2d 914, 920 (Minn. 2019). *See State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017) (stating the court of appeals had to determine what an ordinance prohibited before it could determine whether the state had proven a violation). "When interpreting a statute, the first question is whether the language of a statute is ambiguous." *Id*. "[I]f the Legislature's intent is clear from the statute's plain and unambiguous language, then we interpret the statute according to its plain meaning without resorting to the canons of statutory construction." *State v. Riggs*, 865 N.W.2d 679, 683 (Minn. 2015) (quotation omitted). "A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *State v. Kelley*, 734 N.W.2d 689, 692 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Sept. 18, 2007).

Both parties acknowledge that A.G. never actually left her aunt's home to meet Boss, as he had asked. According to Minnesota Statutes section 260C.425, subdivision 1(a), "Any person who by act, word, or omission *encourages*, causes, or contributes to the need for protection or services is guilty of a gross misdemeanor." Minn. Stat. § 260C.425, subd. 1(a) (emphasis added). There are no published cases that cite to the version of the statute that was applicable at the time of the offense.[1] In its conclusions of law the district

[1] There are two published cases that cite to Minn. Stat. § 260.315, an earlier version of this statute that was repealed in 1999. Minn. Stat. § 260.315 (1998), *repealed by* 1999 Minn. Laws, ch. 139, art. 4, § 3, at 692. According to *State v. Hayes*, "An adjudication of delinquency . . . is not required for a prosecution of contributing to the delinquency of a minor." 351 N.W.2d 654, 657 (Minn. App. 1984), *review denied* (Minn. Sept. 5, 1984). In *State v. Nordstrum*, this court concluded that circumstantial evidence was sufficient to show that bruises on the child's body were intentionally inflicted by the child's babysitter

court cited Minnesota Statutes section 645.17(2), which states "the legislature intends the entire statute to be effective and certain." Minn. Stat. § 645.17(2). The district court reasoned that requiring that the child actually be a runaway or place themselves in an injurious or dangerous environment would render the word "encourage" superfluous. The legal definition of "encourage" is "To instigate; to incite to action; to embolden; to help." *Black's Law Dictionary* 667 (11th ed. 2019). The plain language of the statute criminalizes an individual's acts, words, or omissions that incite a child to act in a manner that would result in his/her need for protection or services. Just because a child decides on his/her own volition not to act in accordance with the offender's encouragement does not mean that the encouragement did not happen.

However, the district court also had to determine that the state had proved there was "the need for the protection or services." *See* Minn. Stat. § 260C.245, subd. 1(a); *Riggs*, 865 N.W.2d at 683 (stating that statutes are read and construed as a whole, to harmonize and give effect to all provisions of the same statute). The statutory definition of "child in need of protection or services" is found under Minnesota Statutes section 260C.007, subdivision 6 (2016). This court previously concluded that "section 260C.007, subdivision 6, requires proof that one of the enumerated child-protection grounds exists and that the subject child needs protection or services as a result." *In re Welfare of Child of S.S.W.*, 767 N.W.2d 723, 728 (Minn. App. 2009). However that case, *S.S.W.*, is a child protection matter, not criminal matter, and therefore the standard of review is different from the

---

to sustain a conviction contributing to neglect of a child against the babysitter. 385 N.W.2d 348, 350-52 (Minn. App. 1986).

present case. *Id.* In child protection matters, the court's focus is on the needs of the child. *See* Minn. Stat. § 260C.201, subd. 2(a)(1) (2016) (requiring courts to consider the best interests of the child in child protection dispositions). In criminal law, due process requires the district court to find that the state has proven each element of a crime beyond a reasonable doubt. *State v. Merrill*, 428 N.W.2d 361, 366 (Minn. 1988) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072 (1970); and *State v. Jones*, 347 N.W.2d 796, 800 (Minn. 1984).

Another important distinction between criminal law and child protection is that, in criminal law, an attempt to commit a crime is also a crime. Minn. Stat. § 609.17 (2016). A person is guilty of an *attempt* to commit a crime when the person engages in an act that is a substantial step toward committing that crime, with intent to commit the crime. *Id.*; *State v. Meemken*, 597 N.W.2d 582, 586 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999). A substantial step toward committing a crime is distinguishable from mere preparation to commit the crime. *Id*. Encouraging a child to be in need of protection or services is a substantial step toward contributing to the child's actual need for protection or services.

We decline to adopt the district court's interpretation that a child does not have to actually be in need of protection or services under Minnesota Statutes section 260C.425. This interpretation fails to harmonize and give effect to the definition of "child in need of protection or services" found under Minnesota Statutes section 260C.007, subdivision 6. Therefore we reverse the district court judgment regarding the plain meaning of section 260C.425. However we conclude, as discussed below, that it is an offense of criminal

attempt to encourage a child to be in need of protection or services, even if the state fails to prove that the child was ever in actual need of protection or services.

II. There was sufficient evidence to conclude that Boss encouraged A.G. to meet him in the middle of the night, and by doing so, he was attempting to put A.G. in a situation where she would be in need of protection or services.

Boss argues the district court had insufficient evidence to find him guilty of contributing to A.G.'s need for protection or services. Boss argues that the direct evidence presented supports a claim of innocence, and that the state's entire case was based upon purely circumstantial evidence and conjecture. Based on our interpretation of Minnesota Statutes section 260C.425 above, we agree that the evidence is insufficient to sustain Boss's conviction. However, we also determine that there is an additional issue present, regarding whether there is sufficient evidence to find Boss guilty beyond a reasonable doubt of the lesser-included offense of attempting to contribute to A.G.'s need for protection or services.

"An attempt to commit the crime charged," is a lesser-included offense of the crime charged. Minn. Stat. § 609.04, subd. 1(2) (2016). When the court of appeals reverses the district court's judgment, this court has three options under Minnesota Rules of Criminal Procedure 28.02, subdivision 12, for its direction to the district court. This court must direct either:

> (a) a new trial;
> (b) vacation of the conviction and entry of a judgment of acquittal; or
> (c) reduction of the conviction to a lesser-included offense or to an offense of lesser degree, as the case may require. If the court directs a reduction of the conviction, it must remand for resentencing.

Minn. R. Crim. P. 28.02, subd. 12.

When the district court's conviction is supported by direct evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the district court to reach the verdict that it did. *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (citing *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989)). The reviewing court must assume "the [fact-finder] believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Direct evidence includes "evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Circumstantial evidence is "evidence from which the fact-finder can infer whether the facts in dispute existed or did not exist." *Id.* (quotation omitted). "When the direct evidence of guilt on a particular element is not alone sufficient to sustain the verdict," appellate courts apply the circumstantial-evidence standard of review. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). The fact-finder does not need to draw any inferences about the purpose of a defendant's actions when the defendant's own statements unambiguously describe his or her intent. *Horst*, 880 N.W.2d at 40 (concluding that appellant's statements were direct evidence of her mens rea and thus the jury did not need to draw inferences about the purposes of her actions).

Boss was convicted of encouraging the need for protection or services under Minnesota Statutes section 260C.425. The statutory definition of "child in need of protection or services" under Minnesota Statutes section 260C.007, subdivision 6, includes

16 enumerated grounds. Subsection 9 states that a child is in need of protection or services if the child's "behavior, condition, or environment is such as to be injurious or dangerous to the child or others. An injurious or dangerous environment may include, but is not limited to, the exposure of a child to criminal activity in the child's home." *Id.*, subd. 6(9). Subsection 13 states that a child is in need of protection or services if the child is a runaway. *Id.*, subd. 6(13). According to subdivision 28, "runaway" means "an unmarried child under the age of 18 years who is absent from the home of a parent or other lawful placement without the consent of the parent, guardian, or lawful custodian." *Id.*, subd. 28 (2016).

A. Boss's encouragement was an attempt to make A.G. a runaway.

Boss argues that the note did not instruct A.G. to run away because it did not tell her to disobey her guardian. Boss argues that instead, the note instructed A.G. to make her own decision on a "spiritual level." During oral arguments, Boss's counsel also argued that Boss never told A.G. not to obtain her guardian's consent before meeting with him. The district court was presented with a written note from Boss to A.G. Boss never denied writing the note. The district court was also presented with emails from Boss to the family facilitator at A.G.'s school explaining why he wrote the note. Boss stated in one email "I wrote [A.G.] a note to try and meet with her." In another email, he stated that he told A.G. that "God had a plan" that he and A.G. would get married someday, if she wanted. Even though the note instructs A.G. to leave "When the Lord tells you," and to "Obey the Lord above all other things!" it also instructs her to leave home in the middle of the night without showing the note to anyone else. Boss stated in the note "take a walk down [C]entral [S]treet by yourself (probably sometime around midnight or after midnight)," and "Look 4

me by the train tracks." The note had a map drawn on it with a star next to a set of train tracks. The note instructed A.G. to "[m]ake sure you are alone before opening" and to "throw this out after you are done reading it."

Based on the note Boss wrote to A.G., the district court reasonably concluded that Boss encouraged A.G. to be absent from the home of her lawful placement without the consent of her guardian. Even if this court were to conclude Boss's note left it up to A.G. to decide whether or not to go, the statute does not require that an offender must *command* the child to run away. Furthermore, while Boss often told A.G. she is free to make her own choices, he also told A.G. that "God" wants her to do certain things. Given the fact that A.G. often attends church activities with the Boss family, such phrasing is particularly manipulative. Therefore, when viewed in the light most favorable to the conviction, the district court's conclusion that Boss encouraged A.G. to be a runaway is supported by direct evidence. However, because A.G. never actually left her guardian's residence, Boss's encouragement only amounted to an attempt, as his criminal efforts were unsuccessful.

B. Boss's encouragement was an attempt to put A.G. in a dangerous or injurious environment.

The district court also found that Boss encouraged A.G. to be in an environment that was injurious or dangerous to her. Boss argues there was no evidence that A.G. was in an environment that was injurious or dangerous because he asked her to marry him 10-15 years in the future, therefore any inference that any sexual contact with Boss would occur was purely speculative. As previously discussed, Boss's note provided direct evidence that

Boss instructed a ten-year-old A.G. to leave her home alone, around midnight, in early December. Officer Mathwig also testified that there was a snowstorm that night, and the location on the map drawn by Boss was next to an abandoned property. No reasonable person would find that it would *not* be dangerous for a ten-year-old to be alone at an abandoned property next to a set of railroad tracks in the middle of the night, especially in December. Based on the record, there was sufficient evidence to support the district court's finding that Boss encouraged A.G. to be in an injurious or dangerous environment. However, because A.G. never actually went to the abandoned property in the middle of the night like Boss suggested, Boss's encouragement only amounted to an attempt.

In addition to the danger the child would be in based on the time and the location of the proposed meeting, there is no dispute that Boss had expressed romantic notions about his relationship with A.G. The district court reasoned that since Boss was an adult with a delusional fantasy that someday he was going to marry A.G., by encouraging her to meet with him, Boss "would have placed A.G. in an environment that would be injurious or dangerous to A.G." In one of his emails to the family facilitator, Boss wrote "I told her that I believed God had a plan for us to be married many years down the road if she wanted that." The district court also found that Officer Mathwig credibly testified that Boss was engaging in predatory grooming of A.G. in gaining her trust by taking her to family activities, isolating her, and offering to marry her. Officer Mathwig also testified that after gaining the trust of the victim, targeting the victim, fulfilling the needs of the victim, and isolating the victim, "a typical violator would sexualize the relationship and continue to maintain control of that victim."

A.G.'s aunt obtained an HRO protecting A.G. from Boss on the basis that A.G. was underage, and Boss was pursuing a romantic relationship with her. Boss wrote a letter to the district court that stated, "Adoption + Marriage = [A.G.] can safely join my family. Or, marriage only if legally it's impossible to have an adoption and marriage in place at the same time." In Boss's emails, he claims that he never made sexual advances on A.G., and that "nothing was said to her in lust or selfish motivation." Boss stated that he was "very aware of the statutory rape laws" and did not intend on breaking these laws. He also stated, "I know that lust is motivated by wanting to control someone and I never wanted to control [A.G.] because I know that is the one thing that will shut her down quicker than anything." These comments could reasonably be construed as evidence that Boss had the desire to sexualize the relationship, and would have done so if he had succeeded in isolating A.G. Therefore, the direct evidence supports the district court's conclusion that Boss encouraged A.G. to be in an environment that was injurious or dangerous to her, by encouraging her to meet with him alone, while he had been engaging in predatory grooming behavior toward her. However, because A.G. never actually met with Boss, Boss's encouragement only amounted to an attempt, as his criminal efforts were unsuccessful.

We conclude the state succeeded in proving that Boss encouraged A.G. to be in need of protection or services, however it failed to prove that A.G. was actually in need of protection or services. Furthermore, we conclude that Boss took a substantial step toward contributing to a child's need of protection or services by encouraging A.G. to be a runaway and to put herself in a dangerous or injurious environment. Because we decline to adopt the district court's interpretation of Minnesota Statutes section 260C.425, and because we

conclude that the state proved that Boss's conduct was an attempt to make A.G. a child in need of protection or services, we reduce Boss's conviction of contributing to the need for protection or services, to attempting to contribute to the need for protection or services pursuant to rule 28.02, and remand for resentencing. *E.g. State v. Carpenter*, 893 N.W.2d 380, 388 (Minn. App. 2017) (reducing appellant's first-degree sale of a controlled-substance conviction to second-degree sale of a controlled substance); *State v. Uber*, 604 N.W.2d 799, 802-03 (Minn. App. 1999) (reducing appellant's conviction for an aggravated DWI to the lesser-included offense of misdemeanor DWI); *State v. Bergstrom*, 413 N.W.2d 206, 211 (Minn. App. 1987) (reducing a felony arson conviction to misdemeanor arson and remanding for resentencing).

The dissent points to the supreme court decision in *Back v. State*, 902 N.W.2d 23 (Minn. 2017), to suggest that every time this court reverses a judgment of conviction, Minnesota Rule of Criminal Procedure 28.02, subd. 12(b), requires this court to vacate the conviction and enter a judgment of acquittal. This interpretation ignores the existence of rule 28.02, subd. 12(c), which *Back* does not address. *Back*, 902 N.W.2d at 30. According to *Back*, outright reversal of a conviction on appeal under rule 28.02 and dismissal of the charges by a prosecutor under rule 30.01 are mutually exclusive remedies. *Id*. (citing Minn. R. Crim. P. 28.02, subd. 12(b); Minn. R. Crim. P. 30.01). There is no reason to extrapolate from *Back* that reversal of a conviction on appeal and reduction of the conviction to a lesser-included offense are also mutually exclusive remedies.

Reversed and remanded.

JOHNSON, Judge (concurring in part and dissenting in part)

I agree with the opinion of the court that the evidence is insufficient to support the conviction of contributing to the need for protection or services for a child. But I do not agree that the appropriate disposition is to "reduce" Boss's conviction to a conviction of a different offense. The state did not charge Boss with attempting to contribute to the need for protection or services for a child. The district court did not make the findings of fact and conclusions of law necessary for a conviction of that uncharged offense. And the state did not make an alternative argument that this court should reduce Boss's conviction to a conviction of an uncharged offense. In these circumstances, the appropriate appellate remedy is to simply reverse the conviction. That is the teaching of *State v. Back*, 902 N.W.2d 23 (Minn. 2017), in which the supreme court stated, "once an appellate court reverses a judgment of conviction outright, . . . Minn. R. Crim. P. 28.02, subd. 12(b), requires the court to 'vacate the conviction and enter a judgment of acquittal.'" *Id.* at 30.

The remedy in paragraph (c) of rule 28.02, subdivision 12, is appropriate if the state charged a defendant with both a greater offense and a lesser offense, the defendant was found guilty of both the greater offense and the lesser offense, and this court concludes on appeal that the evidence is insufficient to support the conviction of the greater offense. In that situation, it is appropriate to remand to the district court for resentencing on the lesser offense, for which the defendant already has been found guilty. *See, e.g.*, *State v Carpenter*, 893 N.W.2d 380, 388 (Minn. App. 2017). But that is not what happened in the present case. The state did not charge Boss with any lesser offense, and the district court did not find Boss guilty of any lesser offense. Thus, *Carpenter* is distinguishable.

The opinion of the court cites *State v. Bergstrom*, 413 N.W.2d 206 (Minn. App. 1987), in which this court determined that the evidence on the sole conviction was insufficient and then, apparently *sua sponte*, reduced the conviction to a conviction of a lesser offense that had not been charged by the state. *Id.* at 211. I respectfully suggest that *Bergstrom* is an outlier.[2] From 1987 to 2017, it allowed this court to order the remedy provided by paragraph (c) instead of the remedy provided by paragraph (b) for reasons that were not explained. But the *Bergstrom* opinion was effectively overruled by the supreme court's subsequent *Back* opinion. Even if we assume that *Bergstrom* still applies, there is no particular reason to order the remedy provided by paragraph (c) in this particular case. The opinion of the court does not identify any such reasons. Furthermore, Boss has not had an opportunity to submit a supplemental brief on the remedy issue, which this court has raised *sua sponte*.

A reduction of Boss's conviction with a remand for resentencing also is inappropriate because it effectively violates Boss's constitutional rights under the Double Jeopardy Clause. *See* U.S. Const. amend. V. "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United*

[2]This court followed *Bergstrom* in only one subsequent precedential opinion. *See State v. Uber*, 604 N.W.2d 799, 802-03 (Minn. App. 1999). In that case, the state specifically argued in the alternative that, if this court were to reverse the defendant's conviction of aggravated DWI for insufficient evidence, this court should "find Uber guilty of the lesser-included offense of misdemeanor DWI." *Id.* at 802. The defendant apparently did not object. *Id.* at 803. But in the present case, the state did not make such an alternative argument. Thus, *Uber* is distinguishable.

States, 355 U.S. 184, 187, 78 S. Ct. 221, 223 (1957). After today's reversal of Boss's conviction, the state obviously could not re-charge him with an attempt offense based on the same set of facts because "the Double Jeopardy Clause precludes a second trial once [an appellate] court has found the evidence legally insufficient." *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 2150-51 (1978). Consequently, "the only 'just' remedy available for [the appellate] court is the direction of a judgment of acquittal." *Id.* at 18, 98 S. Ct. at 2151. Because the state is barred from re-trying Boss, this court also should be barred from essentially convicting him of an uncharged offense at the appellate level, without a second trial. Again, Boss has not had an opportunity to submit a supplemental brief to address the Double Jeopardy issue because this court *sua sponte* has reduced Boss's conviction to a conviction of an uncharged offense.

To be sure, Boss's conduct was disturbing, to say the least. But abhorrent conduct is not a reason to depart from the remedy that normally applies when this court concludes that the state's evidence is insufficient to support a conviction of a single offense.

In sum, I would reverse Boss's conviction outright, without remanding.